STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, Complainant, v. WASHINGTON STATE FERRIES, Respondent.	MEC Case No. 18-01 DECISION NO. 321 – MEC DECISION AND ORDER

APPEARANCES

Schwerin, Campbell and Barnard, attorneys, by *Dmitri Iglitzin* and *Judith Krebs,* appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

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

NATURE OF THE PROCEEDING

The Inlandboatmen's Union of the Pacific (IBU) brought this matter before the Marine Employees' Commission with a complaint that alleged that the Washington State Ferries (WSF) violated RCW 47.64.130 by the installation of six machines to vend "surcharge" tickets to east-bound passengers and by the assignment of ticket-taking duties to ordinary seamen working on the passenger-only ferries and the consequent elimination of passenger ticket taker work hours. The IBU alleged that the WSF violated that portion of the law which requires the WSF to bargain collectively with the representatives of its employees.

In due course, the Marine Employees Commission determined that the complaint alleged facts that could be found to be a violation and set the matter for hearing. WSF answered and denied that a legal violation had occurred.

A hearing was held on January 17, 2002 and March 5, 2002. Both parties subsequently filed post-hearing briefs.

THE RECORD BEFORE THE COMMISSION

The record before the Marine Employees' Commission consists of the following:

1. Complaint dated June 19, 2001.

2. Exhibit A to that Complaint – a two-page letter from Michael Manning of the WSF dated May 9, 2001. The IBU's counsel forwarded this exhibit in a letter dated June 21, 2001.

3. The Marine Employees' Commission's September 7, 2001 Notice of Settlement Conference and Notice of Hearing.

4. The Marine Employees' Commission's November 8, 2001 Notice of Continued Settlement Conference.

5. The Marine Employees' Commission's November 28, 2001 Notice of Continued Hearing Date and Answer Due-Date.

6. The Answer filed by WSF dated January 4, 2002.

7. Transcript of the Hearing of January 17, 2002 (pages 1 – 200).

8. The Marine Employees' Commission's January 18, 2002 Notice of Continued Hearing Date.

9. Transcript of the Hearing of May 5, 2002 (pages 201 – 242).

10. Exhibits 1 through 15 accepted into evidence during the course of the two-day hearing.

11. IBU's request for an altered due-date for the mailing of post-hearing briefs.

12. The Marine Employees' Commission's Order Granting Extension of Time for Filing Briefs.

13. The post-hearing briefs filed by both parties.

On the basis of this record, the Marine Employees' Commission hereby makes the following Findings of Fact.

FINDINGS OF FACT

1. The Inlandboatmen's Union of the Pacific (IBU) represents a bargaining unit of Washington State Ferries (WSF) employees working at the terminals and on the vessels operated by WSF.

2. The parties have a contract which sets the terms and conditions of employment of those employees. Although that contract is past its expiration date, it continues in full force and effect by operation of law (RCW 47.64.170(7)).

3. Among the employees in the IBU bargaining unit involved with this case are "passenger ticket takers" who work at Coleman Dock and Bremerton Terminal in connection with the WSF passenger-only ferries. (There may be other WSF passenger ticket takers in the system but the evidence in this case was focused on the work done at the two terminals.)

4. Passenger ticket takers collect tickets and/or other documentation including boarding passes from non-vehicle passengers seeking entrance onto a ferry. They make sure that the would-be passenger enters the correct ferry and, in cases of crowded conditions, that such would-be passenger has a right to board for a particular departure time.

5. The IBU bargaining unit involved in this case also includes ordinary seamen (OS).

6. The parties' contract specifies that each passenger-only vessel ("Tyee" Class) will be staffed by at least one OS.

7. When the passenger-only vessels are receiving passengers at a terminal, the ordinary seaman helps secure the vessel and attends to the lines and the loading ramp to ensure that it is safe for passengers to embark upon the vessel. In addition, prior to this case, the ordinary seamen were sometimes directed to maintain a count of the individuals entering the vessel and communicate that count to the vessel's master.

8. Prior to the events at issue in this case, the ordinary seamen on the passenger-only vessels did not collect documentation such as tickets or boarding passes from passengers. Prior to the events at issue in this case, the ordinary seamen on the passenger-only vessels were not responsible for making sure that would-be passengers entered the correct boat or had a right to be on a particular vessel for a particular departure time.

9. Late in the year 2000, events outside the scope of this case had the effect of reducing the funding available to the Washington State Ferries.

10. Tariff changes and alterations in the manner in which the ferries were operated were then discussed in public meetings and in formal meetings of the state's tariff commission.

11. WSF management officials decided to address a condition of alleged overstaffing at the Colman passenger terminal, that had been a focus of concern during the public meetings, by eliminating one six-hour per day (five days a week) ticker taker position and reassigning that position's duties to the OSs assigned to the passenger ferries. The same decision was made with respect to the ticket takers assigned to the Bremerton Terminal.

12. The WSF Labor Relations Manager testified that the management made this decision either before or on the same day as he sent the first notice of the decision to the IBU.

13. That notice was sent in a letter dated February 22, 2001.

14. The IBU responded that the matters addressed in the Labor Relations Manager's February 22 letter raised negotiable matter that had to be addressed in the bargaining process.

15. On the revenue side, the tariff commission adjusted fares and also instituted a $1 surcharge each ride, each way for the passenger-only ferries. The fare adjustment is not involved in this case; the surcharge is.

16. The tariff commission did not specify how the surcharge would be collected.

17. Prior to the surcharge, passenger fares were collected only when the passenger vessels were westbound.

18. Sometime prior to late April 2001, WSF management decided to collect the surcharge in both directions rather than imposing a double surcharge one way. In order to sell the surcharge tickets to eastbound passengers, the WSF arranged for the installation of six ticket-vending machines. Three were eventually placed at the Bremerton Terminal, two at the Vashon Terminal and one at the Southworth Terminal.

19. The WSF gave the IBU notice of the installation and operation of the machines in a letter dated May 9, 2001.

20. That same letter reiterated WSF's decision to shift passenger ticket taker duties to the passenger vessel OSs, renaming the position OS/Ticket Taker.

21. The letter stated that with regard to the shift of duties and so-called web sales that were not involved in this case, "WSF considers these issues [to be issues] which WSF has the right to decide without bargaining the decision, but the "impacts and effects" of WSF's decision is definitely subject to negotiation."

22. At the hearing, WSF took the position that the OS/Ticket Taker decision was a mandatory subject of bargaining but that the decision to install the surcharge ticket vending machine was not.

23. The IBU takes the position that in both instances, the decision is a mandatory subject of bargaining as well as the impacts and effects.

24. WSF argues that the IBU waived the right to bargain by an alleged failure to request bargaining in a timely fashion after the receipt of the May 9, 2001 letter.

25. On or about June 4, 2001, the WSF implemented the changes at issue.

26. A passenger ticket taker shift of 30 hours per week was eliminated from the Colman Dock schedule and passenger ticket taker shifts were eliminated from the Bremerton Terminal. (The WSF letter of February 22, 2001 states that a 40-hour shift was to be eliminated at the Bremerton Terminal.)

27. After June 4, 2001, OSs on the passenger-only vessels took boarding passes and surcharge tickets and, in some instances, envelopes for the surcharge, from eastbound passengers and they denied entry to would-be passengers who did not tender the proper documentation. After June 4, 2001, OSs on the passenger-only vessels took boarding passes from westbound passengers.

28. The record is devoid of any indication that there was any practical change or job loss with respect to the ticket-taking function at the Vashon Terminal and the Southworth Terminal. In both places, however, the new machines vended surcharge tickets.

ANALYSIS OF THE CONTROLLING LAW

RCW 47.64.120 directs "Ferry system management and ferry system employee organizations, through their collective bargaining representatives … to negotiate in good faith with respect to wages, hours, working conditions, insurance, and health care benefits … and other matters mutually agreed upon." It is unlawful for either side to refuse to bargain collectively (RCW 47.64.130). There is interest arbitration in the event of failure to reach agreement (RCW 47.64.170) and strikes, work stoppages and lockouts are strictly prohibited (RCW 47.64.140).

The Marine Employees' Commission has the right and responsibility to determine whether or not an action or proposed action by either party generates the duty to bargain (WAC 316-45-550). The Commission uses a balancing test to make this determination. See, by example, *IBU v. Washington State Ferries,* 193-MEC (1997). The test balances the effect that an action has upon wages, hours, and working conditions against the extent to which the subject lies at the core of entrepreneurial control. This approach was specifically affirmed by the Washington State Court of Appeals in *DOT v. Inlandboatmen's Union*, 103 Wn. App. 573 (2000). Where the impact upon employee wages, hours, and working conditions is great and the impact on entrepreneurial control is slight, the decision as well as its impact becomes a mandatory subject of bargaining. Where the reverse is true, the decision can be made in a unilateral manner although there may be a bargaining duty with respect to that decision's impact upon the employees.

There are two matters at issue in this case – the shifting of duties from one classification to another and the operation of machines to vend "surcharge tickets" to eastbound passengers.

With respect to shifting of duties, the MEC has twice ruled that the reassignment of duties from one bargaining unit to another generates the duty to bargain under the balancing test. *IBU v. Washington State Ferries*, 317-MEC (2002) and *IBU v. Washington State Ferries*, 194-MEC (1998). The former case involved the decision to schedule a terminal agent, an IBU-represented employee in a separate bargaining unit, to regularly do work previously done by a traffic attendant at the Edmonds Terminal. The latter case involved training out-of-unit employees (also represented by the IBU) to do certain elements of bargaining unit work. This latter decision was affirmed by the Court of Appeals in *DOT v. Inlandboatmen's Union*, 103 Wn. App. 573 (2000).

The MEC applied the same rule in a grievance arbitration that arose from the assignment of certain bargaining unit work to workers represented by another union. *Teamsters Local 117 v. WSF*, 148-MEC (1996).

The MEC does not appear to have previously addressed the issue of reassignment of work within a bargaining unit. In this instance, it is appropriate to look to rulings of the State's Public Employment Relations Commission which applies the same balancing test to the overall issue.

The issue of intra-unit work transfer came before the Public Employment Relations Commission in the *City of Hoquiam*, 745 PECB (1979) case. PERC ruled that the subject is a mandatory subject of bargaining. A PERC Hearing Examiner's decision reaffirmed this rule in *Lake Washington Technical College*, 4721 PECB (1994), a case which arose out of reclassification of school custodial work. (That decision was subsequently reversed by the full Commission on an issue of waiver that did not affect the finding that the decision was a mandatory subject of bargaining.) Most recently, in *Yakima County*, 6594-C and 6595-C PECB

(combined cases) (1999) PERC reaffirmed this rule when it held that the employer's policy controlling assignment of special work details within the bargaining unit is a mandatory subject of bargaining.

In the current situation before the Marine Employees' Commission, the re-assignment of work eliminated an estimated 70 hours of work per week for one classification and added a significant and unprecedented responsibility to another classification. Both impacts are significant enough to weigh the balance in favor of the obligation to bargain the decision, as WSF belatedly acknowledged at the hearing.

The second matter at issue is the installation of machines to vend surcharge tickets to eastbound passengers. Surcharge tickets were a novelty. They did not eliminate any other tickets. The machines did not displace any jobs nor did they reduce any work hours. The IBU's attempt to tug the balance in its favor rests on the argument that the act of selling tickets brings the work automatically within the scope of the bargaining unit and that the machines, therefore, are eliminating potential work.

The MEC previously ruled otherwise when WSF decided to create and subcontract duty-free shops on certain ferries. *Inlandboatmen's Union v. Washington State Ferries*, 22-MEC (1986).

The Public Employment Relations Commission addressed this issue in *King County Fire District 16*, 3714 PECB (1991). In that case, the employer decided to purchase certain automatic defibrillation equipment for use in the event of medical emergencies. The equipment replaced manual equipment that the bargaining unit members had used some years previously although there was a hiatus between the use of the manual equipment and the automatic equipment.

While the equipment affected the workplace, there was no reduction of work hours. The PERC held that the matter required only effects bargaining.

In *Seattle School District*, 2079 B PECB (1986), the Public Employment Relations Commission refused to find that the unilateral implementation of a computerized start/stop system for school boilers violated the law because the implementation had no ultimate impact on the bargaining unit since the machines did not work and the employees who were supposed to be eliminated were quickly reinstated and had been kept on the payroll at their correct rate in the interim. It seems implicit, however, that the result would have been the reverse had the machines actually performed and had the jobs been eliminated.

In this case, the surcharge machines are selling something that has never been sold before in a place where ticket sellers have not been assigned to sell tickets to passengers for many years. The installation did not generate any job loss.

(WSF also argues that there is a precedent on the basis of the brief mention of an earlier effort to use some kind of vending machines. Both sides appeared anxious not to develop a record regarding that matter and no reliance is placed on the vague testimony that is in the record.)

The novelty of the surcharge ticket as well as the lack of any impact on the work done by ticket sellers in the bargaining unit weigh down the entrepreneurial side of the balance and support the WSF position that the decision is not a mandatory subject of collectively bargaining.

The fact that the duty of collecting the tickets was assigned to the OSs places that part of the surcharge machine matter within the scope of the first issue – the re-assignment of existing duties. The lack of impact on ticket sellers does not affect the fact that the decision to reassign ticket-taking work is a mandatory subject of bargaining as is discussed above.

The determination that the decision regarding a particular matter is a mandatory subject of bargaining does not end the inquiry. There remains the question of whether or not a party can and has waived its right to bargain. The argument is raised by the Washington State Ferries in this case.

(The issue is irrelevant to that portion of the case arising from the installation and operation of the surcharge ticket vending machines excluding the question of the ticket taking assigned to the OS classification. With respect to the machines themselves, WSF acknowledged and acknowledges its duty to bargain about the impact and effects of the machines. The fact that the parties have not initiated such bargaining does not preclude them from fulfilling their obligations now and that fact does not provide a basis for pursuit of a refusal-to-bargain charge against the employer.)

With respect to the reassignment of ticket taker work issue, the employer argues that the union waived its right to bargain by failing to demand bargaining after receipt of the May 9 letter.

The controlling law was summarized by the Public Employment Relations Commission in *City of Clarkston*, 3286 PECB (1989) as follows:

> It is well settled that an employer cannot satisfy its duty to bargain by first making a change in working conditions and then offering to bargain. A union is entitled to influence the decision before it is finalized and implemented, and is not obligated to engage in a futile negotiations (sic) to restore the original conditions.

(Page 12, 3286 PECB)

The Washington Court of Appeals applied the same principle when it rejected the WSF argument that it was improper for the union to file an unfair labor practice charge rather than

trying to initiate bargaining in reaction to an employer action. *DOT v. Inlandboatmen's Union*, 103 Wn. App. 573, 586 (2000).

In the current case before the MEC, the focus on post-May 9 events is misplaced because the employer's May 9 letter announced the employer's refusal to bargain the decision regarding the shift of passenger ticket taker duties. Even without that explicit statement, the May 9 letter itself is an announcement of an implementation and not an offer to bargain about the decision. In addition, the WSF labor relations manager testified that he sent the letter announcing implementation after learning that the union was insisting on bargaining about the matter. The IBU was offered only a chance to discuss the impact of the announced decision. It never had a chance to bargain the decision, much less a chance to waive any such opportunity.

In addition, with respect to the work assignment matter, it cannot be argued that there is waiver by contract. The Management Rights Rule (Rule 4) confirms the employer's right to direct the work force but says nothing about the current claimed right to unilaterally move work from one classification to another. That claim of right is explicitly negated by the agreed-upon procedure for moving a person from one department to another (Rule 21.08) and by the maintenance of separate seniority lists by department and classification (Rule 21.01, 21.04). The claim also appears contradicted by the specific commitment to bargaining in the event of staffing changes on the vessels (Rule 7.05 – that rule's reference to RCW 46.64 appears to be a misprint for 47.64.) In this circumstance, WSF cannot establish waiver by contract with regard to the reassignment of work matter.

Separately, a recent decision by a Public Employment Relations Commission Administrative Law Judge appears to hold that in no circumstances can a public employer unilaterally implement when the law mandates interest arbitration. *Whatcom County*, 7643 PECB

(2002). The case involved a "uniformed personnel" bargaining unit which is subject to the interest arbitration procedures of RCW 41.56.430 through 41.56.490. The Administrative Law Judge held that, "In that environment [i.e. where interest arbitration is mandated], a change of a mandatory subject of bargaining can only be lawfully implemented if the employer and exclusive bargaining representative reach an agreement on the matter or the change is approved through the interest arbitration process." The ALJ undercut the apparent breadth of his ruling by then evaluating (and rejecting) the employer's claim of waiver by the union. Specifically with regard to the issue of alleged waiver by inaction, however, the ALJ noted that the employer's remedy in the proper case would be a refusal-to-bargain charge of its own rather than implementation.

It is not necessary that the MEC consider such a broad ruling in this case because the employer's entire argument regarding waiver focuses on the period after the employer had already announced its refusal to bargain and its illegal implementation. At that point, there was nothing left that the union could waive. Its filing of the instant case was a proper response.

On the basis of the above Findings of Fact and on the basis of controlling law discussed above, the Commission hereby makes the following Conclusions of Law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and this matter pursuant to RCW 47.64.280 and RCW 47.64.130.

2. RCW 47.64.130 as well as RCW 47.64.006, RCW 47.64.120, and RCW 47.64.170 impose the duty on the Washington State Ferries to bargain collectively with the unions representing its employees regarding wages, hours, working conditions, insurance, health care benefits and other matters mutually agreed upon.

3. The parties are parties to a collective bargaining agreement which is in full force and effect by operation of law despite its expiration date (RCW 47.64.170).

4. The decision by the Washington State Ferries to assign passenger ticket taking duties and responsibilities previously done by passenger ticket takers to ordinary seamen is a mandatory subject of bargaining within the scope of those matters concerning which the Washington State Ferries has a legal obligation to bargain collectively with the unions representing its workers.

5. By unilaterally reaching and announcing the decision to shift the duties and responsibilities of passenger ticket takers to ordinary seamen and by expressly limiting its willingness to bargain issues of impact and effect, Washington State Ferries unlawfully refused to bargain collectively and thereby violated RCW 47.64.130(a) and (e).

6. The Washington State Ferries did not establish that the Inlandboatmen's Union waived its right to bargain regarding the decision to shift the work given the fact that the union was never provided a proper, timely opportunity to bargain regarding the decision and given the employer's position at the time of the decision that the decision was not subject to bargaining. In addition, the contract between the parties does not support an argument that there is waiver by contract.

7. The decision to install and operate surcharge vending machines to vend a new item—$1 surcharge tickets—to eastbound customers of the passenger-only service was not a mandatory subject of bargaining because it had no significant effect on the hours, wages or work of the ticket sellers.

8. The Washington State Ferries had no legal obligation to negotiate regarding its decision to sell the new item in this manner.

9. The Washington State Ferries acknowledges that it has a legal obligation to negotiate regarding the impact and effects of is decision to vend the surcharge tickets to eastbound passengers and the Washington State Ferries stands ready to fulfill that obligation. There is no legal violation with regard to this portion of the charge filed by the Inlandboatmen's Union.

10. The decision to assign the collection of the surcharge tickets to ordinary seamen rather than the ticker takers hitherto assigned to the Bremerton Terminal is a mandatory subject of collective bargaining. That matter is within the scope of and is addressed by paragraphs 3, 4, and 5 of these Conclusions of Law.

On the basis of the above Findings of Fact, Analysis of the Controlling Law, and Conclusions of Law, the Marine Employees' Commission hereby enters the following ORDER:

ORDER

1. That portion of the charge addressing the installation and operation of machines to vend surcharge tickets to eastbound customers of the passenger-only ferries is without merit and is hereby dismissed.

2. The Washington State Ferries illegal refusal to bargain with regard to the decision to reassign ticket taker work and responsibilities at Colman Dock and Bremerton Terminal to ordinary seamen is to be remedied as follows.

   a. Washington State Ferries shall restore the status quo ante by ensuring that only ticket takers are assigned ticket taking responsibilities with regard to tickets, surcharge tickets, boarding passes and/or any other documentation used to indicate or establish that a would-be passenger has the right to board a passenger-only vessel at a particular time unless or until the parties bargain a different agreement or a different term

or condition of employment is imposed pursuant to RCW 47.64.240. This portion of the Order does not refer to counting passengers provided that the purpose of the counting is simply to establish a tally and not to deny ingress to any would-be passenger.

b. Washington State Ferries shall make the affected ticker takers at Colman Dock and Bremerton Terminal whole by the payment of 30 hours of ticket taker work per week at Colman Dock and 40 hours of ticket taker work per week at the Bremerton terminal until the status quo ante is restored as directed in sub-paragraph (a). This portion of the order is not intended to guarantee that there will be an equivalent amount of ticket taker work once the status quo ante has been restored as directed in sub-paragraph (a). The statement of hours is intended for make whole purposes only. The payment is to go to ticket takers by seniority at each of the terminals who worked or received pay for less than 40 hours a week excluding any ticket taker who limited himself/herself to less than 40 hours per week and worked up to his/her limit. The hours are to be distributed on a week-to-week basis down the seniority list for the particular terminal until all 30 or 40 are used up. With respect to the Bremerton Terminal, the remedy is intended to address the impact of the loss of the work involving boarding passes as well as the loss of the work generated by the need to take surcharge tickets from would-be passengers. This make whole remedy is not subject to interest.

c. All ordinary seamen working on the passenger-only ferries since June 4, 2001 (the date of the reassignment of the ticket taker work and responsibilities) shall be made whole by the payment of one hour at the overtime rate for each day worked as an OS on a

passenger-only vessel which was actually carrying passengers until the status quo ante is restored as directed in sub-paragraph (a). This make whole remedy is not subject to interest.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC's unfair labor practice ruling with the Commission within ten days from the date this final order is mailed. Any petition for reconsideration must state the specific grounds for the relief requested. Petitions that merely restate the party's previous arguments are discouraged. A petition for reconsideration does not stay the effectiveness of the Commission's order. If no action is taken by the Commission on the petition for reconsideration, within twenty days from the date the petition is filed, the petition is deemed to be denied, without further notice by the Commission.

DATED this 19th day of June 2002.

MARINE EMPLOYEES' COMMISSION

/s/
_____
JOHN BYRNE, Hearing Examiner

Approved by:

/s/
_____
JOHN NELSON, Chairman

/s/
_____
JOHN SULLIVAN, Commissioner