STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

DOUGLAS P. LINDBERG, Complainant,	)	CASE 9324-U-91-2070
vs.	)	DECISION 4042 - PECB
PORT OF SEATTLE, Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER.

Hafer, Price, Rinehart and Robblee, by John Burns, Attorney at Law, appeared on behalf of the complainant.

Preston, Thorgrimson, Shidler, Gates and Ellis, by J. Markham Marshall, Attorney at Law, appeared on behalf of the respondent.

On August 20, 1991, Douglas P. Lindberg filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Port of Seattle had violated RCW 41.56.140(1) by laying him off in retaliation for protected activities. A preliminary ruling issued by the Executive Director on August 28, 1991, pursuant to WAC 391-45-110, concluded that the complaint stated a cause of action. A hearing was held before Examiner William A. Lang at Kirkland, Washington, on November 7, 1991. Post-hearing briefs were filed by the employer and the complainant on January 16, 1992.

BACKGROUND

The Port of Seattle conducts warehousing and shipping operations on the Seattle waterfront, as well as air terminal operations at Seattle-Tacoma (SEA-TAC) International Airport. Container terminals maintained by the employer on the east and west sides of

the Duwamish waterway are provided with cargo handling equipment, and the Port of Seattle employs electricians and operating engineers to maintain the cranes used to lift containers between ships and various land vehicles. Those terminals are rented by various shipping companies, who ship and store cargoes using port facilities. The cranes are then operated by longshoremen employed by the shipping companies.

International Brotherhood of Electrical Workers, Local 46, is the exclusive bargaining representative of electricians employed by the Port of Seattle in three units: Aviation, Maintenance/Waterfront and Marine. The 18 electricians employed in the Maintenance/Waterfront unit work primarily on the cranes, and those are the employees involved in this controversy.

Local 46 manages a hiring hall, from which electricians can be referred, based on their skills, qualifications and seniority, for temporary employment with the Port of Seattle. Under the terms of the collective bargaining agreement between Local 46 and the Port of Seattle, electricians on temporary dispatch for more than six consecutive months gain permanent employment status with the Port of Seattle.

Douglas P. Lindberg was dispatched from the Local 46 hiring hall to the Port of Seattle on March 21, 1991, as a temporary crane electrician. Lindberg was laid off from that employment on July 26, 1991. Lindberg believed that he was laid off because he was a "union activist", and he subsequently filed this unfair labor practice case with the Commission.

POSITION OF THE PARTIES

Lindberg and the union believe that, although he was not a union officer, Lindberg was identified by the employer as a union

activist, and that he was targeted with union officers for retaliation because of protected activities. The union contends that Lindberg was laid off prior to the expiration of his dispatch, along with the shop steward and members of the union's negotiating team, at the time when the employer harbored anti-union feelings over the negotiation of a successor collective bargaining and the union's filing of grievances. The union argues that Lindberg was known to be a union activist by at least one Port manager, and that the employer's awareness of his union activities is bolstered by the "small shop" doctrine. Further, it is asserted that Lindberg was directly involved in a "whistle blowing" incident involving a container accident, resulting in a shifting of legal liability to the Port of Seattle. It is claimed that the "loss of business" reasons offered by the employer for the layoff was pre-textual, because the employer knew of the tenant's intentions before it hired Lindberg. Moreover, the union contends the employer retained two other temporary crane electricians who were dispatched later, and who were less qualified than Lindberg.

The employer denies that Lindberg was laid off because of his union or concerted activities. The employer explains that Lindberg was laid off for legitimate business reasons, citing a decrease in the number of crane electricians needed after the departure of the Evergreen Marine Corporation as a Port of Seattle tenant, and because of a contract reduction of the number of shifts.

DISCUSSION

The Standards for Decision in Discrimination Cases

Where discrimination is alleged under RCW 41.56.140(1) or RCW 41.56.150(2), and the respondent defends that it had legitimate reasons for its action, the situation is evaluated under the "dual motivation" standard adopted by the Commission in City of Olympia,

Decision 1208-A (PECB, 1982), citing with approval Wright Line, 251 NLRB 1083 (1980). The use of that test was affirmed by the court in Clallam County vs. PERC, 43 Wn.App. 589, 599 (1986), affirming the Commission's earlier finding of an unfair labor practice concerning the discharge of an employee in Clallam County, Decision 1405-A (PECB, 1984).

Under the Wright Line analysis, the complainant initially has the burden of making a prima facie showing sufficient to support an inference that union discrimination was a motivating factor in the decision or action being challenged. In this case, the complainant must show that the employer was not only angry with the union officers, but also targeted Lindberg and acted against him out of animus related to his protected union activities.

If the complainant establishes its prima facie case under the Wright Line analysis, the burden shifts to the respondent to prove that the same action would have occurred without regard to the employees' protected activity. This evidence usually consists of evidence of a "legitimate business purpose".

Evidence of Animus

The Contract Negotiations and Grievances Filed by Local 46 - Acting on behalf of Local 46 and other affiliated craft unions, the Seattle Building and Construction Trades Council has been a party to a series of collective bargaining agreements with the Port of Seattle dating back to a "letter of agreement" signed in 1965.[1]

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[1] The letter of agreement signed by the executive director of the Port of Seattle and the president of the Trades Council on February 10, 1965, recognized the council and its affiliated local unions, including IBEW Local 46, as the representative of workers within their various jurisdictions for the purposes of collective bargaining. The agreement also recognized a number of management prerogatives, such as the right to determine job classifications, to direct work and lay off for lack of work.

Subsequent contracts have been referred to as the: "Maintenance Agreement Addendum (MAA)". The most recent relevant addendum covered the period from December 15, 1988 through April 30, 1991.

The union believes that this controversy had its beginnings during the negotiations on the MAA in 1988. Local 46 had voted against ratification of the MAA, and the reason given for that action was that the electrician rates of pay under the MAA were only 88% of the rates paid under the "Uptown" agreement.[2] Local 46 was outvoted in the ratification vote, however, and it made known that it would not participate in negotiations for a successor agreement in 1991. Sixty days prior to the expiration of the MAA in 1991, Local 46 notified the Port of Seattle and the Trades Council that it intended to negotiate a separate agreement with the employer.

On February 18, 1991, Port of Seattle Labor Relations Director John R. Swanson sent correspondence to Local 46, to the attention of Business Manager Paul Schwendiman. The Port of Seattle therein served notice of its intent to terminate the MAA and 1965 letter of agreement, effective April 30, 1991. Swanson enclosed seven copies of a Letter of Assent, designating the Puget Sound Chapter of the NECA as its collective bargaining representative. At the same time, Swanson informed Schwendiman that the Port of Seattle would be a signatory to the "the Inside Wiremen's agreement" between the Puget Sound Chapter of NECA and Local 46. Swanson enclosed copies of proposed changes developed by the NECA Chapter, and notified the union that the Port of Seattle reserved the right to propose amendments to other articles of the NECA agreement. Swanson closed the letter with a statement anticipating harmonious negotiations with the union.

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[2] The "Uptown" agreement refers to the construction trade agreement negotiated by Local 46 with Puget Sound Chapter of the National Electrical Contractors Association (NECA). That agreement is also known as "the Inside Wiremen's agreement".

Local 46 did not sign the Letter of Assent as proposed by the Port of Seattle. On May 2, 1991, Schwendiman did sign an interim agreement terminating the participation of Local 46 in the Trades' Council Addendum, effective May 1, 1991, and declaring that the "Port of Seattle Electricians will be under the terms and conditions of the labor agreement between the Puget Sound Chapter, NECA and the L. U. 46, IBEW".[3] Future terms and conditions were to be open to negotiations.

On May 9, 1991, the Port of Seattle and the union conducted their first negotiations, wherein Local 46 submitted its counter-proposals.

On May 13, 1991, Local 46 filed a grievance against the Port of Seattle, on behalf of all the electricians employed in the waterfront-marine unit. The union claimed that the employer had not paid a $2.00 crane technician differential or overtime in accordance with the Inside Wiremen Agreement. The grievance was signed by all 18 electricians employed in the unit. Lindberg was among the employees who signed the grievance.

In a June 14, 1991 letter addressed to Local 46 Business Representative Eugene "Pat" Dimico, Swanson confirmed discussions concerning the crane technician differential which had taken place in Swanson's office on the previous day.[4] Swanson expressed a belief

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[3] The agreement was signed by Steve R. Washburn on behalf of the Puget Sound Chapter of NECA. Swanson testified in this proceeding that Washburn was not authorized by the Port of Seattle to sign the May 2 Agreement. Although the record is not clear as to the precise steps taken in reaching the agreement, the evidence indicates that there was some agreement between the parties to pay 95% of the "Uptown" rates while a contract was being negotiated.

[4] The employer and Local 46 had agreed in 1989 that electricians who successfully completed crane technician training would receive a $2.00 per hour differential. The union claimed that side agreement was independent of

that the only agreement between the parties after the expiration of the MAA was the NECA Agreement and the 1965 Letter of Agreement, and that all other agreements were null and void. Swanson voiced concern over what he considered obvious misrepresentation, saying:

> ... The union position on this matter is reprehensible and inconceivable; and in my experience, without precedent. It is difficult to believe that your organization would resort to outright dishonesty in a situation like this.
>
> There is no grievance available regarding this matter either in the MAA or the NECA "Uptown" agreement. ...

Dimico testified that Swanson angrily told Dimico that he was off the wall, uneducated and had better learn the procedures.[5]

The relations between the Port of Seattle and Local 46 became strained. It is clear that the employer was frustrated with Dimico, who they believed was the cause of the lack of progress in the negotiations, as well as on the settlement of the crane differential grievance. In a July 2, 1991 letter to Dimico, Washburn wrote that the proposals from Local 46 presented at the May 9 meeting were absurd, and would not be discussed. Washburn also complained that Dimico's action of writing to the executive director of the Port of Seattle in an attempt to resolve grievances violated the "basic principles" and grievance procedures of the agreement. Washburn cautioned Dimico that he would file a

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the MAA, while the employer argued that the differential disappeared when the parties agreed to terminate the MAA and to raise the electrician's rate to 95% of the "Uptown" rate during negotiations.

[5] Dimico was relatively inexperienced having been selected as a business representative by Local 46 several years earlier.

grievance against him if he did not follow the procedures. Washburn ended the letter by observing:

> Local Union 46, IBEW and the Puget Sound Chapter, NECA enjoy a very harmonious relationship. We are gaining market share for signatory contractors and union electricians. We have jointly advertised our industry and we have settled grievances as provided for in the labor agreement. **I hope you are not bent on destroying that relationship.** [emphasis supplied]

The grievance concerning the crane differential remained unresolved, and was scheduled to be arbitrated in late November, 1991.[6]

The union's claim that Lindberg was known as a strong union adherent by "at least one Port manager" is not supported by the record. The official named, Christopher Knutsen, functioned as a electronics system specialist who taught classes to crane technicians. The record does not establish that Knutsen was specifically aware of any union activity by Lindberg. Even if the record did support the argument, Knutsen was himself a strong union adherent. Like the instructor in Ben Franklin Transit, Decision 1906 (PECB, 1984), Knutsen's knowledge cannot be attributed to the employer because he was a fellow union member. Moreover, the foremen were similarly long-standing members of Local 46.

The Examiner also disagrees with the union's claim, based on the "small shop" doctrine enunciated in Port of Pasco, Decision 3307 (PECB, 1989), that knowledge could be attributed to the managers who made the decision to lay off Lindberg and the other union negotiators. Lindberg did not sit on Local 46's negotiating committee or serve as a shop steward or other union spokesman.

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[6] The record discloses, however, that the majority of the other grievances were settled later through discussions with Local 46.

Lindberg's claimed union activity was limited to expressing dissatisfaction over the contract negotiations in the context of several conversations with co-workers, his foreman, and a shop steward who was on the negotiating committee. As a temporary employee, Lindberg was not even affected by the negotiations, although he volunteered:

> Now mind you, I didn't have anything to gain or lose from this. But as a union member, I wanted to have a contract ... They were my union brothers.

Transcript pages 145 and 146.

Lindberg said he had handed out union decals which he picked up from the hiring hall and put on his locker, but those decals merely commemorated the union's centennial, and did not appear to be controversial. Lindberg had complained to his co-workers and foremen about the distribution and payment of overtime, and some of this dissatisfaction was expressed in the form of grievances filed with the employer, but Lindberg was not directly involved or associated with those grievances and most of them were settled. Lindberg was not particularly identified with the grievance on the crane differential, because it was signed by all of the electricians in the unit, including the foremen.

Based on the foregoing facts, the Examiner does not find sufficient evidence to infer any nexus between Lindberg's protected activities and his layoff. Allowing that there was some hostility between the Port of Seattle management and Dimico, Lindberg was not identifiable as an activist either by the grievances, by the handing out of a few decals, or by the various conversations with fellow unionists about a contract negotiation which did not directly affect him.

The Container Accident -

On April 24, 1991, Lindberg witnessed the dropping of a container weighing 13.5 tons onto the chassis of a truck, resulting in injury

to a longshoreman. The accident involved Crane 66 at Terminal 30. No one present at the accident scene heard the alarm signal which automatically sounds when the "hoist bypass control" is activated.

An investigation was conducted shortly after the accident by Maritime Survey Associates Inc.[7] The surveyors did not interview the crane operator or the electricians who were witnesses to the incident. The manager of technical services and administration for the Port of Seattle, Dennis McCormick, testified that he was alerted by radiophone, and arrived at the scene around 15 minutes after the accident. John Achor, the assistant superintendent of maintenance and cargo for the Port of Seattle, and a surveyor were already at the scene. McCormick's responsibilities at the accident scene included checking out the crane to determine if something malfunctioned. McCormick stated that the proximity switches were among the crane parts that were checked by the crane crew in his presence,[8] and that none of the switches malfunctioned or were replaced.

The accident report filed by the Maritime Survey Associates firm on May 2, 1991 concluded that, in the absence of a safety system failure, it appeared that the operator voluntarily defeated the system by use of the "hoist bypass" control. The report also noted that the container itself was deformed, and was the most probable cause of the inability to gain proper engagement.

Another marine surveyor, Alexander Gow, Inc., investigated the accident and interviewed the crane operator, who denied using the

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[7] The Port of Seattle and shipping companies do not do their own investigation of waterfront accidents. The practice is to hire an independent company to investigate such incidents. The investigators are referred to as surveyors.

[8] The "proximity switch" tells the crane operator that the container is seated properly.

hoist bypass control. The surveyor made inconclusive findings. The surveyor did not find any mechanical or electrical deficiencies of Crane 66. The report also allowed the possibility that the container was somehow defective.

Two days later, Lindberg came to believe that the accident may have been caused by a defective proximity switch. Lindberg testified that another electrician told him that Achor had ordered the switch thrown away.[9] Lindberg testified that he retrieved the switch from a garbage can.

Lindberg's willingness to expose a claimed coverup is claimed to have been another in the series of protected activities, but the Examiner does not agree that it forms a basis for shifting the burden under the Wright Line analysis. The difficulties with the argument are threefold:

(1) There is no indication that the information Lindberg claims to have possessed was ever brought forth as a "safety" concern through the union, or in defense of the crane operator;

(2) There is no evidence that the employer was aware of Lindberg's views, or of his claimed possession of the proximity switch, at the time the layoff decision was made and implemented; and

(3) The evidence indicates that Lindberg's attempts to act on the matter all occurred after his layoff. While Lindberg testified

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[9] Achor testified that he was shown a proximity switch, and was told that it had come off the beam on Crane 66. This occurred in a conversation with Chuck Alford who, it appears, is one of the other employees in the bargaining unit. Achor testified that he told Alford to keep the switch in his office for future reference. Achor stated that if the switch did come off the beam, they would be able to tag it. Achor indicated he would not throw the switch away, because it might be needed in a lawsuit against the manufacturer of the switch. Achor testified, however, that a change of the switch should have been logged, and that the log did not show the switch was in fact changed.

that he turned the proximity switch over to a representative of the Longshoremen's union in "July or August" of 1991, it is clear that this occurred after his layoff on July 26, 1991. Lindberg testified that the president of that union, Pat Vukich, was a personal friend, and that he felt he had nothing to lose after having been laid off by the Port of Seattle. Lindberg's sworn statement about the accident to the Department of Labor and Industries was dated July 30, 1991.

The Dispatch and Lay Off of Lindberg -
Lindberg's March 21, 1991 dispatch from the hiring hall made reference to "Control codes LTD employ ends 09/14/91". Lindberg testified that a six-month term of employment was verified by Achor during an initial employment interview. Knutsen, who joined Achor and Lindberg later in the initial interview, did not recall the term of Lindberg's dispatch being mentioned during the interview, but testified that everyone understood that the dispatch was for "up to six months".[10]

The union argues that the employer's layoff of Lindberg prior to the completion of his six-month "contract" demonstrates that he was a victim of anti-union discrimination, but the Examiner does not find the evidence sufficient to support such an inference.

The Port of Seattle handles some 1.1 million containers a year. On February 5, 1991, the Business Section of the Seattle Times had headlined that the Evergreen Marine Corporation of Taiwan was moving its shipping operations from Terminal 18 at the Port of Seattle to the Port of Tacoma. Evergreen was considered to be the world's largest shipping line, and it shipped 75,000 containers through Seattle each year. According to the newspaper article, the

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[10] Knutsen was delighted that Lindberg was dispatched, because Lindberg had one year prior crane experience which he obtained during his apprenticeship, and therefore would not require extensive training.

move by Evergreen was not thought to be as dramatic a blow to the Port of Seattle as the loss, in 1985, of a tenant which had moved 400,000 containers through Seattle each year.

The union argues that, because the Port of Seattle knew of Evergreen's departure before they hired Lindberg, that its "loss of business" reason for his layoff was pretextual. The Examiner disagrees. The argument ignore the crucial fact that Evergreen departed on July 1, 1991, three weeks prior to the lay off of Lindberg and the other three electricians. The hiring of Lindberg as a temporary employee, rather than as a regular employee, would seem to be compatible with the employer's advance knowledge of Evergreen's departure and the anticipated loss of business. The Port of Seattle had both a business need for personnel up to that time, and a reduced need for personnel after that time. In view of the anticipated loss of business with the departure of Evergreen, it would seem probable that the dispatch would not be for a specific term but for up to six months given the uncertainty of business condition.

The decision on who among the 18 electricians was to be laid off was made by General Manager of Marine Maintenance Bill Raymond, with the assistance of Knutsen and Achor. Raymond testified that the decision to reduce the number of crane electricians was caused by the loss of Evergreen Marine Corporation as a tenant, and the change in the number of shifts worked from four in seven days under the old contract to three shifts in five days under the successor agreement. Knutsen testified that he participated in determining who should be kept, based on their potential, technical skills and cooperation skills.[11] After deciding who they would keep, the remaining four electricians left were the ones laid off. Apart

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[11] Knutsen referred to a need for cooperation with irate longshoremen, who would yell at maintenance personnel when a crane is inoperative, as well as with other craftsmen, customers and managers.

from the layoff of Lindberg from "temporary" employment, the layoff list included three regular employees of the Port of Seattle,[12] but their situations are not before the Examiner at this time. Suffice it to say that the record does not establish that any of the management officials who made the layoff decision were aware of any of Lindberg's alleged protected activities.

Conclusion

The record indicates that there were difficulties in the negotiation of a successor collective bargaining agreement, and in the resolving of one grievance. The evidence does not, however, establish that the relationship of the Port of Seattle and the union had deteriorated to the point of animus. Lindberg's alleged activities, such as his handling out of union decals, being one of the signatories of a group grievance, and expressing dissatisfaction over collective bargaining negotiations, does not rise to the level of identifying him as a union activist. Retaliation against Lindberg because of his "whistle blowing" actions has not been established as a basis for his layoff, because Lindberg's actions took place after the layoff and because employer officials were not aware of Lindberg's interest in the incident. The burden of making a prima facie case indicating animus has not been made. The case must be dismissed.

FINDINGS OF FACT

1. The Port of Seattle is operated pursuant to Title 53 RCW, and is a "public employer" within the meaning of RCW 41.56.030(1).

2. International Brotherhood of Electrical Workers, Local 46, a bargaining representative within the meaning of RCW 41.56-

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[12] Those included a shop steward, Wally Mathes, as well as two employees who served on the union's negotiations committee, Tom Landers and John Newman.

.030(3), was the exclusive bargaining representative of certain employees of the Port of Seattle during the period relevant to these proceedings.

3. Douglas P. Lindberg was an employee of the Port of Seattle from March 21, 1991 until July 26, 1991. Lindberg was dispatched from the union hiring hall as a temporary employee, and was informed of the "temporary" nature of his employment at an initial interview with employer officials. Lindberg's employment was within the bargaining unit represented by IBEW Local 46, although the contract signed by Local 46 and the Port of Seattle was not directly applicable to him while in "temporary" status.

4. During the period of his employment, Lindberg expressed dissatisfaction to fellow union members over the lack of progress in negotiations, and he handed out decals commemorating the union's centennial. There is no basis to conclude that the employer was aware of or offended by such activities.

5. During the period of his employment, Lindberg was a beneficiary of one or more grievances pursued by the union on behalf of bargaining unit employees. Most such grievances were resolved without particular controversy, and there is no basis to conclude that the employer particularly identified Lindberg as a union activist because of such activities.

6. Along with all other bargaining unit employees, Lindberg was named as a grievant on a grievance protesting elimination of a wage differential for work on cranes. While that grievance was not resolved while Lindberg remained an employee of the Port of Seattle, there is no basis to conclude that the employer particularly identified Lindberg as a union activist because of such activities.

7. After he had been laid off, Lindberg took several actions to pursue his belief that the Port of Seattle had covered up the true facts in connection with the cause of an injury accident which occurred on April 24, 1991. There is no evidence that Port officials were aware of Lindberg's interest or views in the accident prior to his layoff.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to Chapter 41.56 RCW.

2. The evidence, as described in paragraphs 4 through 7 of the foregoing findings of fact, does not establish a prima facie case sufficient to support an inference that union animus was a motivating factor in the layoff of Douglas P. Lindberg, so that action does not constitute an unfair labor practice under RCW 41.56.140.

ORDER

The complaint charging unfair labor practices filed in this matter shall be, and hereby is, DISMISSED.

Entered at Olympia, Washington, on the 23rd day of April, 1992.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

WILLIAM A. LANG, Examiner

This order may be appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.