Port of Vancouver, Decision 6979 (PECB, 2000)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:	
INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 4	CASE 14599-E-99-2430
Involving certain employees of:	DECISION 6979 - PECB
PORT OF VANCOUVER	DIRECTION OF CROSS-CHECK

Leonard, Carder, Nathan, Zuckerman, Ross, Chin & Reman, by William H. Carder, Attorney at Law, appeared on behalf of the petitioner.

Schwabe, Williamson & Wyatt, by Thomas M. Triplett, Attorney at Law, appeared on behalf of the employer.

On May 21, 1999, International Longshore and Warehouse Union, Local 4 (ILWU), filed a petition for investigation of question concerning representation with the Public Employment Relations Commission, under Chapter 391-25 WAC. The ILWU sought certification as exclusive bargaining representative of three employees of the Port of Vancouver (employer). An investigation conference was conducted on June 16, 1999, with participation by representatives of both parties. Issues were framed at that time concerning the timeliness of the petition and concerning the propriety of the petitioned-for bargaining unit. A hearing was held on September 1, 1999, before Hearing Officer Mark S. Downing. Both parties filed briefs.

On the basis of the evidence and arguments presented, the Executive Director rules that the petitioned-for unit limited to three employees in the employer's maintenance operation is an appropriate

unit for the purposes of collective bargaining. A cross-check is directed to resolve the question concerning representation.

BACKGROUND

The employer is organized under Title 53 RCW, and is governed by a three-member board of elected commissioners. The commissioners appoint the employer's executive officers, including an executive director, a port counsel, and a port auditor. In turn, the executive director is responsible for approximately 65 employees hired as administrative staff, security and approximately 15 "maintenance" employees.

The employer operates a commercial river port located on the north shore of the Columbia River at the point of confluence with the Willamette River. It has 600 acres of operating facilities along 1.5 miles of riverfront. Those facilities handle a wide range of cargo, and the employer provides equipment, manpower, and storage facilities to approximately 40 industrial tenants.

The Maintenance Workforce

Generally, the employer has responsibility for common areas, and it maintains electrical service, water service, buildings, streets and approximately 18 miles of rail trackage. Twelve of the employees in the employer's maintenance section are "skilled trades" employees who provide construction and maintenance services for tenants, depending upon the particular lease with the tenant. Those employees include:

2 heavy equipment operators
2 piledriver operators

2 carpenters
1 carpenter foreman
1 sprinklerman
3 laborers
1 electrician

Those employees work at various work sites throughout the employer's facilities, operating heavy equipment (such as road graders and front-end loaders), repairing and resurfacing roads, digging trenches, laying pipe, driving piles, repairing buildings, maintaining building roofs and siding, and electrical work. None of these employees regularly work at the employer's shop, or maintain or repair the equipment they use in their daily tasks.

Responsibility for the maintenance of the employer's vehicles and heavy equipment has been assigned to the three maintenance mechanics who are at issue in this proceeding. They generally perform all of their work in the employer's maintenance shop facility.

STIPULATIONS

During the investigation conference, which was conducted by telephone conference call, the representatives of the employer and petitioner entered into several stipulations and framed the issues for hearing in this matter. The investigation statement issued on June 24, 1999, then included:

> This statement is issued pursuant to WAC 10-08-130 and WAC 391-08-210 to state the stipulations made by the parties at the investigation conference and to control the subsequent course of proceedings. This statement is prepared in lieu of an election agreement and shall be posted on the appropriate employee bulletin boards in the

> employer's premises for a period of seven days pursuant to WAC 391-25-230.
>
> 1. The following matters were resolved during the course of the conference:
>   a. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.
>   b. The addresses of the parties as printed on the case docket sheets were corrected to show Tom Triplett at 1211 SW 5th, Portland, Oregon 97204.
>   c. The petitioner, ILWU, Local 4, is a lawful labor organization qualified to act as bargaining representative pursuant to RCW 41.56.030(3).
>   d. A question concerning representation exists between the parties.
> 2. The following matters remain in dispute between the parties:
>   a. The employer claims the petition is untimely filed because of a voluntary recognition between the employer and IUOE, Local 701.
>   b. The employer questioned the appropriateness of the proposed unit.
>
> The case will be assigned to a hearing officer to hold a hearing and resolve the dispute.
>
> Any objections to the foregoing must be filed, in writing, with the Representation Coordinator within 10 days following the date hereof and shall, at the same time, be served upon each of the other participants named above. This statement becomes part of the record in this matter as binding stipulations of the parties, unless modified for good cause by a subsequent order.

Neither the employer nor the ILWU filed any objection concerning the eligibility list. Although International Union of Operating Engineers (IUOE), Local 701, had earlier filed a letter with the Commission in which it asserted that the three petitioned-for

mechanics should be accreted to its existing bargaining unit, that union did not move for intervention in this matter, and was not present at the hearing.

DISCUSSION

The Appropriate Bargaining Unit

The determination of appropriate bargaining units is a function delegated by the Legislature to the Public Employment Relations Commission. RCW 41.56.060. Unit determination is not a subject for bargaining in the usual mandatory/permissive/illegal sense and, while parties can agree on unit matters, such agreements are not binding on the Commission. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). RCW 41.56.060 directs the Commission:

> In determining, modifying or combining the bargaining unit, the commission shall consider **the duties, skills, and working conditions** of the public employees; **the history of collective bargaining** by the public employees and their bargaining representatives; **the extent of organization** among the public employees; and **the desire of the public employees.**

RCW 41.56.060.

Unit determinations are made on a case-by-case basis, starting in a representation case under Chapter 391-25 WAC from the unit structure proposed by the petitioning union. A unit can be certified if it is ***an*** appropriate unit; it need not be the most appropriate unit.

> The statute does not confine us to certifying only "the most appropriate unit" in each case. **It is only necessary that the petitioned-for bargaining unit be an appropriate one.** Thus, the fact that there may be other groupings of employees which would also be appropriate, or even more appropriate, does not require rejecting a proposed unit that is appropriate.

City of Centralia, Decision 3495-A (PECB, 1990) [Emphasis by **bold** supplied]

The right of employees to a voice on the selection of their representative is further emphasized, in the case of port district employees, in RCW 53.18.030:

> In determining which employee organization will represent them, employees shall have maximum freedom in exercising their right to self-organize.

Thus, the employer would need to establish in this case that the unit configuration sought by the ILWU is "inappropriate".

Positions of the Parties on "Unit" -

The employer argues that a unit encompassing its entire maintenance workforce (15 employees) is the only appropriate unit for any of those employees, and that the petitioned-for unit of three employees should be found inappropriate. It requests resolution of an issue which, it states, was raised by the letter in which the IUOE asserted that the maintenance mechanics should be accreted to its existing bargaining unit. The employer also argues that the petition filed in this matter was untimely, because of a voluntary recognition between the employer and the IUOE.

The ILWU argues that the petitioned-for unit is appropriate because the maintenance mechanics have different wages and benefits than

the other maintenance employees, because the petitioned-for employees share a distinct community of interest, and because they have no history of affiliation with a bargaining agent. In opposing the employer's arguments concerning accretion and/or a voluntary recognition, the ILWU asserts that acceptance of the employer's arguments would foreclose the right of the affected employees to determine their representative for bargaining.

The History of Bargaining -

The employer's arguments concerning timeliness and the rights of IUOE Local 701 are unfounded, and are rejected. While the "history of bargaining" component of the unit determination criteria set forth in RCW 41.56.060 is the basis for discussion of "severance" and "timeliness" issues in numerous decisions by the Commission and counterpart agencies such as the National Labor Relations Board (NLRB), it has no application in a case where, as here, there is no actual history of bargaining.

Since 1977, the employer has had letters of agreement in effect with unions representing some of the employees in its maintenance workforce, as follows:[1]

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[1] In a 1977 letter to the IUOE, the employer described its position, as follows:

> This will reiterate our established position that the Port as a municipal corporation does not enter into labor agreements with the various union of the building trades.
>
> The Port however, does pay the wage scale and health and welfare benefits provided for under the existing agreement between the union and the Employer's Association. This arrangement has been in effect since 1968.

Thus, the 12 maintenance employees have been paid the wages and benefits established by collective bargaining between the respective unions and other employers.

* With International Union of Operating Engineers, Local 701, covering heavy equipment operators;

* With Piledrivers, Local Union 2416, representing pile-driver operators;

* With SW District Council of Carpenters, Local 1715, representing carpenters;

* With National Automatic Sprinkler Industry Union, Local 669, representing sprinklermen;

* With International Brotherhood of Electrical Workers, Local 48, representing electricians; and

* With Laborers International Union of North America, Local Union 335, representing laborers.

Those employees receive the wages specified by a local master agreement covering their particular craft, the employer contributes to six different union retirement trust funds, and the employer contributes to six different union medical programs. The employer deducts union dues from the wages of those employees, and transmits those funds (in differing amounts for all but two of the unions) to the specific craft union to which the employee belongs.[2]

The petitioned-for maintenance shop mechanics have never been represented by a labor union, covered by a collective bargaining agreement, or even covered by any of the letters of agreement described above. They are the employer's only maintenance

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[2] Although questions concerning the ongoing validity of those letters of agreement signed years ago need not be, and are not, decided here, the absence of a ruling on those matters here does not constitute an acknowledgment that they are valid. Under RCW 41.56.070, a collective bargaining agreement cannot be for a term greater than three years, and cannot be renewed automatically. Under State ex rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), public sector collective bargaining agreements must be in writing to be enforceable.

employees who are covered by the Public Employees Retirement System and by the employer's medical insurance plans. The employer has never deducted union dues from the wages of the petitioned-for employees, nor has it ever been authorized to so do.

The employer's claim of having extended voluntary recognition to the IUOE as exclusive bargaining representative of the petitioned-for employees is not supported by the record. Apart from the procedural vacuum created by the failure of the IUOE to move for intervention in this proceeding, there is certainly neither signed documentation of such a transaction nor a signed collective bargaining agreement following up on such a transaction. There was no evidence presented at the hearing that the mechanics have ever asked for representation by the IUOE for purposes of negotiating their wages, hours or working conditions. Under City of Mukilteo, Decision 1571-B (PECB, 1983) at page 4, "a request for recognition must claim majority support from an appropriate unit". In the absence of a claim of (and a willingness to demonstrate) such support, an employer would commit an unfair labor practice by extending voluntary recognition to a union that did not hold majority status in the unit, and a union which accepted voluntary recognition would be subject to scrutiny as an unlawfully assisted "company union". Finally, even if there were proof of a valid voluntary recognition, the "certification bar" set forth in RCW 41.56.070 only applies to a certification issued by the Commission following an election or cross-check.

Duties, Skills and Working Conditions -
The petitioned-for bargaining unit consists of two utility mechanics (Stephen Handy and Kerry Karschney) and the mechanic foreman (Mark Savage). The evidence clearly establishes that they have a community of interest separate and apart from the employer's other maintenance employees.

The employer's position description for the utility mechanics is as follows:

> BASIC FUNCTION:
> Perform major and minor repairs to a wide variety of both gasoline and diesel powered equipment. Includes preventative maintenance tasks, engine breakdown and buildup, repairing carburetors, tuning engines, servicing and repairing hydraulic systems, welding broken accessories and similar heavy-duty mechanic functions. Perform other duties and responsibilities as required including conveyor and other mechanical systems in support of marine operations.
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> QUALIFICATIONS:
> Journeyman mechanic experienced in working on diesel and gasoline powered equipment such as front end loaders, cranes (diesel, electric), crawler cranes, dump trucks, automobiles, lift trucks, etc. Must have acceptable arc and acetylene welding credentials. Must be familiar with and be able to check and repair all electrical/electronic and carburetor systems for the above equipment.
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> EXPERIENCE:
> Prefer a minimum of five years related experience and satisfactory references. Ability to write legibly and converse in the English language. Must possess a current Drivers License.

The mechanics testified that they repair dump trucks, front-end loaders, road graders, vibratory rollers, forklifts, chain saws, electrical vibrators for doing concrete work, rubber-tired cranes, asphalt breakers, backhoes, pickups, cars, trucks, and security vehicles. They primarily work in the shop, and testified that they only operate this equipment as necessary to move equipment into or out of the shop for repair or maintenance. The utility mechanics testified that they never do any carpentry, plumbing, electrical, piledriver or laborer work.

The employer's job description for the mechanic foreman position (with emphasis by **bold** on similarities) is as follows:

> BASIC FUNCTION
> Under the direction of the director of terminal services, supervises mechanical shop operations for the maintenance, service and repair of mechanical and utility equipment. This includes all mechanical shop functions and personnel assigned. **Must be able to perform the duties of all subordinates whenever necessary.** Schedules all work assignments, periodically councils and evaluates work of subordinates and insures that all personnel are informed and use proper safety procedures in carrying out their assigned tasks.
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> Supervises the work of all of the mechanical shop maintenance personnel. Oversees the **major and minor repairs of all port owned and related mechanical equipment, including preventative maintenance tasks, such as engine breakdown, buildup, engine turning, servicing and repairing of hydraulic systems, welding and similar mechanical functions.** Incumbent is responsible for requisitioning, through central purchasing, and purchasing through field purchases, parts, supplies, tools and necessary equipment.
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> This is a **working foreman position and the incumbent is expected to perform all of the same duties and functions as a journeyman utility maintenance mechanic.** Is responsible for recording daily time sheets and maintaining equipment and shop maintenance needs. Makes daily work assignments for all maintenance personnel. Conducts periodic safety meetings with staff to insure that proper shop and field safety practices are being observed and followed. Maintains and makes periodic employee performance reviews as required. Incumbent is expected to be available for all district emergency situations and to designate an alternate in his absence. Perform other related duties as assigned.
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> QUALIFICATIONS:
> **Journeyman mechanic** experienced in assembly, maintenance and repair of utility, construction and automotive equipment. This experience in-

> cludes, but is not restricted to **internal combustion engine mechanics, diesel engine mechanics, fuel and carburetor systems, electrical and generating systems, wiring, ignition, power trains, brakes, chassis, metal working, welding, various machine operations and all fluid, hydraulic and pneumatic power systems.** Must be skilled in record keeping and other shop and automotive administration.
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> Requires a good knowledge of principles of leadership and be able to satisfactorily communicate with fellow employees and the public.
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> Must be able to read and write legibly and converse in the English language. Must be able to read and interpret blueprints, sketches, instructions and directions. Requires good knowledge of port policies and procedures and a familiarity with port facilities and equipment.
>
> . . .
>
> EXPERIENCE:
> Must have a minimum of five years experience as a journeyman mechanic in the area of assembly, maintenance and repair of utility construction and automotive equipment. Should have supervisory experience.

As is explicitly noted in his job description, the mechanic foreman performs all of the job duties of the utility mechanics. He does some of that work in the field, but primarily works in the shop.

Interchange or interaction between employees in a petitioned-for unit and other employees can be a basis for finding a community of interest, but the employer's claims of "constant contact" and "interplay" with other members of the maintenance workforce are not persuasive. The evidence merely establishes that the shop crew and the other maintenance employees have occasion to interact at the beginnings and ends of their shifts, in the lunchroom they share, and when discussing the maintenance or repair needed on a particular piece of equipment. It is clear that their actual work is not

interchangeable. The mechanics never operate any of the equipment used by the other employees for "production" purposes, and the other employees do not perform any maintenance or repair tasks other than basic oiling or greasing in routine operation.

Similarities of wages, hours or working conditions can be a basis for finding a community of interest to exist, but the evidence in this case clearly demonstrates more differences than similarities. Where the other crafts employees are paid according to wage scales established by the crafts unions in the greater Vancouver/Portland area, the petitioned-for mechanics are paid on a wage scale established by the employer, presumably on a competitive basis. The shop mechanics have always been under different pension and medical benefit plans than the other maintenance employees.

Extent of Organization -
This element of the statutory unit determination criteria compares a petitioned-for unit to the whole of the employer's operations, and thus provides a toe-hold for "anti-fragmentation" and "table of organization" arguments. It is necessarily applied in the context of any bargaining unit structures already existing within the employer's workforce.

Here again, the employer appears to be arguing a position that is clearly contrary to the evidence of-record. It asserts:

> Key to consideration of this factor is unitary management or supervision; vertical or horizontal integration with others; whether they are in the same or a different department; and critically, the issue of unnecessary fragmentation. ... There can be little question that fragmentation and probable lack of representation would result from petitioner's contentions. First, both the Pipefitter and the Electrician, as one-person units, would be left without any right to orga-

> nize. Second, the Port would be treated to the prospect of six (6) unions representing thirteen (13) employees and two supervisors.

It appears however, that the employer is describing the present situation, not what will result if its objections are overruled. The evidence shows that the employer has treated its skilled craft employees other than the petitioned-for mechanics as represented employees, even to the extent of deducting union dues. Having made those decisions in the past, it cannot now credibly argue that the **only** appropriate bargaining unit must be a wall-to-wall unit of all maintenance employees. The decision in City of Auburn, Decision 5775 (PECB, 1996), is instructive:

> [N]either the petitioner, the employer nor [an intervening union] has a right to dictate the choice of bargaining representative for the employees at issue in this proceeding. The employer's arguments favoring accretion of the petitioned-for positions to [an existing unit] in this case are essentially the same as those which were advanced and rejected in City of Vancouver, Decision 3160 (PECB, 1989), where historically unrepresented employees were given the opportunity to vote on representation. No provision within Chapter 41.56 RCW provides a reward in heaven for employers who manage to preserve one or more pockets of unrepresented employees within their workforces, and the specter of "skimming" issues should fuel employer concerns about excessive fragmentation of units. The comeuppance for employers that do manage to have pockets of unrepresented employees tends to occur when the employees in one or more such stranded groups exercise their statutory right to organize for the purposes of collective bargaining.

See, also, Cusick School District, Decision 2946 (PECB, 1988). The employer's concerns about fragmentation do not override the historical absence of union representation for the petitioned-for

mechanics, particularly where those mechanics have duties and skills distinct from those of the other maintenance employees.

While accretions of employees or positions to an existing bargaining unit can be ordered under particular circumstances, the circumstances existing in this case do not support the employer's assertion that the petitioned-for employees should be accreted to the so-called "bargaining unit" represented by the IUOE. RCW 41.56.040 sets forth the general rule, guaranteeing public employees a voice in the selection of their exclusive bargaining representative. Accretions are an exception to that general rule, and are only ordered where the positions involved can neither stand on their own as a separate unit nor properly be added to any other bargaining unit. The party proposing accretion has the burden of establishing that those conditions are met. In the absence of circumstances which warrant depriving the affected employees of their voice on their representation, an accretion must be denied. See, Pierce County, Decision 6051-A (PECB, 1998) and cases cited therein. See, also, City of Vancouver, supra, rejecting arguments similar to those advanced by the employer in this case. The mechanics at issue in this case could stand alone as a separate community of interest, and there is no support for a conclusion that the IUOE has greater claim to them than any of the other unions now recognized by the employer.

Desires of Employees -

As explained in City of Marysville, Decision 4854 (PECB, 1994), the Commission sometimes finds it necessary and appropriate to assess the "desires of employees" on unit issues. That occurs where either of two or more unit configurations could be appropriate, based upon other unit determination criteria. The Commission then conducts a secret-ballot unit determination election, giving the employees involved an opportunity to express their desires on their

unit placement under the protection of a secret ballot.[3] In the instant case however, there are no alternative units available for these employees. Therefore a unit determination election will not be required.

Conclusions on "Unit" Issue -
The petitioned-for bargaining unit is found to be an appropriate unit for the purposes of collective bargaining. The four factors listed in RCW 41.56.060 are not prioritized. The circumstances of each case determine whether each factor applies, and which factor(s) predominate(s), in reaching a decision. Okanogan School District, Decision 5394-A (PECB, 1997). The evidence in this case indicates that the petitioned-for employees have distinct duties, skills, and working conditions; the historical arrangements described by the employer clearly exclude the petitioned-for employees; the employer has failed to carry the heavy burden of proof to establish that the petitioned-for unit is inappropriate, or that the petitioned-for employees should be accreted to an existing bargaining unit; no other union has intervened to seek a different unit, so the circumstances for conducting a unit determination election are not present.

Method for Determining Question Concerning Representation

RCW 41.56.060 authorizes the Commission to determine questions concerning representation by conducting a secret-ballot election for that purpose, or by conducting a cross-check of employer and union documents.

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[3] The unit determination election procedure obviates the need for (or propriety of) employees being called upon to give sworn testimony or be subjected to cross-examination on such a sensitive issue, which is often closely related to their choice of exclusive bargaining representative.

Positions of the Parties on Determination Methodology -
The showing of interest presented by the ILWU suggests that it has the support of more than 70% of the employees in the petitioned-for bargaining unit. It has requested that the question concerning representation be determined by a cross-check of employer and union documents, directed under WAC 391-25-391 and conducted under WAC 391-25-410.

The employer asserts that an election should be conducted if this petition is not dismissed. In its brief, the employer argues, generally, that the determination of whether the mechanics are represented for purposes of collective bargaining should only be determined by a secret ballot election.

Discussion on Determination Methodology -
The employer's general objections to the cross-check procedure are not persuasive. The appropriate uses of the cross-check procedure were thoroughly discussed in City of Winslow, Decision 3520-A (PECB, 1990). The Commission's use of the cross-check procedure had previously been affirmed by the courts in judicial review proceedings resulting from Evergreen General Hospital, Decision 58-A (PECB, 1977), in King County Public Hospital District 2 v. Public Service Employees, 24 Wn.App 64 (1979), and in City of Redmond, Decision 1367-A (PECB, 1982). The Commission had stated in Redmond:

> Our conclusion is based on the language of the statute, RCW 41.56.060, as well as considerations of efficiency. RCW 41.56.060 clearly provides three methods for determining a bargaining representative, and does not suggest a legislative preference for any particular method. Contrary to the employer's suggestion, the statute does not prefer the election procedure to other methods. RCW 41.56.070 sets forth election procedures to be used "in the event the commis-

> sion elects to conduct an election..." (emphasis added). This again recognizes the options available to the commission, which have been left to the discretion of the agency to exercise.
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> The cross-check has the advantage of being a more efficient procedure than an election, requiring less utilization of this agency's scarce resources. On the other hand, an election accurately reflects whether any employees who signed authorization cards have changed their minds between the time they signed the card and the election, and would also give the union time to garner further support. Our rule, WAC 391-25-391, weighs the advantages and disadvantages of the two approaches, and resolves the matter by allowing a cross-check when the showing of interest indicates that the union has been authorized as the bargaining representative by a "substantial majority of the employees". ....

The circumstances for direction of a cross-check are met in this case. If any individual employee has had a change of heart since they signed their authorization cards, WAC 391-25-410(2) provides them a procedure to revoke their previous authorization.

The Eligibility List

During the course of the hearing, the employer sought to raise an "eligibility" issue concerning the mechanic foreman, claiming that he should be excluded from the bargaining unit as a supervisor. The Hearing Officer rejected the employer's claim, reasoning that the employer had waived this eligibility issue by failing to raise it in response to the Commission's request for a list of eligible employees or at the Investigation Conference.

Positions of the Parties on Eligibility -

The employer renewed its eligibility argument in its post-hearing brief. The employer contends Mark Savage is a supervisor, cites

RCW 53.18.060(3),[4] and argues that the Hearing Officer improperly rejected the employer's attempt to raise this issue at the hearing.

The union contends that the mechanic foreman is merely a working foreman or leadman of the type that is commonly included in the same bargaining unit with other rank and file employees.

The Procedural / Waiver Issue -
Based on review of the pertinent documents, the Executive Director overrules the ruling that the employer waived its right to raise this eligibility issue. While the Commission's rules and procedures encourage stipulations on issues in representation cases, and while precedents such as Community College District 5, Decision 448 (CCOL, 1978) enforce the stipulations made by parties, the documents in this case suggest silence, rather than stipulation.

The employer assertion that its first response to the petition "expressly reserved" a right to modify or amend its position is not conclusive. In actual fact, the June 3, 1999 letter sent by the employer in response to a request made under WAC 391-25-130 for a list of employees only vaguely stated (emphasis by **bold** supplied):

> Secondly, the individuals listed on the petition are as follows: Mark Savage, Steve Handy, Kerry Karschney. **This list may be subject to change.**

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4 The cited section is a provision in Chapter 53.18 RCW, which is read in conjunction with Chapter 41.56 RCW. It states:

> **RCW 53.18.060 Restraints on agreement.** No labor agreement or contract entered into by a port district shall:
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> ...
>
> (3) Include within the same agreements: ... (b) port supervisory personnel.

In the context of a collective bargaining process designed to foster good communications, and an investigation conference process designed as a fact-gathering exercise, that response clearly fell far short of providing notice that the employer was claiming that Mark Savage should be excluded from the unit as a supervisor.

Even the employer's June 22, 1999 letter objecting to some of the language used in the investigation statement fell short of framing the "eligibility" issue which the employer now seeks to litigate. The employer's letter only stated:

> This paragraph limits the issue to timing of the filing of the Petition. However, the Port has other issues, including a critical issue of appropriate bargaining unit.

An Amended Investigation Statement on June 24, 1999, added an "appropriate unit" issue based upon the employer's June 22 letter. Still, the employer did not file any further objection, or make any explicit request to frame an "eligibility" issue concerning Mark Savage.

What is missing is clear indication that the "eligibility" subject was addressed during the Investigation Conference. The terms of the Investigation Statement and Amended Investigation Statement make clear that they were to control the subsequent course of the proceedings, but that cannot elevate silence to the same dignity as a conscious stipulation. Although the process would certainly have been better served if the employer had given earlier notice of its intention to argue that the mechanic foreman should be excluded from the proposed bargaining unit as a supervisor, the evidence and arguments appear to be sufficient to make a ruling.

The Exclusion of Supervisors -

The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, is silent on the subject of "supervisors". In a decision issued early in its administration of the statute, and arising out of a separate unit of supervisors, the Commission ruled that supervisors have the right to organize and bargain under Chapter 41.56 RCW. City of Tacoma, Decision 95-A (PECB, 1977). The Supreme Court of the State of Washington reached a similar conclusion and cited the Commission's decision with approval in Municipality of Metropolitan Seattle (METRO) v. Department of Labor and Industries, 88 Wn.2d 925 (1977). The METRO decision also concerned a separate bargaining unit of supervisors. In the months that followed Tacoma and METRO, the Commission had occasion to exclude supervisors from the bargaining unit which contained their rank-and-file subordinates, in order to avoid a potential for conflicts of interest which would otherwise exist within the bargaining unit, and that approach was also affirmed by the courts. City of Richland, supra. The Commission and the courts have thus arrived at an interpretation of Chapter 41.56 RCW which both matches the interpretation of the National Labor Relations Act prior to the Taft-Hartley amendments,[5] and the language of RCW 53.18.060.

The Commission's decisions emphasize the inquiry about potential conflicts of interest which might arise where supervisors and their subordinates are included in the same bargaining unit. See, for example, Spokane International Airport, Decision 2000 (PECB, 1984). The focus of inquiry is on the types of authority outlined in Section 2(11) of the NLRA and in RCW 41.59.020(4)(d) of the Educational Employment Relations Act. Numerous decisions have rejected exclusion of "working foremen" and "lead workers" who lack

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[5] See, Packard Motor Car Co. v. NLRB, 330 U.S. 485 (1947), cited by our Supreme Court in METRO.

The mechanic foreman schedules the work assignments of the utility mechanics and reviews their work, but does so in the context that the mechanic foreman is expressly required to possess the same skills as the utility mechanic. The Commission's precedents impose an "additive" or "cumulative" analysis to the criteria for supervisory status, rather than the "any one" approach used by the NLRB in interpreting the specific language of the NLRA. Thus, the authority to assign work is not compelling in this case.

There is no evidence that Savage has the power to hire, promote, transfer, layoff, recall, suspend, discipline or discharge any employees. Indeed, Senior Director of Operations Walter Morley testified that he has the sole authority to hire, discipline and terminate the mechanics. While Morley added that he would consult with the mechanic foreman concerning decisions on hiring, he emphasized that the final decision would be his alone.

The employer's own job description for the mechanic foreman position clearly indicates he is a lead worker. In addition to calling for the disputed employee to do exactly the same work as the other two members of the petitioned-for bargaining unit, nothing in that job description provides any indication that his responsibilities include any of the indicia of a supervisor as defined in years of Commission decisions. See, for example, City of Bellingham, Decision 2823 (PECB, 1987) and City of White Salmon, Decision 4370-A (PECB, 1994).

Examination of the exhibits admitted in evidence at the hearing discloses that the employer's claim that the mechanic foreman should be excluded from the petitioned-for bargaining unit is also inconsistent with its treatment of a carpenter foreman position within its maintenance workforce. Similar to the situation of the

Vancouver, excluding elected officials, the executive head of the bargaining unit, confidential employees, supervisors, and all other employees of the employer.

3. A question concerning representation exists, under RCW 41.56.060, in the bargaining unit described in paragraph 2 of these Conclusions of Law.

4. The mechanical foreman is a lead worker who is not a supervisor within the meaning of RCW 53.18.060 and Commission precedent, and whose inclusion in the bargaining unit described in paragraph 2 of these Conclusions of Law does not present a potential for conflicts of interest warranting an exclusion under RCW 41.56.060 and interpreting precedents.

5. A cross-check conducted under WAC 391-25-410 is the appropriate method, under RCW 41.56.060 and WAC 391-25-391, for determination of the question concerning representation in this matter.

DIRECTION OF CROSS-CHECK

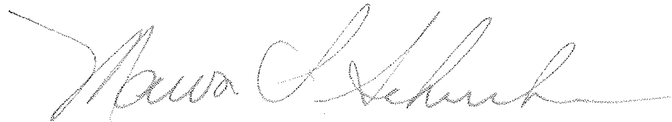
1. The Port of Vancouver shall immediately supply the Commission with copies of documents in its employment records which bear the signatures of the employees involved in this proceeding.

2. A cross-check of records shall be made under the direction of the Public Employment Relations Commission in the bargaining unit described in paragraph 2 of the foregoing Conclusions of Law, to determine whether a majority of the employees in that bargaining unit have authorized the International Longshore

and Warehouse Union, Local 4 to represent them for the purposes of collective bargaining.

Issued at Olympia, Washington, on the 24th day of February, 2000.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARVIN L. SCHURKE, Executive Director

This order may be appealed to the Commission by filing objections under WAC 391-25-590.