STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, Complainant, v. WASHINGTON STATE FERRIES, Respondent.	MEC CASE NO. 52-03 DECISION NO. 392 - MEC DECISION AND ORDER

Schwerin, Campbell and Barnard, by *Robert Lavitt*, Attorney, appearing for the Inlandboatmen's Union of the Pacific.

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

STATEMENT OF THE CASE

This case is before the MEC based upon a complaint filed by the Inlandboatmen's Union of the Pacific (IBU) on June 17, 2003. The Complaint alleges that Washington State Ferries (WSF) unilaterally decided to exclude from its request for proposals RFP, the requirement that the food service concessionaire offer preferential hiring to the existing galley workers aboard the WSF system and abide by the remainder of their labor agreement.

When settlement efforts failed to resolve this issue, the matter was set for hearing before MEC then Chairman John D. Nelson. WSF filed its answer, denying the alleged unfair labor practice, and the hearing was held on September 17, 2003. (MEC Case 48-03, incorrectly referenced in the transcript caption, was not heard on this date.)

Briefs were timely filed by both parties.

DISCUSSION OF THE ISSUES

WSF proposes defining the issues as follows:

A. Does the MEC have jurisdiction over this labor dispute, involving solely employees of a concessions subcontractor?

B. Does the MEC have authority to regulate any action by WSF, which has or may have an effect upon a bargaining unit, whether or not the unit is subject to MEC jurisdiction?

C. If either A. or B. above are answered in the affirmative, has WSF committed an act which requires remedial intervention by the MEC, by issuing an RFP for concessions services which does not require the successful bidder to grant preferential hiring to existing employees of the present concessionaire, or to honor the existing labor agreement?

The IBU arguments all fall within the proposed statement of issues. While WSF argues that there can be no MEC jurisdiction present because the labor dispute involves solely employees of a concession subcontractor, IBU takes the position that jurisdiction attaches through this state's well established public policy of preventing foreseeable labor unrest set forth in RCW 47.64. The IBU views the action by WSF in not including the labor protection provisions in its RFP seeking a new food service concessionaire, as inviting labor unrest.

IBU argues that the MEC has general jurisdiction over this dispute under its public policy mandate found at RCW 47.64.006 to ensure labor peace and promote harmonious and cooperative relationships between the ferry system and its employees by permitting ferry employees to organize and bargain collectively. It maintains that by statutorily prohibiting strikes and work stoppages, the MEC has been given a broader reach under state statute in defining mandatory subjects for collective bargaining, particularly the terminology in RCW 47.64.120 (1) that requires bargaining over other matters mutually agreed upon. This policy

mandate, in the view of IBU, clearly requires that MEC take jurisdiction to ensure labor peace and an orderly transition in the selection of a food service concessionaire.

While WSF contends that there is not an established practice under which the RFP invariably required the proponent to agree to hiring the existing workforce and apply terms and conditions of the existing collective bargaining agreement covering the galley workers, the IBU maintains, and the evidence seems to support, that the only occasion upon which there was not such a provision in the RFP was for the 1988 food concession contract. The result of that 1988 omission apparently caused some serious concerns and discussions between WSF and IBU which resulted in the early termination of the food concession contract, and issuance of a new RFP with the preferential hiring and assumption of contract requirements. It also appears that the 1988 successful bidder, Greyhound, d/b/a Restaura Dining Services did hire the predecessor employees and apply the terms of the then current collective bargaining agreement to the concession employees.

Additionally, IBU sought assistance from WSF to require the 1991 incoming proponent to fund the accrued sick leave of concession employees. This was accomplished by agreement and has been maintained to the present time.

WSF urges that the MEC is lacking jurisdiction in this matter because Washington law grants it jurisdiction only over WSF employees, and that jurisdiction is granted only in favor of bargaining units, not unions. WSF asserts that for MEC to assume the kind of quasi-jurisdiction which it views the IBU as urging here, would be to open to MEC jurisdiction any number of contracts arrived at through RFPs for services that WSF routinely contracts for such as vessel and terminal constructions, repair and maintenance, property leases and terminal agent contracts. WSF contends that decisions about the nature and direction of future food service aboard the

vessels are at the very core of entrepreneurial control. To require WSF to include language requiring preferential hiring and adherence to the existing collective bargaining agreement is to require WSF to continue indefinitely, a business model which worked well for many years, but which has been passed by time.

WSF buttresses its argument regarding MEC's lack of jurisdiction upon MEC precedent, incorporated herein by reference. In Decision No. 89-MEC (1993) the MEC issued a Declaratory Order in which it held that MEC did not have jurisdiction over the employees of the then concessionaire, Marriott (the predecessor to SODEXHO) in this same unit of galley employees aboard the WSF vessels. This holding of the MEC relied on the National Labor Relations Board test as set forth in *Res-Care, Inc., 280 NLRB 670 (1986).* In accordance with the NLRB ruling, the MEC declined jurisdiction and dismissed the petition for declaratory judgment because the evidence did not demonstrate that WSF retained control of the core bargaining subjects in its contract with the concessionaire. IBU counters that the precedent set by Decision No. 89-MEC may be of limited value in the analysis of this case in that it was premised on the *Res-Care* case which the NLRB has since overruled in *Management Training, 317 NLRB 1355 (1995).* In overruling *Res-Care* the Board held in *Management Training:*

> that jurisdiction should no longer be determined on the basis of whether the employer or the Government controls most of the employee's terms and conditions of employment. Nor should the Board be deciding as a jurisdictional question, which terms and conditions of employment are or are not essential to the bargaining process.
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> *Id.* (slip op. at 4.)

Continuing, the NLRB in *Management Training* held that whether the private employer and the exempt entity are joint employers is irrelevant. The Board then held that even though it had no jurisdiction over governmental entities and thus could not compel them to sit at the bargaining

table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control. Finally, the Board held that it is for the parties to determine whether bargaining is possible with respect to other matters available for negotiation.

Finally, IBU argues that the precedent established in Decision No. 89-MEC does not limit the MEC's jurisdiction over the WSF, and that it was the WSF which made the unilateral decision to remove provisions from the concessionaire RFP that would require preferential hiring for incumbent galley employees and assumption of the substantive terms of the current collective bargaining agreement. This decision made by WSF is therefore subject to the application of RCW 47.64.090, a recently enacted change made by the legislature in 2003 the apparent purpose of which is to encourage the development of passenger only ferry service. In IBU's view, the concessionaire contract at issue here meets the statutory definition of a lease as contemplated by RCW 47.64.090, giving the MEC jurisdiction over the concessionaire.

FINDINGS OF FACT

1. WSF contracts with concessionaires for various services, among them being a food service operation that operates the galleys and produces food for sale to WSF riders and employees on most WSF routes.

2. In selecting a concessionaire, WSF issues a Request for Proposal (RFP) to which proponents hoping to win the concession contract respond.

3. Various food service contractors have operated the galleys for WSF. The current contractor is SODEXHO, which has operated the food service contract since 1991. The initial award in 1991 was to Marriott food services, which was later acquired by SODEXHO.

4. From 1988-1991 the food services concessionaire was Greyhound, d/b/a Restaura Dining Services.

5. In preparing to issue the RFP for the contract year beginning in 2003, WSF made a decision to issue separate RFPs for each of seven segments. Proponents could make a proposal for one or all or any combination of the segments. The on-board galley service was just one of the total package of seven segments. Other segments on which RFPs were issued included vending machines and on-shore services, as well as some issues that had not before been considered for concessionaires, such as news, books and convenience, on-shore food and beverages.

6. WSF witnesses characterized the RFP prepared for the 2003 contract as "labor neutral". It did not require the proponent to give preference to the current galley employees, nor did it require applying the terms of the collective bargaining agreement.

7. The change in methodology was the result of a management decision to attempt to broaden and increase new revenue opportunities creating new concession services that had not existed previously.

8. In issuing the 1988 RFP for food services, WSF did not include language which required preferential hiring of galley employees or assumption of the then current collective bargaining agreement.

9. The contract award for food services went to Greyhound, d/b/a Restaura Dining Services in 1988. Thereafter, WSF required Restaura to employ the galley employees from the previous contractor and apply the terms of the unexpired collective bargaining contract.

10. After two years of Restaura operating the food service concession, WSF prepared an addendum to the contract permitting early termination by mutual agreement. WSF thereafter prepared a food service master plan and issued an RFP for the period 1991-1996.

11. In the selection of the food service contractor for the 1991-1996 contract period (issued for an initial period of five years) the RFP required the successful contractor to give preference in hiring to the nonsupervisory galley employees and abide by the existing collective bargaining contract.

12. The 1996 RFP provided for a five-year contract period plus a five-year renewal option.

13. In 2003 SODEXHO notified WSF that it did not want to extend its contract in that it could not make a reasonable profit under existing terms and conditions, and that it intended to cease operations as of October 18, 2003.

14. WSF prevailed successfully in its efforts to have SODEXHO extend its contract until December 31, 2003 by agreeing to reduce its commission on SODEXHO sales from 10.5% to 7%.

15. SODEXHO also engaged in discussions with IBU concerning certain unspecified concessions to the collective bargaining agreement.

16. Prior to the issuance of RFPs, WSF engaged internally in protracted discussions and analysis of changes to be made to the structure of food services to be provided to WSF customers. The staff recommended and WSF management adopted the so-called “labor neutral” approach to the issuance of the RFP. IBU sought to discuss the decision to adopt the labor neutral stance, but was rebuffed by WSF management.

Based upon the above discussion of issues and finding of fact, the following discussion and analysis and conclusions of law are made.

DISCUSSION AND ANALYSIS

In analyzing the facts and arguments advanced in this case it is paramount that the MEC carefully consider the threshold issue of jurisdiction. Having earlier established that the MEC does not have jurisdiction over labor relations matters between the Marriott Corporation (the then food service concessionaire to WSF), MEC, even in the context of the Marriott case found general jurisdiction over the labor/management relations between and among the employees' labor unions of WSF pursuant to Chapter 47.64 RCW, 34.0500 RCW, and WAC 316-02-300. (See Conclusions of Law No.1*, Decision No. 89-MEC).* The MEC does not here claim to now have jurisdiction over food service concession contractors who may be subject to the jurisdiction of the National Labor Relations Board depending upon whether the totality of operations impacts interstate commerce. As stated by the NLRB in *Management Training Corp., 317 NLRB 1355, at n.16:* "The fact that we have no jurisdiction over governmental entities and cannot compel them to sit at the bargaining table does not destroy the ability of private employers to engage in effective bargaining over terms and conditions of employment within their control . . ." The Board held in that case that it was not a proper consideration as to whether the quality and/or the quantity of factors available for negotiation were sufficient. Where a party over which the Board has jurisdiction has control over some terms or conditions of employment, it is for the parties to determine whether bargaining is possible.

In the case involving the food service concessionaire and WSF we have a reverse view of the exempt entity situation from that encountered by the NLRB in *Management Training Corp.* Thus, while MEC does not claim jurisdiction over the food service concessionaire, it is clear that

general jurisdiction exists over the labor/management relations between and among the employees' labor unions and WSF. The IBU contends, and it is found, that WSF has a long practice, interrupted on only one occasion and then quickly reinstated when problems appeared, of requiring food service concessionaires to give preferential hiring to galley employees of the predecessor concessionaire.

The unrebutted testimony of Barry Firth who had been employed by the management consulting firm in 1990 and later served WSF as Food Service Manager from 1991-1998 established that WSF closely controlled the RFP process. Firth was instrumental in obtaining an agreement with the 1991 incoming contractor concerning unfunded sick leave accruals that would protect such employees in the event of a new food service contractor taking over. Firth also recalled that when Marriott first took over the food service contract in 1991, the IBU enlisted his assistance in talking with Marriott representatives to reinforce to them that WSF expected the existing collective bargaining contract to go forward as written until expiration or until such time that Marriott could negotiate a new agreement.

In 1996 when WSF issued a new RFP it reiterated that proponents would abide by the existing agreement and give preference to the predecessor food service concessionaire employees.

Throughout all of the history of food service concessionaires, WSF has maintained a bargaining relationship with IBU for various units of IBU represented WSF employees. Labor relations between these parties have at times been strained, but have usually been subject to cordial resolution through the collective bargaining process, regular labor-management meetings on issues and occasional grievance or unfair labor practice resolution by the MEC. The MEC,

following its statutory mandate has not seen a labor stoppage involving WSF employees since the early 1980s.

Incoming food service concessionaires have had to contractually agree to train employees not only in food service techniques, but also participate in safety drill aboard the WSF vessels, and man stations assigned by WSF. Galley employees accrue seniority for their service aboard vessels that may be used in applying for positions as WSF employees. A number of such conversions occur each time the WSF hires in its various units of employees. It is of course a maxim of maritime law that the vessel's Master, a WSF employee, can discipline any employee working aboard the vessel under his control, including the galley employees.

It is clear that WSF has for many years in the past, required new food service concessionaires to give preference in hiring to predecessor employees and apply the terms of the predecessor labor agreement. In a time frame during this history where such a requirement was not set forth in the RFP, WSF nonetheless forced the proponent to adhere to the requirements. Whether such practice was implemented and continued to prevent a labor stoppage that could impact WSF employees or to better its relationship with IBU, it is clear that it became a practice on which IBU was entitled to depend. When management chose to eliminate this practice in preparation for the 2003 RFP, without first bargaining with IBU, it violated its bargaining obligation to IBU under RCW 47.64.120. It will be required to reissue its RFP regarding the food service concessionaire.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction in this case over the labor/management relations between and among the employees' labor unions and Washington State Ferries pursuant to Chapter 47.64 RCW.

2. MEC does not have jurisdiction over labor relations matters between SODEXHO and the Inland Boatmen's Union of the Pacific.

3. In 2003, WSF altered a longstanding practice in which RFPs for food service concessionaires required a proponent to give preference to employees of the predecessor food service employer and apply the terms and conditions of the collective bargaining agreement.

4. By unilaterally changing the practice for issuing RFPs in 2003, WSF is in violation of RCW 47.64.120.

ORDER

It is ordered that the complaint of unfair labor practice by the Inlandboatmen's Union is granted and affirmed. WSF is hereby directed to rescind its Request for Proposals issued to secure concessionaire food service on WSF vessels. Any change in the past practice of requiring proponents to give preference to galley employees employed by the previous food service operator and apply the terms and conditions under which they were employed may only be made after bargaining in good faith with the IBU.

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

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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 _____ day of December 2003.

MARINE EMPLOYEES' COMMISSION

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JOHN NELSON, Hearing Examiner

Approved by:

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JOHN SULLIVAN, Commissioner

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JOHN BYRNE, Commissioner