STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 9,	)	
Complainant,	)	CASE 10320-U-93-2367
vs.	)	DECISION 4989 - PECB
PORT OF SEATTLE,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Respondent.	)	

Schwerin, Burns, Campbell & French, by Spencer N. Thal, Attorney at Law, appeared on behalf of the complainant.

Herman Wacker, Attorney at Law, appeared on behalf of the respondent.

On March 10, 1993, International Longshoremen's and Warehousemen's Union, Local 9, filed a complaint charging unfair labor practices with the Public Employment Relations Commission, alleging that the Port of Seattle had refused to bargain in violation of RCW 41.56.140(4). The charges were heard by Examiner Katrina Boedecker on May 12 and 13, and June 20 and 21, 1994. During the hearing, the Examiner granted a joint motion of the parties to bifurcate the liability issue from the issue of the appropriate remedy. The parties filed responsive briefs which completed the record on the liability issue.

BACKGROUND

The Port of Seattle (employer) is a municipal corporation of the State of Washington which provides a variety of transportation and storage services to its customers. In its aviation division, the employer owns and operates the Seattle/Tacoma International Air-

port. In its marine division, the employer owns and operates piers, wharfage facilities and marinas along Elliott Bay in Seattle.

Local 9 (union) is the exclusive bargaining representative of 90 to 150 persons employed by the employer in its actual warehousing, operations and distribution functions. As a part of its responsibility as the exclusive bargaining representative of longshore and warehouse workers, the union operates an exclusive hiring hall which supplies both regular and casual employees to meet the employer's specific work needs.

Among its marine division services, the employer leases warehouse space in Terminal 106 to commercial customers. The employer also provides "logistics services" which include warehousing and distribution assistance at Terminal 106 in Seattle. As a part of the warehousing arrangements, the Port will receive, inventory and distribute a customer's product. A component of this service may include reworking, manipulating or repackaging customer products. A customer's product would be "reworked" if it required removal from the shipping container and some assembly or repair. Typically, "repackaging" consists of unpacking cargo as it was shipped into the United States, repackaging the product in different quantities, and then shipping repacked goods to specific customers. As a part of repackaging, a product might also be labeled with a safety warning required in the United States, have a promotional coupon inserted in the package, or be given quality control checks according to the customer's specifications.[1] All this mandates movement of cargo (i.e., from a ship into warehouse storage, from storage to a "repacking" or "reworking" area, from that area back into storage, and finally from storage to trucks or railroad cars for shipment designated destinations throughout the country. These

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[1] For example, Port of Seattle employees unloaded and stored deflated basketballs for one customer. Upon receipt of orders, the balls were inflated and shipped according to order specifications.

work practices were consistent with a statement which has been in the parties' collective bargaining agreement since 1978:

> SECTION I
> PURPOSE AND RECOGNITION
>
> The purpose of this agreement is to provide for wages, benefits, and contract conditions as applied to the employment of warehousemen at the Port. The Port recognizes International Longshoremen's and Warehousemen's Union, Local 9, as the sole collective bargaining agent representing the employees covered by this agreement. The Port agrees that warehouse work defined in this agreement under Port of Seattle management which is physically in a Port-operated warehouse shall be done by the Union.

This movement of cargo has, with some exceptions, historically been done by employees represented by the union.[2]

For nearly 30 years, Hasbro, Incorporated, which is the largest toy manufacturer in this country, has been a significant customer of the Port of Seattle. In 1985, Hasbro leased approximately 28,000 square feet of warehouse and office space at Terminal 106. In 1989, Hasbro increased its leased space in the same building to 55,100 square feet.[3] Since the inception of its lease, Hasbro has

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[2] Although the testimony was not precise, it appears there have been a few instances over the last 20 years when goods have been shipped out of the employer's facilities for repackaging by other employees. Goods shipped to the Northwest Center Disabled Worker Project for repackaging were returned to the employer's facilities and put back into inventory upon completion of the work at the Northwest Center. It appears, however, that the Northwest Center has not been used for this type of work since 1989, and the recent practice has been for Port of Seattle employees to do the repackaging work.

[3] During the hearing, the parties and the Examiner made a tour of the facilities involved: The space operated by the employer is a bare warehouse; the space leased by Hasbro is divided for repackaging work by walls enclosing the work area with security doors.

used its own employees for repackaging or reworking Hasbro products within its leased premises. Not infrequently, Hasbro used repackaging for assembly, quality control or repair of products shipped into this county from Asia, before they would be shipped out to dealers throughout the United States. The Hasbro employees who did the repackaging or reworking tasks were not represented by the union. This practice was consistent with a signed 1978 letter of understanding from the employer to the union.

> This letter of understanding is pursuant to the contract negotiations between the International Longshoremen's and Warehousemen's Union, Local 9, and the Port of Seattle.
>
> The Port is not in a position to provide direction to its lessees by specifying that a particular labor union perform work on leased premises. However, the Port agrees that it will, on a good faith basis, as practical, provide information to Local 9 regarding upcoming lease agreements which involve Port warehouse facilities. Such information shall be conveyed through informational listings provided by the Port and on a routine basis during normal Labor Relations Committee meetings with the Union.
>
> My signature below certifies the Port will assure that the conditions of this letter of understanding are implemented and maintained as indicated above for the term of the July 1, 1978 labor agreement.

Port of Seattle employees represented by the union continued to handle the goods reworked by Hasbro employees. That included moving goods into the warehouse, moving them from the warehouse to the Hasbro-leased space for repackaging, and moving the goods from the Hasbro space for shipment or back to the warehouse for storage and later distribution.

The 1986 lease between the employer and Hasbro repeated the intent of the 1978 letter of understanding in the following language concerning the use of the premises:

> ...
> 5. Lessee shall use the premises for assembly and repackaging of toys and related items and shall not use them for any other purpose without the written consent of the Port. ...

A footnote to that lease provision provided that "consent shall not be unreasonably withheld".

In 1989, the employer and the union agreed that another Port of Seattle customer, Sega of America, could rework its products by hiring temporary employees instead of utilizing Port of Seattle employees. That agreement was also memorialized in a signed letter of understanding:

> Sega of America has requested assistance in modification of 102,000 units of their item number 1600 at Terminal 106, Building 4. This work is expected to last between six and eight weeks depending upon production. There is a requirement to perform soldering on each individual unit. Sega will be employing trained personnel from a temporary agency to perform the soldering. It is our understanding that these people have had prior experience in this type of work. Local 9 will provide all other personnel.
> ...

The employer had claimed, and the union appears to have accepted, that members of the bargaining unit did not have the soldering skills particularly required for that work.

In 1990, Hasbro determined that products shipped in from Asia were significantly improved, and were no longer in need of the quality control inspection or repair that had previously been required. Hasbro also decided that the leased space where it was reworking its products was larger than it needed for just its own products. Accordingly, Hasbro began marketing its expertise in reworking or repackaging as available to other manufacturers.

Initially, Hasbro only did repackaging work for customers that it recruited outside of the employer's existing customer base. In 1991, however, Hasbro contracted with Sega to perform repackaging and reworking, even though Sega had previously used the employer's facilities and employees for such activities. The minutes of the parties' July 1991, Labor Relations Committee (LRC) meeting record the following on this issue:[4]

> The Port stated they don't feel this issue is a topic for the LRC because it doesn't pertain to the Port. The Port didn't assign any work, and doesn't manage the operation. ... The Union stated the Port and the Union have agreed to allow Hasbro to do their own work only. The Port stated they have a lease for the property with no limitations to the work. The Union stated Hasbro is to rework their own product only - they are not an independent contractor, and it is unfair competition. ...
>
> The Union stated Hasbro has bid other work. The Port stated it was with no support from them - Sega contacted Hasbro. ... The Port further stated they have no authority to dictate to Hasbro. ...

[Emphasis by underline in original.]

Eventually, a letter of understanding was signed between the employer and union concerning this change in practice. That document dated September 18, 1991, includes:

> The Hasbro rework area will handle a rework project for Sega. It is anticipated that this project will consist of the following activity:
>
> 1. Sega will ship in containers of component parts and materials consisting of knocked down master cartons and packaging materials

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[4] The LRC is a standing committee of union and management personnel which meets regularly to discuss issues between the parties. Minutes from the LRC meetings are reviewed by both parties, and each individual page of the minutes is signed off by each party. Presumably, this verifies the accuracy of the reported discussions.

(i.e. styrofoam) to building 1 to be unloaded at 1 by Local 9 personnel.

2. Product and materials will be transported by fork lift into the rework area by Local 9 personnel.
3. The Hasbro rework work area will rework the parts and materials making master cartons by their rework employees.
4. Local 9 personnel will move finished product from the rework area to a storage position anticipated to be in bay 2 in building 1.
5. Shipping this finished product will be through building 1 shipping area by Local 9 personnel.
6. It is currently anticipated that this activity will consist of an estimated 220,000 units or approximately 36,666 master cartons of finished product on approximately 3055 pallets.
7. This project is anticipated to commence in October or November and be completed by the forth quarter (i.e. October, November, or December).
8. Based upon the currently known information, we anticipate this activity would generate work opportunity for approximately nine Local 9 Personal during project.
9. If the shipping activity creates an onerous work load for the current shipper a temporary shipper will be added on an as is needed basis.

The agreement contains the facts as they are currently known to both Local 9 and Port of Seattle Management. We look forward to this mutually beneficial operation.

The evidence indicates that this agreement was made in the context that all employees on the Local 9 hiring hall seniority list were employed and the casual list had been exhausted in 1991. Thus, the union could not have supplied personnel to do the Sega work.

By 1992, the employer's shipping and warehousing business had fallen off. Approximately 15 to 20 employees holding seniority

under the Local 9 contract had been laid off, and employees from the casual list were not being utilized. In 1992 and 1993, Hasbro performed repackaging work for Sega and for three other former Port of Seattle customers: Nintendo, U.S. Gold, and Triax. The employer advised Local 9 representatives in LRC meetings that any rework/repack of Nintendo, U.S. Gold, and Triax products was going to be done by Hasbro, and that it would not bargain with the union on the issue. The employer took the position that it had been outbid by Hasbro for the business of its traditional customers, and that the decision had therefore been taken out of its hands.

During or about this same time, the union learned of a promotional brochure developed by the employer which described the relationship between the Port of Seattle and Hasbro in terms quite different from what the union had previously understood. To wit:

> When a customer walks into the Port's terminal 106 warehouse, he doesn't know where the Port stops and Hasbro begins. The operation is seamless. By fully integrating the Port's warehousing and distribution operations with those of Hasbro, the world's largest toy manufacturer is able to respond even faster to customers' needs, gaining a competitive edge in a demanding retail market. The Port is constantly working with Hasbro and other customers to find ways to eliminate duplication to do the job better. In Hasbro's case, the Port has become a member of the corporate family.
>
> The Port's association with Hasbro goes back nearly three decades to when the company chose Seattle as a point of entry for its imported toys from the Pacific Rim. As the relationship evolved, Hasbro increasingly called upon the Port's logistical services, relying on the Port to track its inventory electronically and distribute it nationally. Like Hasbro, more companies are realizing that not only is it more efficient to turn to specialists like the Port, but it's more economical because they benefit from the Port's infrastructure, experience and flexibility.

> Hasbro's operation has grown to include a 60,000 square-foot repackaging center, with two shifts of employees keeping production lines going 16 hours daily. They enhance products by doing anything from assembly to repackaging. Hasbro then turns to the Port for distribution.
>
> Today, Hasbro and the Port are taking their partnership one step further. They are merging their respective expertise -- packaging and manufacturing with logistics -- into an unbeatable combination of services to help businesses, especially smaller ones, prepare products for market and get them distributed with lower cost and effectiveness of a larger company. It's a sophisticated collaboration that provides specialized services for area businesses while enticing new trade -- both international and domestic -- to the region, And it's a model of the type of mutually beneficial partnership the Port is working to achieve with all its customers, as well as with business, labor community and government leaders.

Beginning in 1992, the union requested information from the employer relating to the Hasbro rework issue. Initially the requests were for service agreements, preferential use agreements, and leases between the Port of Seattle and Hasbro.

On March 9, 1993, the union, through its attorney, requested feasibility or background studies which led to the development of the current marketing brochure, the marketing plan, and any correspondence with Hasbro concerning repack or related activities. The union also requested documents relating to repack customers and it stated that the reason for its request was:

> The marketing plan and the apparent success of the marketing plan in marketing Hasbro warehousing services poses a distinct threat to the bargaining unit represented by Local No. 9 and is a direct violation of the law and the contract between Local No. 9 and the Port. This plan appears to be in direct contradiction to the parties' agreement to continue the contract until the end of the privatization study period

> at which time there would be bargaining regarding the future of the Port operation. The above requested material is necessary in order to evaluate the scope of the contract violation and to properly fulfill the Union's duty to fairly represent the full-time and casual employees that it represents.

Having received no reply from the employer, the union wrote again on March 24 and April 13, 1993. The April 13 letter included:

> ... it has come to the union's attention that there is currently a contract with an outfit called U.S. Gold that involves re-packaging "flashback" into three packs and sealing them with sealing tape. ... I would like access to all of the documentation regarding that contract and the work done under it as well as all of the information requested in the previous letters. ...

On May 26, 1993, Director of Labor Relations John R. Swanson of the Port of Seattle wrote a letter to the union which responded to all of the union's requests and either supplied the documents or explained why he could not supply specifically requested documents. Where documents were not provided, the usual explanation was that the documents did not exist.

On November 9, 1993, Local 9's legal counsel wrote the employer and requested additional information concerning "outside temporary help" and any agreements with Hasbro concerning loading railroad containers. Logistics Division Director Craig Hautamaki of the Port of Seattle replied on November 22, 1993.

Based in part on information received as described above, the union objected to Hasbro's doing repackaging work for former Port of Seattle customers. It filed grievances and raised objections at LRC meetings. Based upon the employer's marketing brochure, the past history of work assignments, and the past agreements on work assignments, the union concluded that the employer was subcon-

tracting bargaining unit work to Hasbro. It then filed the instant unfair labor practice complaint.

POSITIONS OF THE PARTIES

The union asserts that the work available for its bargaining unit members was affected by the employer's decisions: (1) to reduce its rework services, and (2) to market Hasbro's rework services to its customers. It further argues that the employer made those decisions in violation of the parties' collective bargaining agreement, and without bargaining with the union. Finally, the union claims that the employer refused to provide it with relevant, requested information necessary to fulfilling its responsibilities as the exclusive bargaining representative.

The employer argues that it has not subcontracted bargaining unit work, because it has no contractual relationship with Hasbro concerning repackaging or reworking customer products. It asserts that its relationship with Hasbro is exclusively limited to the lease between them. It argues that the terms of the lease have remained constant, regardless of whether Hasbro does any repackaging on property leased from the Port of Seattle. It further argues that it has no authority to bar its other customers from using Hasbro's repackaging and reworking services, nor does it have knowledge of when such repackaging will take place. Finally, the employer justifies its marketing of Hasbro's repackaging services as a way of attracting new customers for both itself and Hasbro, citing that bargaining unit employees would still be engaged in moving goods into and out of warehouses, as well as into and out of the repackaging facility, regardless of who does any repackaging or reworking of products. The employer acknowledges that it has a duty to provide requested information or documentation to the exclusive bargaining representative, but argues that the union has not proved a failure to comply with its requests for information.

The employer asserts that where the union requests have been clear, it has fully complied.

DISCUSSION

Contracting-out Bargaining Unit Work

City of Seattle, Decisions 4163 and 4164 (PECB, 1992), provides a comprehensive introduction to the National Labor Relations Board (NLRB) and Commission precedents on the topic of the duty to bargain decisions to contract out bargaining unit work:

> The Public Employees' Collective Bargaining Act, Chapter 41.56 RCW, requires public employers to engage in collective bargaining with the exclusive bargaining representatives chosen by their employees. RCW 41.56.030 defines the subjects over which negotiations are required:
>
> > RCW 41.56.030 Definitions. As used in this chapter: ...
> >
> > (4) "Collective bargaining" means the performance of the mutual obligations of the public employer and the exclusive bargaining representative to meet at reasonable times, to confer and negotiate in good faith, and to execute a written agreement with respect to grievance procedures and **collective negotiations on personnel matters, including wages, hours and working conditions**, which may be peculiar to an appropriate bargaining unit of such public employer, except that by such obligation neither party shall be compelled to agree to a proposal or be required to make a concession unless otherwise provided in this chapter.
>
> [Emphasis by **bold** supplied.]
>
> The topics of "grievance procedures and ... personnel matters, including wages, hours and working conditions" have come to be known as **mandatory subjects of bargaining**. An employer who refuses to bargain concerning a mandatory sub-

ject commits an unfair labor practice pursuant to RCW 41.56.140(4). City of Pasco v. PERC, 119 Wn.2d 504 (1992).

A balancing test is used to determine whether a particular topic is a mandatory subject of bargaining. In IAFF, Local 1052 v. PERC, 113 Wn.2d 197 (1989), the Supreme Court of the State of Washington described the factors to be applied, as follows:

> On one side of the balance is the relationship the subject bears to "wages, hours and working conditions". On the other side is the extent to which the subject lies "at the core of entrepreneurial control" or is a management prerogative. ... Fibreboard Paper Prods. Corp. v. NLRB, 379 U.S. 203, 222-23 ... (1964) Where a subject both relates to conditions of employment and is a managerial prerogative, the focus of inquiry is to determine which of these characteristics predominates. [Citation omitted.]

IAFF, Local 1052 v. PERC, at page 203.

The Court's adoption of the balancing test was consistent with previous Commission rulings concerning scope of bargaining disputes. See, Lower Snoqualmie Valley School District, Decision 1602 (EDUC, 1983); City of Olympia, Decision 3194 (PECB, 1989).

The preservation of "bargaining unit work" has been found to be a mandatory subject of collective bargaining in a number of cases decided by the National Labor Relations Board (NLRB) and the federal courts under the National Labor Relations Act.[7] The Fibreboard holding cited by our Supreme Court in IAFF, Local 1052, supra, involved an employer's decision to contract out maintenance work to an independent contractor. The work had previously been performed by bargaining unit members, whose employment was terminated as a result of the subcontracting decision. Noting that the maintenance work continued to be performed, although now by employees outside of the company, the Supreme

7/ Decisions construing the federal law are persuasive in interpreting similar provisions of Chapter 41.56 RCW. Nucleonics Alliance v. WPPSS, 101 Wn.2d 24 (1984); City of Bellevue v. IAFF, Local 1604, 119 Wn.2d 373 (1992).

Court of the United States held that the employer's decision was subject to mandatory bargaining.[8] Since Fibreboard, the NLRB and federal courts have consistently held that infringements on bargaining unit work are a mandatory subject of bargaining.

In National Woodwork Mfrs. Assn. v. NLRB, 386 U.S. 612 (1967), a contractors' association filed a complaint against a local carpenters' union, alleging that work preservation language in the parties' collective bargaining agreement violated the NLRA. The language at issue stated that union members would not handle premachined doors. The NLRB upheld the contract clause, ruling that the "will not handle" provision was designed to preserve cutting and fitting work which jobsite carpenters had customarily performed. The Supreme Court affirmed the NLRB's ruling, holding that work preservation language of this nature was lawful.

In Brotherhood of Locomotive Firemen & Enginemen, 168 NLRB 677 (1967), aff'd 419 F.2d 314 (D.C. Circuit, 1969), the NLRB held that the preservation or diversion of work usually performed in a bargaining unit is a mandatory subject of bargaining. The union represented office employees, including auditors, working in the offices of another union. During contract negotiations, the employer proposed to exempt the auditor classification from the unit. Although the employer withdrew the proposal at a later point in the negotiations, it proceeded

8/ In his concurring opinion, Justice Stewart emphasized that the case involved the security of one's employment or, in fact, whether there was to be any employment at all. Justice Stewart added a comment concerning the transfer of bargaining unit work:

> ... [A]ssignment of work among potentially eligible groups within the plant - all involve similar questions of discharge and work assignment, and all have been recognized as subjects of compulsory collective bargaining.

Fiberboard, supra, at page 224.

At the same time, it was indicated that not every decision affecting job security would constitute a mandatory subject, and that decisions "at the core of entrepreneurial control" would be considered to be permissive subjects of bargaining. Examples of "permissive" subject areas cited by Justice Stewart included decisions concerning the volume and kind of advertising expenditures, product design, manner of financing and of sales, commitment of investment capital, and the basic scope of the enterprise. Such decisions are not primarily about conditions of employment.

after execution of the collective bargaining agreement to establish a non-unit classification of general organizer-auditor. The NLRB ordered the employer to restore the status quo ante, holding that the union had been deprived of its right to bargain over the transferring of unit work. A ruling by the NLRB was upheld by the court in NLRB v. Rockwell-Standard Corp., Trans. & Axle Div., 410 F.2d 953 (6th Circuit, 1969). The bargaining unit included office clerical employees of several divisions, including the employer's "Clark Street office". The employer moved one of the divisions to a facility three and one-half miles away from the Clark Street facility, and hired an outside service agency at the new location to provide receptionist, telephone operator and mail clerk functions that had been performed at the Clark Street office by unit employees. The union requested information about the employees at the new facility, seeking to determine whether unit work had been transferred to non-unit employees, but the employer refused to provide the requested information. The NLRB held that such a refusal violated the NLRA. In affirming the Board's ruling, the court stated, as follows:

> If unit work was in fact transferred from the Clark Street offices to the [new facility], the Union may have grounds to file grievances or unfair labor practice charges. The preservation or diversion of unit work is a subject of mandatory bargaining under the Act. Fibreboard ...

NLRB v. Rockwell-Standard ..., at page 957.

An employer's reassignment of unit work to another group of its own employees was at issue in Awrey Bakeries, Inc., 217 NLRB 730 (1975), aff'd 548 F.2d 138 (6th Circuit, 1976). The employer was in the business of making and selling baked goods to the public through retail stores. Truck drivers represented by the Teamsters Union transported the food to the stores. After the drivers left the products on a store's loading platform, bakery employees known as hostesses carried the food into the store, arranged the displays and checked the quantities. The hostesses were represented by the Retail Clerks Union. When the employer's agreement with the Retail Clerks expired, the hostesses were discharged and their work was subse-

quently performed by the truck drivers. The NLRB ruled that these facts constituted a prima facie refusal to bargain violation, and the employer was ordered to restore the status quo ante to remedy its violation.

In Dahl Fish Co., 279 NLRB 1084 (1986), the employer was engaged in the business of processing fish at two facilities located in Bellingham, Washington. The employees of one facility had union representation, while the employees of the other facility were not represented by a union. The collective bargaining agreement provided a wage increment for work performed at the [union] plant. When the union rejected an employer request that unit employees process fish at a much lower wage rate than was provided for in the parties' agreement, the employer laid off all of its union employees and transferred the work to its non-union facility. The NLRB concluded that the employer's work transfer decision was a mandatory subject of bargaining, because it did not amount to a change in the scope, direction or nature of the business.

...

The Fibreboard principles have been reiterated in numerous Commission decisions over the years.[9] In South Kitsap School District, Decision 472 (PECB, 1978), a union alleged that the employer refused to bargain over its decision to transfer work to employees outside of the bargaining unit. The union was the exclusive bargaining representative for a unit of "aides". In the name of terminating its aide program, the employer discharged all 78 members of the bargaining unit, but it actually divided their responsibilities between additional certificated and classified positions within the employer's workforce. Awrey Bakeries, Inc., supra, was cited for the following principle:

> ... [T]he NLRB and several state labor boards have held that an employer is obligated to bargain the decision to reassign bargaining unit work to other

9/ The term "skimming" is used in Commission decisions to describe transfers of bargaining unit work to other employees of the same employer. The term "subcontracting" describes situations where an employer transfers unit work to employees of another employer.

> employees, which decision results in the layoff or termination of bargaining unit employees.

South Kitsap School District, at pages 318-19.

Noting that the employer's decision to "terminate" its aide program did not materially change the direction of services offered, and that the same classes and services were still offered to students, it was concluded that an employer had an obligation to bargain the "skimming" of the aide work to other employees. The employer was ordered to restore the status quo ante.

The contracting out of unit work during the term of a collective bargaining agreement was at issue in City of Vancouver, Decision 808 (PECB, 1980). The employer contracted with a private company to take over operations of its wastewater treatment plant. The union alleged that it was never notified of the employer's proposed decision to contract out. In ruling that the employer's conduct violated RCW 41.56.140(4), the Commission stated, as follows:

> Especially in this case, where a collective bargaining agreement was in effect at the time of the discharge of a significant portion of the bargaining unit, it would serve the intent of the statute to permit the union to collectively bargain to protect negotiated working conditions.

City of Vancouver, at page 6.

The fact that the 18 city employees laid off as a result of the contracting decision were all offered (and accepted) employment with the private firm did not eradicate the employer's violation of its collective bargaining obligations toward the union.

City of Kennewick, Decision 482-B (PECB, 1980) involved the employer's decision to contract out janitorial work at city hall to a private firm. When the subcontracting decision was made, the bargaining unit position which had been performing that work was vacant. The Commission nevertheless found a violation of RCW 41.56.140(4), stating:

> Contracting out of work which has been done or which may be done by bargaining

> unit employees is a subject of mandatory bargaining.

City of Kennewick, at page 13.

Even though no individual employees were displaced by the employer's actions, the employer was required to bargain about its subcontracting decision.[10]

...

In City of Kelso, Decision 2120-A (PECB, 1985), an employer violated its bargaining obligation by subcontracting its fire suppression and fire prevention services to a neighboring fire district. In ruling that the city was obligated to bargain its underlying subcontracting decision, the examiner cited Fibreboard Paper Prods. Corp. v. NLRB, supra; South Kitsap School District, supra; City of Kennewick, supra; and City of Vancouver, supra, for the following principle:

> While the cases detailed above arose in different factual settings, one common circumstance exists. In each of the subcontracting disputes, the employer did not change its business character, and it provided the same services to the public. The only evident change was the removal of the employees performing the work from the bargaining unit and from the employer's payroll.

City of Kelso, Decision 2120 (PECB, 1984), at page 11.

...

The Commission's most recent examination of skimming allegations occurred in Spokane County Fire District 9, Decision 3482-A (PECB, 1991). The Commission held that the employer's new procedure of compensating volunteer fire fighters at $5.00 per hour for "standby" work was specifically designed to increase the frequency with which volunteers would respond, and to reduce the overtime opportunities for bargaining unit employees. The employer's actions were

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10/ An examiner enlarged this principle in Community Transit, Decision 3069 (PECB, 1988), to include work that "could" be performed by unit employees. The employer had already contracted out certain bus routes to a private bus company. When the employer added new routes, it awarded them to the private company, resulting in an expansion of that company's level of services. A violation was found because the added routes could have been unit work.

found to constitute a skimming of unit work, leading to the conclusion that RCW 41.56.140(4) had been violated.

Application of Precedent

While the foregoing precedents provide the Examiner with a background picture of the competing employer and employee interests in cases of this nature, the matters at hand cannot be resolved by mere recitation of such decisions. Our Supreme Court in IAFF, Local 1052 v. PERC, supra, requires a case-by-case adjudication of scope of bargaining disputes utilizing the balancing approach. The court explained the importance of this approach, as follows:

> Every case presents unique circumstances, in which the relative strengths of the public employer's need for managerial control on the one hand, and the employees' concern with working conditions on the other, will vary. General understandings -- such as an understanding that staffing levels typically weigh on the managerial prerogative side of the balance of employer and union interests -- may, of course, inform PERC's analysis. But care must be taken to recognize meaningful distinctions in the circumstances of different cases.

IAFF, Local 1052 v. PERC, supra, at page 207.

Decisions on skimming and subcontracting issues often turn on a close examination of the specific duties that are alleged to be unit work.

The specific facts of the instant case present some twists on the conventional fact patterns in the cases cited above:

In this case, the amount of work assigned to bargaining unit employees out of the referral hall varies from time to time, depending upon what projects the employer has contracted to do for either existing or new customers. In more typical cases, the employer's decision to contract out results in layoffs or reduction of a fixed employer workforce.

In this case, the employer either did not bid for contracts that would have provided repackaging work for the bargaining unit, or knowingly maintained prices for repack work that did not make it

competitive with its own lessee, Hasbro. In more typical cases, a fixed task or amount of work is reassigned in order to take it away from bargaining unit employees.

Although the effect of the employer's decisions and actions was somewhat disguised by the nature and practices of hiring in the warehouse environment, it nonetheless resulted in a loss of work opportunities for the members of the bargaining unit. The reduced amount of work available to unit members had an impact on employee wages, hours and working conditions.

Subcontract to Perform Bargaining Unit Work -
It is clear from this record that bargaining unit employees were performing repackaging and/or reworking services for Port of Seattle customers prior to 1992. It is also clear that the employer decided, at some point in 1992, that having its employees perform such work was too labor intensive and not cost effective. The employer apparently decided that having Hasbro take on more repack work would not only eliminate unprofitable assignments of Port of Seattle employees, but would also attract new customers to Seattle. That, in-turn, had a potential to increase utilization of the employer's profitable shipping and warehouse operations.

The employer defends that no subcontracting occurred, because it did not contract with Hasbro or anyone else to perform rework or repackaging that had previously been done by its own employees. It argues that Compton Service Company and Teamsters Local 688, 212 NLRB 557 (1974), supports the contention that a contractual relationship must exit in order to support a charge of unlawfully subcontracting out bargaining unit work. It thus contends that there would need to have been a contractual relationship between the employer and Hasbro to perform the employer's work, in order to find that the employer contracted out bargaining unit work in violation of Chapter 41.56 RCW. That argument ignores, however, that the employer made a conscious decision not to submit bids for

repackaging work, or to submit bids which effectively took it out of the repackaging business.

In Compton, the employer passively lost work to competitors.[5] There was no violation in that case, because there was no evidence that the employer had "... taken steps to dissipate the unit. Respondent did not change its operations, its customers changed theirs". In contrast, the instant case presents just the reverse of that statement. The Port of Seattle changed its operation by either not seeking out its own repackaging customers or by charging prices which would not be acceptable to customers. Moreover, the employer's **own** advertising encouraged its customers to use Hasbro's services instead of the repackaging services historically offered by the Port of Seattle. The employer is disingenuous, at best, when it makes the statement that:

> The Port seeks work from its customers whenever it has the opportunity to do so. The customers decided to stop working with the Port.

The employer presented no evidence that it made any real effort to maintain any repackaging work by its own employees. It did just the opposite: It advertised Hasbro's rework services in lieu of its own. This was not just a customer's decision not to use its repackaging services. This was the employer's decision to effectively cease doing the work. It is clear that the Port actively encouraged its own customers and potential customers to use Hasbro for repackaging their products. The effects of that decision **by the employer** created a bargaining obligation under the statute.

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[5] Regardless of whether an employer passively allows or actively contracts to have another entity perform particular work, the impact on the bargaining unit is the same. Work previously done by bargaining unit employees is no longer available to them; although the work is still being done, it is being done by a contractor's employees instead of by bargaining unit employees.

Entrepreneurial Decision -

Unlike Dahl Fish Co., supra, and South Kitsap School District, supra, the employer's decision was a budget consideration which did change the direction of services offered by the employer by raising the price of its services and thus taking itself out of the market, or just taking itself out of the market entirely. It was clearly an entrepreneurial decision made in the course of normal business and therefore was not subject to collective bargaining. Spokane County Fire District, Decision 2860 (PECB, 1988); Fire Fighters Local 1052 v. PERC, 113 Wn.2d 197 (1989).

Effects on Bargaining Unit Work -

The impact of the decision concerning repack work had a substantial effect on bargaining unit work, as well as bargaining unit members' wages and work hours. Simply put, Port of Seattle employees would no longer do repackaging work. The employer argues that its decision to stop doing repack work for its customers should not be subject to "effects" bargaining, because the union has failed to show any substantive effect on the unit employees. A similar argument was raised and overruled in City of Seattle, supra:

> The cited precedents indicate that the existence of a duty to bargain is not tied to there being detriment to a particular employee, and that a duty to bargain a "skimming" or "subcontracting" decision can be based on long-term considerations such as the erosion of unit work, loss of promotional opportunities, and adverse effect on the job security of bargaining unit employees.

Regardless of the extent of the damages or whether the damages have been mitigated by the additional work brought into Seattle by new customers attracted by the "partnership" with Hasbro, the obligation to bargain the effects of decisions which impact bargaining unit work remains. The impact of the decision was a mandatory subject of bargaining. Pierce County Fire District 3, Decision 4146 (PECB, 1992); City of Seattle, supra.

Waiver by contract -

The employer argues that its decision to stop doing repackaging work for its customers was made in conformity with the parties' collective bargaining agreement. The language in question is found in SECTION I, PURPOSE AND RECOGNITION, of the agreement. The paragraph concludes with the following statement:

> ... The Port agrees that warehouse work defined in this agreement under Port of Seattle management which is physically in a Port-operated warehouse shall be done by the Union.

The employer interprets that language to have the "obvious implication" that warehouse work **not** under Port of Seattle management and not physically in a warehouse it operates is not restricted by the collective bargaining agreement.

The union, naturally, disagrees. Citing Pierce County Fire District, Decision 4146 (PECB, 1992), it argues that such a "reverse implication" of Section I is contrary to the Commission's established precedent that contractual waivers must be "specific to the subject matter and knowingly made". The union contends that a negative implication is insufficient to establish a contractual waiver of the statutory right to bargain.

The union argument must prevail. As stated above, the duty to bargain results from the employer's decision to no longer perform repackaging work for its customers. The employer put itself out of the "management" of work "which is physically in a Port-operated warehouse". It is not going out of the repackaging business, however. Instead, it desires that repackaging work be done on its premises, and it is now actively advertising a "partnership" with Hasbro to do repackaging work that was formerly done by its own employees. The effects of that decision were not bargained, nor are they controlled by contract language. The bargaining obligation remains.

Request for Information

The Commission has consistently held that a part of the good faith relationship between an employer and a certified bargaining representative is the timely transfer of requested information:

> Once a good faith demand is made for relevant and necessary data, the information must be made available promptly and in a useful form. ... Delay in supplying requested information necessary to the bargaining process is an unfair labor practice.

Fort Vancouver Regional Library, Decision 2350-C, 2396-B (PECB, 1988).

And:

> That duty [to bargain] inherently includes an obligation to be forthcoming with explanation of the proposals made or positions taken in collective bargaining, as well as a duty to provide the opposite party with requested information that is reasonably necessary to prepare for collective bargaining or contract administration.

City of Seattle, Decision 4844 (PECB, 1994).

A failure to provide requested information is an unfair labor practice under RCW 41.56.140(4).

According to the union, it repeatedly made requests of the employer throughout 1992 and into 1993, for information relating to the rework issue. The union used the joint LRC meetings as the forum to make its requests for information. In 1993, in addition to the LRC discussions, the union began making written requests, and made several requests through its attorney for additional information concerning rework.[6] On May 26, 1993, the employer gave the union

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[6] The union's counsel made requests on March 9, 1993 and April 13, 1993.

an itemized response to its requests which included, in some instances, assertions that there were no documents containing the information requested.

The employer defended its actions by asserting that the union had not been clear about its information requests, and that the union did eventually get all relevant documentation. It argues that an examination of "the totality of the conduct of both parties" would not lead to a finding of a technical violation, because it "responded to one (out of four) information requests after some delay and misinterpreted the union's request".

In examining the written, jointly revised and approved minutes of 12 LRC meetings that were placed in evidence at the hearing, it is not clear that the requests made during the committee meetings were clear or consistent:

On July 2, 1991, the parties discussed rework in relation to work done by Hasbro for Sega. The minutes reflect that the **employer** asked for a copy of any agreement between the Port of Seattle and the union regarding Hasbro to do rework. The **union** stated that there was no such document, and indicated there was only an oral agreement.

The minutes for the April 13, 1993 LRC meeting only referenced that the union's March 9, 1993 request for information had not been responded to by the employer.

The minutes for the May 12, 1993 LRC meeting stated that the union had filed three separate requests for information, and had not received the requested information.[7]

In addition to the above, it appears that three other requests for information were made: On February 16, 1993, February 25, 1993, and on November 11, 1993. The employer responded to the February

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[7] The minutes detailed requests on March 9, 1993 and March 24, 1993, and did not list a date for the third request.

letters on March 2, 1993, and it responded to the November request on November 22, 1993.

The record developed by the parties does not reflect a consistent lack of response to requests by the union for information concerning Hasbro specifically or rework generally.

In contrast to the requests made through the LRC process, the March 9, 1993 correspondence from the union's legal counsel does record specific requests for information which were not immediately responded to by the employer. The union argues that it took requests at LRC meetings and written requests over the course of nine months, and finally the March 9, 1993 letter from its legal counsel, to obtain the information. In fact, however, neither the minutes from the LRC nor the February information requests reflect that the requests made in the March 9, 1993 letter from legal counsel had been made earlier. In the evidence presented, the most credible delay by the employer in responding to requests for information concerning Hasbro was from the union's March 9, 1993 letter to the May 26, 1993 response from the employer.[8] The March 9 letter reads, in part:

> On behalf of ILWU Local No. 9, I am writing to ask for the following information pursuant to the Union's role as bargaining representative and also pursuant to the Freedom of Information Act. The information is generated by the discovery that the Port of Seattle has initiated a marketing plan that markets warehouse services to be performed by persons other than Local No. 9 - represented employees.
>
> The information requested is as follows:
>
> 1. All feasibility studies or background studies that led to the development of the current marketing brochure and/or marketing

[8] A subsequent request for information was sent by the union on November 11, 1993, and was responded to by the employer on November 22, 1993.

plan that involves the marketing of warehouse space and the marketing of warehouse activities including foreign trade zone activities to be done by persons other than those represented by Local 9.

2. All contracts with any prospective customers regarding the marketing of warehouse services as part of a marketing effort.

3. All correspondence and/or other documents that have gone to or been received from or relate to Hasbro and/or Al Breault with respect to warehouse activities and repack and related activities from the period of January 1, 1991 to present including all documents and correspondence relating to the Port's marketing plan and relating to the Port's interaction with Hasbro and/or any other related company in providing warehousing and repackaging or related services to potential customers, particularly any documents relating to the "unique partnership with our long-standing customer Hasbro, Inc." that is featured in the marketing brochure distributed by the Port of Seattle and its Logistics Services Division.

4. All documents that relate to the statement in the Port of Seattle's Logistics Services portion of the marketing brochure that, "Hasbro,Inc., the World's largest toy manufacturer, has the proven expertise and experience to handle your products cost effectively and efficiently. These packaging/marketing services are just one more example of the Port of Seattle's commitment to provide comprehensive, value-added services for our customers." In addition, provide all documents relating to the statement that is contained in the same brochure that deals with Hasbro's alleged expertise in warehouse work including assembly, labeling, hand-packaging, repackaging, shrink-wrapping and related areas.

5. All documents relating to, sent to or received from SS Company (also known as Sol Spitz Company) or any other entity with a similar name from the period of January 1, 1991 to present.

6. All arrangements whereby Sega Company engages the services of Hasbro for warehousing

> work including repackaging work and related work.
>
> The marketing plan and the apparent success of the marketing plan in marketing Hasbro warehousing services poses a distinct threat to the bargaining unit represented by Local No. 9 and is a direct violation of the law and the contract between Local No. 9 and the Port. This plan appears to be in direct contradiction to the parties' agreement to continue the contract until the end of the privatization study period at which time there would be bargaining regarding the future of the Port operation. The above requested material is necessary in order to evaluate the scope of the contract violation and to properly fulfill the Union's duty to fairly represent the full-time and casual employees that it represents. ...

Although not a response time that should by held up as exemplary, the employer's response to this detailed request in a little less than three months does not seem entirely unreasonable. Preparation of that response required research into the records of a large and complex employer. The union presented no evidence that it was unduly handicapped by this delay. Without such a showing or at least some justification for the need for a shorter return time, an unfair labor practice charge cannot be sustained.

FINDINGS OF FACT

1. The Port of Seattle is a public employer within the meaning of RCW 41.56.030(1) and 53.18.010.

2. The International Longshoremen's and Warehousemen's Union, Local 9, a bargaining representative within the meaning of RCW 41.56.030(3) and an employee organization within the meaning of RCW 53.18.010, is the exclusive bargaining representative of an appropriate bargaining unit of approximately 150 longshore and warehouse employees employed by the Port of

Seattle. The employees are dispatched to specific jobs through a jointly operated hiring hall.

3. The employer and the union are signatories to a series of collective bargaining agreements which have run at least from 1975 to the present.

4. For several years, as a part of its warehouse operation, the employer has offered and done "repackaging" and "reworking" services for its clients. With some specific exceptions, bargaining unit members performed these services. The exceptions were instances when the repackaging required special skills or equipment not available to port employees, when port employees were not available or when goods were shipped to the Northwest Center Disabled Worker Project for repackaging.

5. One Port of Seattle customer, Hasbro, Incorporated, has done its own repackaging or reworking of goods. In 1978, the parties agreed to this practice which was memorialized to some extent in a memo between the parties.

6. In 1989, the employer and the union agreed by signed letter of understanding that rework for a particular Port of Seattle customer, Sega of America, would be by temporary employees hired by Sega. The rework involved soldering skills which were not available among Port employees. Port employees did all the transporting and warehousing of the Sega products.

7. In 1991, by written agreement between the Port of Seattle and the union, Hasbro employees reworked component parts and materials for Sega. Bargaining unit employees continued to move product to and from the Hasbro leased area where the reworking was done.

8. In 1992, the Port of Seattle began marketing Hasbro's repackaging and reworking services in its own promotional materials.

9. On March 9, 1993, the union requested specific information concerning the employer's marketing of warehouse services to be performed by employees other than those represented by the union.

10. The employer replied to the March 9, 1993 request on May 26, 1993.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in these matters pursuant to Chapters 41.56 and 53.18 RCW, and 391-45 WAC.

2. The employer's decision to no longer assign its own employees to perform either repackaging or product reworking and/or to encourage customers and potential customers to use its lessee, Hasbro, Incorporated, to do their repackaging or reworking work, is an entrepreneurial budget decision made in the course of normal business. The decision changed the nature of services offered by the employer to its customers and it is therefore not subject to collective bargaining.

3. The employer's decision to cease doing repackaging and reworking work directly affects employee wages and hours and impacts employee interests in job security and lost work opportunities. The effects of the management decision is a mandatory subject of bargaining pursuant to RCW 41.56.030(4).

4. The employer failed to demonstrate that the union waived its right to bargain the effects of the decision on repackaging and reworking through general contract language.

5. By deciding to cease offering its customers repackaging and reworking services and/or advertising that such services be done by its lessee and its lessee's employees, without, upon request, having bargained with the union as the exclusive bargaining representative concerning the effects of that decision, the Port of Seattle has committed an unfair labor practice in violation of RCW 41.56.140(1) and (4).

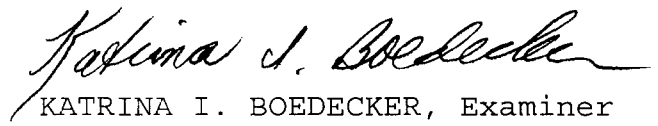
6. The union failed to prove that the time it took for the employer to respond to the union's request for information, from March 9 to May 26, 1993, was unreasonable considering the general nature of the information requested, the size and nature of the warehouse operation and the number of persons necessary to collect the information.

INTERLOCUTORY ORDER

The hearing in this matter shall be reconvened, as soon as is practical, for the Port of Seattle and International Longshoremen's and Warehousemen's Union, Local 9, to present evidence and argument concerning the appropriate remedy, taking into consideration the Findings of Fact and Conclusions of Law, entered above.

ENTERED at Olympia, Washington, on the 8th day of March, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



KATRINA I. BOEDECKER, Examiner