

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE)	
PACIFIC,)	
)	
Complainant,)	MEC CASE NO. 4-85
)	
)	
vs.)	DECISION NO. 22 49
)	
)	FINDINGS OF FACT,
WASHINGTON STATE FERRIES,)	CONCLUSIONS OF LAW
)	AND ORDER
Respondent.)	
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Hafer, Price, Rinehart & Schwerin by John Burns, Attorney at Law, appeared for the complainant.

Kenneth Eikenberry, Attorney General, by Robert McIntosh, Assistant Attorney General, appeared for the respondent.

On June 12, 1985, the Inlandboatmen's Union of the Pacific (hereinafter IBU) filed a complaint with the Marine Employees' Commission alleging that Washington State Ferries (hereinafter WSF) committed unfair labor practices within the meaning of RCW 47.64.130 when WSF unilaterally contracted out the duty free shop operation aboard the ferry system vessels M.V. Elwha and M.V. Kaleetan. Rex L. Lacy was designated as examiner to make Findings of Fact, Conclusions of Law and Order. A hearing was held on May 22, 1986, at Colman Dock, Pier 52, Seattle, Washington. The parties filed post-hearing briefs.

BACKGROUND

Washington State Ferries is a division of the Washington State Department of Transportation and the employer of employees covered by Chapter 47.64 RCW. Its principal offices are located at the Colman Dock, Pier 52, Seattle, Washington. Donald R. Schwartzman, Marine Superintendent, is responsible for the day-to-day operation of the ferry vessels and terminals, labor relations,

personnel, customer service, and public affairs. Armand Tiberio, currently the Director of Operations, was Director of Employee Relations when this issue arose.

The Inlandboatmen's Union of the Pacific, is a "collective bargaining representative" within the meaning of RCW 47.64. 011(3). Burrill Hatch is regional director of the IBU.

The IBU is the recognized collective bargaining representative for a bargaining unit of maintenance and operation employees working aboard ferry vessels and at the ferry terminals. Included in the IBU bargaining unit are oilers, wipers, vessel watchmen, matrons, bosuns, terminal agents, ticket sellers, ticket takers, terminal watch/attendants, information supervisors and clerks, and shore gang employees. The IBU and WSF have engaged in collective bargaining since the State of Washington purchased the ferry system. The latest contract covering operations and maintenance personnel was effective from April 1, 1983 to June 30, 1985.

Food service is provided aboard vessels and in terminals operated by WSF by a contracted concessionaire, Saga Food Service of Washington, Inc. (hereinafter Saga). IBU represents food service employees working for Saga, but in a bargaining unit separate and apart from the bargaining relationship between IBU and WSF. The IBU and Saga have entered into a series of separate collective bargaining agreements covering the food operation employees. The latest contract between the IBU and Saga is effective from July 1, 1985 to June 30, 1988. Saga Foods' exclusive franchise agreement with WSF specifically excludes duty free shop operations from its jurisdiction.

WSF operates an international route between Anacortes, Washington, and Sidney, British Columbia, Canada. In early 1983, WSF entertained the idea of operating duty free shops aboard its vessels assigned to that international

route. At that time, WSF requested pre-qualification bids from in-bond companies engaged in duty free shop operations. For reasons which are not explained in this record, the ferry system did not proceed with the establishment of duty free shops at that time.

Early in 1985, WSF again decided to consider operating duty free shops aboard the ferry vessels on the international route between Anacortes and Sidney. In January, 1985, WSF requested pre-qualification bids from interested in-bond companies. The bids were to be submitted to WSF by February 22, 1985. At least four companies responded. On March 1, 1985, the pre-qualification bids were opened at a public bid opening in Seattle, Washington. Export, Incorporated, whose headquarters are located at Riveria Beach, Florida, submitted the most favorable bid. Throughout the bidding process, WSF had not notified the IBU of its intent to contract out the duty free shop operation, and did not offer to bargain either the decision or the effects of the decision to contract out the operation of duty free shops.

Between March 1, 1985 and March 21, 1985, the IBU had an opportunity to learn of the proposal to operate duty free shops aboard WSF vessels assigned to the international route by having been provided a copy of the agenda for the Transportation Commission meeting to be held on March 21, 1985.

On March 21, 1985, the Washington State Transportation Commission formally awarded a contract to Export, Incorporated for the operation of duty free shops aboard the ferry vessels M.V. Elwha and M.V. Kaleetan. The contract to operate the duty free shops was signed on April 23, 1985. Export, Inc. commenced operations on those vessels on June 21, 1986.

After the announcement to let the contract for the duty free shop operation to Export, Inc. was made, WSF did not offer to bargain the effects of the decision to contract out the work.

At the time the contract for operation of the duty free shops was awarded to Export Inc., IBU and WSF were engaged in negotiations for their 1983 - 1985 collective bargaining agreement. IBU asked some questions about the operation

of the duty free shops, but the record contains only extremely sketchy information concerning those discussions. Additionally, the record does not indicate that IBU sought recognition as collective bargaining representative of the employees working in the duty free shops, or that the IBU requested WSF to bargain wages, hours, and conditions of employment for duty free shop employees. In fact, the testimony indicates that the conversations regarding the duty free shops can be best characterized as questions and answers, rather than as meaningful collective bargaining negotiations. The 1983-1985 collective bargaining agreement between the parties was executed on December 20, 1985.

Export, Inc. operates 14 border duty free shops across the United States. They have 3 in-bond warehouses, one of which is located in Seattle, Washington. In addition to the duty free shops which it operates aboard the two WSF vessels, Export, Inc. sells in-bond merchandise to cruise ships, fishing boats, and commercial vessels. In-bond merchandise is basically merchandise upon which applicable taxes and duties are not being collected. Export, Inc. leases approximately 378 square feet of deck space on the main passenger deck of each of the ferry vessels involved. Export, Inc. pays the State of Washington 25.6% of its gross receipts or \$2000, whichever is greater, for the deck space it uses.

Export, Inc. assigns two employees to each of the three daily trips from Anacortes to Sidney during the summer, two employees on the one international trip during the fall and early winter, and one employee during the middle and late winter trip. The number of employees thus varies from 10 or 11 (3 of which are supervisors) in the peak summer months to 3 or 4 employees in the winter months. Export, Inc. employees are responsible for the upkeep, cleanliness and maintenance of the leased space, merchandise inventories and control, and all selling functions of duty free merchandise. Those employees are required to have "Z" cards issued by the United States Coast Guard. They are assigned emergency stations and fire stations on the vessels, and are under the authority of the master of the vessel.

POSITION OF THE PARTIES

The Inlandboatmen's Union of the Pacific contends that the employer has violated Chapter 47.64 RCW by contracting out the duty free shop operation without affording the union the opportunity to bargain the issue; that the subcontracting of the duty free shops adversely affected IBU bargaining unit employees by diluting bargaining unit work; that Export, Inc. employees are considered to be part of the vessel crews (because the subcontractor's employees must possess proper Coast Guard seamen documentation and are assigned emergency stations like any other crew member); that the union learned of the contracting out of the duty free shop operation after the concessionaire had been selected; and that the collective bargaining agreement between the parties does not waive the union's right to bargain the contracting out of bargaining unit work.

Washington State Ferries contends that it did not violate Chapter 47.64 RCW when it contracted out the duty free shop operation on the ferries M.V. Elwha and M.V. Kaleetan; that the collective bargaining agreement between the parties does not prohibit the contracting out of new work; that the work performed by the duty free shop employees bears no relationship to the work performed by the employees in the IBU bargaining unit (and, therefore, does not infringe upon work historically performed by bargaining unit personnel); that no IBU bargaining unit employees were adversely affected by the employer's decision to contract out the duty free shop operation; that the contracting out of the duty free shop operation is consistent with WSF'S past practice of contracting out the food service, gift shop, amusement, free publication and literature operations aboard the vessels and at Colman Dock; and, further, that the union has waived its right to bargain the contracting out of the duty free shop operation.

DISCUSSION

Under Federal law, the collective bargaining obligations of the employer and the exclusive collective bargaining representative are defined by Sections

8(a)(5), 8(b)(3), and 8(d) of the National Labor Relations Act, as amended.

Section 8(a) of the NLRA provides that:

(a) It shall be an unfair labor practice for an employer

* * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

Section 8(b) of the NLRA provides that:

(b) It shall be an unfair labor practice for a labor organization or its agents

* * *

(3) To refuse to bargain collectively with an employer, provided it is the representative of his employees subject to the provisions of section 9(a).

Section 8(d) of the NLRA defines the bargaining obligation as:

(d) ... the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession...

Chapter 47.64 RCW, applicable to the employees of Washington State Ferries, defines the bargaining obligation as follows:

RCW 47.64.120 Scope of negotiations. Ferry system management and ferry system employee organizations, through their collective bargaining representatives, shall meet at reasonable times, to negotiate in good faith with respect to wages, hours, working conditions, insurance and health care benefits as limited by RCW 47.64.270, and other matters mutually agreed upon. Employer funded retirement benefits shall be provided under the public employees retirement system

under chapter 41.40 RCW and shall not be included in the scope of collective bargaining. Negotiations shall also include grievance procedures for resolving any question arising under the agreement, which shall be embodied in a written agreement and signed by the parties.

RCW 47.64.130(1)(e) and RCW 47.64.130(2)(c) make refusal to bargain collectively by either party an unfair labor practice under the act.

The duty to bargain in good faith imposes an obligation upon the employer to give notice to and bargain with the union that represents its employees before making any changes in wages, hours or conditions of employment subject to the mandatory duty to bargain. Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 205-215 (1964); NLRB v. Katz, 369 U.S. 736, 743-744 (1962).¹ Unilateral changes (i.e., those made without notice and an opportunity for bargaining) violate the collective bargaining statutes because they derogate the status of the employees' collective bargaining representative and interfere with the right of self-organization by emphasizing that there is no need for a union. May Department Stores Co. v. NLRB, 326 U.S. 376, 385 (1945); NLRB v. Katz, *supra*. Because unilateral action(s) undermine the stability of industrial relations, they are prohibited by the collective bargaining statutes regardless of the actual subjective intent of the employer. NLRB v. Katz, *supra*; Florida Steel Corp. v. NLRB, 601 F. 2d 125, 130 (C.A. 4, 1979). Thus neither an employer's claim of economic justification, necessity or hardship, nor the emergency nature of a situation, are sufficient justification for a unilateral change, as there is no reason to consider issues of "good faith" of a party that has refused to negotiate about terms and conditions of employment.

Notice must be given sufficiently in advance as to afford the union an opportunity for counter argument or proposals. See, Rochester Institute of Technology, 264 NLRB 1020. Presenting the union with a fait accompli is not

¹ A labor organization has the same obligation. However by its nature, a unilateral change in terms and conditions of employment usually involves action by the employer.

sufficient, for notice is important only as it bears upon whether there existed reasonable opportunity for the union to bargain before unilateral action is taken by the employer. Rose Arbor Manor, 242 NLRB 795 (1979); Winn Dixie Stores, Inc., 243 NLRB 972 (1979). Upon receiving notice, outside of the context of ongoing negotiations, of an employer's proposed change in terms and conditions of employment, it is incumbent upon the union to timely request bargaining. The union cannot be content with merely protesting the action or filing an unfair labor practice. Citizens National Bank of Willmar, 245 NLRB 389 (1979). Bargaining pursuant to such notice must be in good faith. Winn Dixie Stores, Inc., *supra*.

Not every unilateral change constitutes a breach of the bargaining obligation, however. The change must be a "material, substantial and significant" one. Rust Craft Broadcasting of New York, Inc., 225 NLRB 327 (1976). Further, the prohibition against unilateral changes extends only to changes involving mandatory subjects of bargaining. In general, the NLRB and the courts have found a matter to be a mandatory subject of bargaining if it sets a term or condition of employment or regulates the relation between the employer and the employee. Womac Industries, 238 NLRB 43 (1978). A unilateral change in terms and conditions of employment is not violative of the Act if it involves a permissive non-mandatory subject of bargaining. Allied Chemical & Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass, Chemical Division et al., 404 U.S. 157, 185-188 (1971); if the change is nondiscretionary and merely preserves the "dynamic status quo", i.e., action consistent with past policies and practice. NLRB v. Katz, *supra*; if the action concerns a managerial decision of the sort which is at the core of entrepreneurial control, i.e., decisions involving fundamental changes in the scope, nature or direction of business rather than labor cost. First National Maintenance Corp., 452 U.S. 666 (1981); or if the union has waived its right to bargain the changes.

The Waiver Issue

The employer contends that the union has waived its bargaining rights, both by its conduct and by the collective bargaining agreement between the parties.

Waiver is the intentional relinquishment of a known right. Thus,

[a] finding of waiver depends upon whether an analysis of the contractual language and the facts and circumstances surrounding the making and administration of the collective bargaining agreement indicates whether there has been a clear relinquishment of the bargaining right."

American Oil Co. v. NLRB, 602 F.2d 184, 188 (C.A. 8, 1979).

Waivers must be "express", Communication Workers of America, Local 1051 v. NLRB, 644 F.2d 923, 928 (C.A. 1, 1981); must be clear and unmistakable, General Electric Co. v. NLRB, 414 F.2d 918, 923-924 (C.A.4, 1969), cert. denied 396 U.S. 1005; and it must be shown that the right to bargain was consciously waived. Tocco Division of Park-Ohio Industries, Inc. v. NLRB, 702 F.2d 624, 628 (C.A. 6, 1983).

Waivers may occur by express contractual provisions, by bargaining history, or a combination of both. Chesapeake & Patomac Telephone Co. v. NLRB, 687 F.2d 633, 636 (C.A. 2, 1982). Waivers may also occur by inaction. Waiver by bargaining history can be established only if it is shown that the subject was fully discussed or consciously explored and the union consciously yielded its interest in the matter. American Distributing Co. v. NLRB, ___ F.2d ___ (C.A. 9, 1983), 115 LRRM 2049. To establish a waiver by inaction it must be shown that the union had clear notice of the employer's intent to institute the change sufficiently in advance of implementation as to afford a reasonable opportunity to bargain regarding the proposed change and that the union failed to timely request bargaining. American Distributing Co. v. NLRB, *supra*.

Examination of the record made in this case discloses that the union has not waived its right to bargain the issue in this matter by express contractual provisions. The collective bargaining agreement is silent about the subject of subcontracting of work. The management rights clause of the 1983-1985 contract reads as follows:

Rule 4 - Management Rights

4.01 Subject to the specific terms and conditions of this Agreement, the Employer retains the right and duty to manage

its business, including but not limited to the following: the right to adopt regulations regarding the appearance, dress, conduct of its employees, and to direct the work force consistent with work procedures as necessary to maintain safety, efficiency, quality of service, and the confidence of the traveling public. The Union retains the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Rule 16. The existence of this clause shall not preclude the resolution of any such grievance on its merits.

The broad, but ambiguous, language in the management rights provision does not address the topic of subcontracting any work within the system. Therefore, it cannot be concluded that any collective bargaining rights have been waived.

The bargaining history of these parties does not indicate any waiver of bargaining rights. From the time the State of Washington acquired the ferry system, the IBU, in conjunction with other unions representing some of the employees working on the vessels, have represented all of the employees of the ferry system. The limited discussions during the negotiations for the 1983-1985 agreement (which were ongoing in early 1985) are not sufficient to warrant a finding that the union has waived its right to bargain the issue.

Lastly, the union has not waived its bargaining rights through inaction. The record does not indicate that the union had clear notice of the employer's intent to contract out the operation of the duty free shop operation sufficiently in advance of the implementation of the change to afford a reasonable opportunity to bargain the issue. At best, the agenda of the Transportation Commission meeting gave the union notice by means of its vague reference to "duty free shops". By then, the evidence indicates that the decision to bid out the work had been made and the bids had already been received and opened, so that even the agenda was presenting the union with a fait accompli. Thus, by its own actions, the employer has eradicated its defense that the union has waived its right to bargain the issue through inaction.

The Unit Work Issue

Preservation of bargaining unit work has been determined to be a mandatory subject of collective bargaining. National Woodwork Manufacturers Association v. NLRB, 386 U.S. 612, 640-642 (1967).

Based on the fact that the Saga franchise agreement excludes the operation of duty free shops, the IBU argues that the employees of Export, Inc. fall within the scope of the maintenance and operation bargaining unit covered by the contract between the IBU and WSF. The argument is particularly based upon the fact that the duty free shop employees are required to possess Coast Guard "Z" cards, the fact that they have emergency stations, and on a letter from Schwartzman indicating that the duty free shop employees are considered to be part of the vessel crew. To further support its argument, IBU produced contracts from the Alaska and British Columbia ferry systems which indicate that employees working in duty free shops are included in maintenance and operation bargaining units. Additionally, Hatch testified that cashiers and gift shop employees are part of the IBU bargaining unit in the Alaska ferry system.

Re-asserting the same arguments used in support of its "waiver" theory, WSF additionally asserts that the IBU was provided the names of the duty free shop by the concessionaire, and, further, that IBU met with the employees in an organizational meeting.

The evidence presented indicates that employees of the gift shops aboard Alaska and British Columbia ferries are engaged in selling duty free merchandise. Alaska ferry employees are represented by IBU, and British Columbia's employees are represented by another organization. Testimony and exhibits presented at the hearing indicate, however, that the State of Alaska and the province of British Columbia may be both the purveyors and owners of the duty free merchandise. Such is not the case in this matter. The State of Washington does not own or sell merchandise. Furthermore, it does not appear from this record that WSF has ever operated duty free shops in the past.

WSF stands in the shoes of a landlord (decklord?). WSF has a history of contracting out various operations. Schwartzman testified that, in addition to the food operation contracted to Saga, the ferry system leases space to concessionaires who operate the gift shop at Colman Dock, the vending machines aboard the vessels and at the terminals, the public information booth, and the game machines. The contract awarded to Export, Inc. can be viewed as an extension of the ferry system's practice of leasing commercial space to concessionaires. In this instance, the lease of space aboard the ferry vessels can be likened to a lease of a store within a shopping mall or of a specialty department (e.g., a pharmacy, jewelry or boutique) within a larger retail store. The concessionaire has leased space aboard the M.V. Elwha and the M.V. Kaleetan for a percentage of the profits or a fixed rental amount, whichever is greater. The concessionaire has retained all its managerial rights, including employee selection and direction, normally associated with operating a retailing business. Export, Inc. is responsible for the cleanliness and maintenance of the space it leases from WSF, just as Saga is presumably responsible for the space leased for the food operation.

The decision to contract out the duty free shop operation concerns a managerial decision of the sort which is at the core of entrepreneurial control. Unilateral actions have been held not to be violative of the a collective bargaining statute if the change involves fundamental changes in the scope, nature or direction of business, rather than labor cost. First National Maintenance Corp., 452 U.S. 666 (1981). The NLRB further explicated such changes:

Such changes include, inter alia, decisions to sell a business or a part thereof, to dispose of its assets, to restructure or to consolidate operations, to subcontract, to invest in labor-saving machinery, to change the methods of finance or of sales, advertising, product design, and all other decisions akin to the foregoing.

Otis Elevator Company, A Wholly Owned Subsidiary of United Technologies, 269 NLRB 893 (1984).

There is no evidence that labor costs or any anti-union animus were involved in the decision at issue. The decision to contract out the duty free shop operation is a continuation of WSF's ongoing practice of contracting out some peripheral operations, amounting to a lease of 378 square feet of deck space aboard each of two vessels sailing on a particular route for a particular use (i.e., an in-bond company engaged in selling duty free merchandise). The work devolving from that decision is new work that is unrelated to the work historically performed by the employees in the maintenance and operations bargaining unit represented by the IBU. As such, it falls within the precedents of First National Maintenance Corp, supra, and Otis Elevator, supra, involving core entrepreneurial decisions on the fundamental scope, nature or direction of the business.

The Adverse Effect Issue

The union asserts that its bargaining unit members have been adversely affected, because job opportunities have been given to non-represented employees when bargaining unit employees were on layoff. The union points out that ticket takers were being eliminated throughout the ferry system at the same time that Export, Inc. was in the process of hiring employees to work in the duty free shops. Additionally, the IBU contends that selling work, regardless of the nature of the work, is selling work, and therefore, should be performed by stewards who are included in the union's bargaining unit.

WSF contends that the work performed by the duty free shop employees is new work that bears no resemblance to the work historically done by IBU members and, therefore, no employee has been adversely affected.

Every person employed aboard a vessel under the jurisdiction of the United States Coast Guard is considered to be a member of the vessel "crew" and is assigned an emergency station, etc. There is no evidence that WSF was able to (or did) reduce the number of bargaining unit employees assigned to the M.V. Elwha and the M.V. Kaleetan because of the presence of the duty free shop employees on those vessels. To the extent that the duty free shop employees had emergency station assignments, their presence merely supplemented existing

WSF crew members or filled posts that would have been unmanned in the absence of the duty free shops. There was no adverse effect on the vessel crews.

Selling functions occur throughout the ferry system and the operations of its concessionaires, by ticket sellers, pursers, food service employees, gift shop employees, and even employees who service vending machines, in addition to the duty free shop employees. There is no evidence that IBU/WSF bargaining unit employees in the ticket taker classification being affected by layoffs had performed any selling functions, however, except for the possibility of their having worked out-of-classification as a ticket seller. Ticket takers, whether at a terminal or on a vessel, engaged in collecting, punch cancelling, and verifying the correctness of vehicle and/or pedestrian tickets which had been sold by other employees in the separate ticket seller classification. Additionally, they directed traffic and operated terminal equipment, assisted ferry users and answered questions regarding ferry system operations. By contrast, duty free shop employees were hired and trained in the methods for selling in-bond merchandise such as tobacco products, perfume, imported confectioneries, liquors, binoculars, sunglasses, and some statuettes. Specialized training was needed to insure compliance with federal and state laws concerning the sale of in-bond goods. The selling work performed by Export, Inc. employees does not appear to be so unique, physically demanding, or complicated that employees from the ticket taker classification could be categorically disqualified from consideration for employment, but neither is the work so closely related to ticket taker work as to suggest that they were entitled to preferential consideration. No evidence was presented to the examiner indicating that ticket takers applied for, and were denied, employment in the duty free shops. Therefore, the examiner cannot conclude that bargaining unit members were adversely affected by the contracting out the duty free shop operation.

FINDINGS OF FACT

1. Washington State Ferries is a division of the Washington State Department of Transportation. The Department of Transportation is governed by the Transportation Commission. Donald R. Schwartzman, Marine Superintendent, is responsible for the operation of the ferry vessels and terminals.
2. Inlandboatmen's Union of the Pacific, a "collective bargaining representative" within the meaning of RCW 47.64.011(3), is the recognized collective bargaining representative of an appropriate bargaining unit of Washington State Ferries maintenance and operations employees working aboard ferry vessels and at the various terminals. IBU is also the recognized collective bargaining representative of a separate appropriate bargaining unit of food service employees employed by Saga Food Service of Washington, Inc. Don Liddle is President, and Burrill Hatch is Regional Director of the Inlandboatmen's Union of the Pacific.
3. Washington State Ferries and the Inlandboatmen's Union of the Pacific have been parties to a series of negotiated agreements. The latest contract covering the maintenance and operations employees is effective from April 1, 1983 to June 30, 1985.
4. Saga Food Service of Washington, Inc. and the Inlandboatmen's Union of the Pacific have been signatory parties to a series of negotiated agreements. The latest contract covering the food operation employees is effective from July 1, 1985 to June 30, 1988.
5. In early 1983, Washington State Ferries explored the feasibility of operating duty free shops on the international route between Anacortes, Washington and Sidney, British Columbia, Canada. The project was aborted.

6. In early 1985, Washington State Ferries decided to operate duty free shops on the International route. WSF requested pre-qualification bids from interested in-bond companies. At least four companies submitted bids. The bids were returned by February 22, 1985 and were opened on March 1, 1985. Export Incorporated was the low bidder. On March 21, 1985, at a scheduled meeting, the Transportation Commission formally awarded a contract to Export, Inc. to operate duty free shops on the international route.
7. The record, as a whole, does not indicate that Washington State Ferries ever notified the Inlandboatmen's Union of the Pacific of its intent to operate duty free shops, and, additionally, never offered to negotiate the effects of the decision to operate duty free shops aboard ferry system vessels.
8. Between March 1, 1985 and March 21, 1985, the Inlandboatmen's Union of the Pacific became aware of the employer's decision to contract for the operation of duty free shops through the published agenda for the March 21, 1985 meeting of the Transportation Commission. By that time, the decision to contract had already been made and so was presented to the union as a fait accompli.
9. About June 15, 1985, Export, Inc. commenced operations of duty free shops aboard the ferry vessels M.V. Elwha and M.V. Kaleetan on the International route between Anacortes, Washington and Sidney, B.C., Canada.
10. The record, as a whole, does not indicate that the Inlandboatmen's Union of the Pacific demanded to bargain the issue of the duty free shop operation or the effects of the decision to subcontract the duty free shop decision. IBU did raise questions regarding the operation of the duty free shop concession at the ongoing negotiations for the 1983-1985 contract. Their questions were answered in the same manner as they were raised. It cannot be inferred that meaningful collective negotiations regarding the subject of the duty free shops occurred.

11. The operation of duty free shops is new work of a type not previously performed on ferries, wharves or terminals operated by Washington State Ferries. The work performed by the duty free shop employees is similar to the work performed by Saga employees in gift shop and food operations aboard ferry vessels and at Colman Dock. The Saga franchise agreement specifically excludes duty free shop operations from its coverage.
12. Maintenance and operations employees of Washington State Ferries represented by the IBU have not been adversely affected by the contracting out of the duty free shop operation. The record does not indicate that any employees involved in the selling function were terminated, or were denied any employment opportunities.

CONCLUSIONS OF LAW

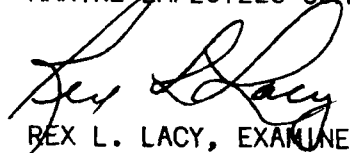
1. The Marine Employees' Commission has jurisdiction over this matter pursuant to Chapter 47.64 RCW.
2. The Inlandboatmen's Union of the Pacific has not waived its right to bargain the issue of duty free shop operations through the collective bargaining agreement, through bargaining history, or by inaction.
3. Washington State Ferries did not violate Chapter 47.64 RCW when it did not offer to bargain the decision, or the effects of the decision, to contract out the operation of the duty free shop operation aboard the ferry vessels M.V. Elwha and M.V. Kaleetan, for the reason that such work was outside the scope of the bargaining relationship between Washington State Ferries and the IBU under Chapter 47.64 RCW.

ORDER

On the basis of the entire record in this matter, the complaint alleging that Washington State Ferries has committed unfair labor practices should be, and hereby is, dismissed.

Dated at Olympia, Washington this 18th day of November, 1986.

MARINE EMPLOYEES COMMISSION


REX L. LACY, EXAMINER