Skagit County, Decision 6348 (PECB, 1998)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC,	)	
Complainant,	)	CASE 13081-U-97-3163
vs.	)	DECISION 6348 - PECB
SKAGIT COUNTY,	)	
Respondent.	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Schwerin, Campbell, Barnard, by Elizabeth Ford, Attorney at Law, appeared for the complainant.

Summit Law Group, by Bruce L. Schroeder, Attorney at Law, appeared for the respondent.

On April 9, 1997, the Inlandboatmen's Union of the Pacific (union) filed a complaint charging unfair labor practices with the Public Employment Relations Commission under Chapter 391-45 WAC, alleging that Skagit County (employer) had refused to bargain both the decision to contract out work historically performed by employees represented by the union and the effects of that decision, in violation of RCW 41.56.140(4). The specific work at issue is the operation of a ferry between Anacortes and Guemes Island.

The Executive Director reviewed the complaint under WAC 391-45-110, and found a cause of action to exist on allegations of surveillance of bargaining unit employees and employer insistence on withdrawal of union proposals as a pre-condition to reaching an agreement. However, the Executive Director noted problems with other allegations of the complaint, as filed, and issued a deficiency notice on

June 13, 1997.[1] The union submitted an amended statement of facts. The Executive Director issued a preliminary ruling on July 30, 1997, finding a cause of action to exist on allegations that the employer contracted out ferry service without meeting its bargaining obligations, and designating J. Martin Smith as Examiner in the matter. The employer filed an answer on August 19, 1997.[2] A hearing was held at Mt. Vernon, Washington, on November 18 and 26, 1997, before the Examiner. The parties filed briefs.

BACKGROUND

The ferry service at issue in this proceeding has historically been conducted by Skagit County as part of its Road District 3, which covers the western half of the county, including the cities of Mt. Vernon, Anacortes and Sedro Woolley. The only vessel used in this service, the *M.V. Guemes*, transports passengers and automobiles between Anacortes and Guemes Island. Each crossing of the Guemes Channel involves a run of about 15 minutes. Residents of Guemes

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[1] All facts alleged in a complaint are assumed to be true and provable under WAC 391-45-110; the question there is whether (as a matter of law) the complaint states a claim for relief available through unfair labor practice proceedings before the Commission. The agency staff does not "investigate" unfair labor practices in a manner familiar to those who practice before the National Labor Relations Board, and the Executive Director does not exercise any "prosecutorial discretion" under WAC 391-45-110. Among the deficiencies noted at that time were:

- An allegation that the employer "stalled and obstructed" the negotiations was found to be vague.
- An allegation that the employer was "getting out of the ferry business" was found to be ambiguous.

The Executive Director declined to consider or act upon a letter which counsel for the employer volunteered in advance of any preliminary ruling.

[2] The union filed, but later withdrew, a motion for temporary relief under WAC 391-45-430.

Island depend on the ferry for passage to Anacortes, to the county seat at Mt. Vernon, and to destinations outside the immediate area.

The normal crew for the *M.V. Guemes* consists of a captain and two deck-hands. The 14 employees involved in the operation have been represented by the Inlandboatmen's Union for many years.[3] During the period pertinent to this case, Scott Braymer has been the union's principal negotiator and business representative.

The employer negotiates with exclusive bargaining representatives for several bargaining units organized among its employees. During the period pertinent to this case, the employer utilized Stephanie Wood of its Human Resources Department as its negotiator. The employer's attorney, Bruce Schroeder, also appeared at the bargaining table from time to time.

Onset of this Dispute

The problems addressed in this complaint date from late 1996 and early 1997, when the parties were in negotiations to replace a contract that was in effect for 1994 through 1996. Ron Panzero, a captain in the bargaining unit, remembered that the employer initially demanded extensive revisions in the parties' contract. Overtime issues and a re-definition of the bargaining unit to exclude certain part-time employees were paramount issues. Also proposed was an amendment to the contract, as follows:

> 3.05 The employer may lay off employees for lack of work, budgetary restrictions, contracting or privatization of services, or good faith reorganization authorized by the employer.

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[3] Notice is taken of the docket records of the Commission for Case 249-M-76-60, which indicate that a mediation case was filed for this unit on April 28, 1976.

> 3.06 In considering who is to be laid off, individual qualifications and documented performance shall be considered. When the factors are considered to be equal, seniority shall be the determining factor. ..."

The employer's proposal was loathed and feared by union negotiators, who were aware that the employer had begun to study the idea of using private carriers to operate the ferry.

Employer official Charles Tewalt testified that the idea of contracting out the ferry operation was a recurring issue in Skagit County.[4] Public Works Director Jan Keiser, who was new to his position in 1996, had been told of the arrangements used by Pierce County to operate a ferry between Steilacoom and Anderson Island, and a visit was made to Tacoma on January 7, 1997. Several discussions were held among road department personnel. Tewalt indicated that he showed documents from the Anderson Island operation to members of the *M.V. Guemes* crew.

The March 28, 1997 Events -

A meeting between the employer and union was scheduled for March 28, 1997. At that meeting, Woods announced that Schroeder would be the employer's principal spokesman on the contracting-out issue. Schroeder then announced that the Board of County Commissioners would be distributing requests for proposals (RFPs) to solicit private carriers who might take over operation of the *M.V. Guemes*. Schroeder outlined various cost items that led the employer to conclude that contracting out needed to be reviewed. He also acknowledged possible impacts upon members of the bargaining unit. There was some discussion as to why the employer had not sought

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[4] Tewalt is the supervisor of Road District 3. It appears he participated in all but one of the bargaining sessions for a successor contract in 1996-1997. See Exhibit 2.

fare increases or user fees as an alternative to contracting out the operation. Union spokesman Braymer indicated surprise at the announcement, and recessed the meeting after 20 minutes to talk with his bargaining unit and re-consider the union's position.

The parties have produced evidence in this record concerning two other events which transpired on March 28, 1997:

- The employer's sheriff and undersheriff instructed Deputy Kevin Sigman to "watch" the Guemes ferry operation for possible problems (e.g., vandalism, damage, and/or verbal altercations with patrons) related to the employer's announcement of its interest in contracting out the operation.[5] Sigman boarded the ferry at Guemes Island, and made several passages on the vessel. Sigman was invited to the wheelhouse, and was invited to sample doughnuts and coffee provided by Captain Ron Panzero and the crew. Sigman had a "Ferry Detail" assignment sheet with him, telling him what to watch for. Several crew members saw that paper, and were upset by the instructions concerning "obvious damage to ferry by ferry employees". Sigman left duty at 2:00 p.m. on March 28, 1997, and another of the employer's law enforcement officers rode the ferry later that day and/or on March 29, 1997. No incidents occurred, and a "no-incident"report was written by the relief officer on March 29. Woods indicated that no report was filed with her office, and that no disciplinary actions were taken regarding events of these two days.

- The employer issued two news releases on March 28, 1997, one to the local news media and one to patrons on Guemes Island. Reading substantially the same, they indicated that RFP's

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[5] Woods indicated the employer was worried about liability and possible friction between passengers and crew on the ferry over political issues such as the ferry service.

> would be issued to seek private operators for the *M.V. Guemes*. The employer cited United States Coast Guard regulations and increased costs as reasons to contract out the ferry operation. The Ferry Advisory Committee of Guemes Island was told it would be involved in the decision making process.

A formal RFP dated March 31, 1997, was received by most interested parties around April 4, 1997. The RFP set a May 5, 1997 deadline, for responses.[6]

Union Requests for Information -

In the context that the employer and union had scheduled a bargaining session for April 22, 1997, Braymer sent a request to Wood on April 1, 1997, asking the employer to provide the union:

> (1) a copy of all of the county's requests for proposal; (2) a copy of any preliminary drafts of any kind concerning this matter (3) a copy of any and all inner-county [sic] communication relative to this issue.

On April 3, 1997, Braymer sent the employer a more formal request for bargaining on both the decision to contract out the ferry operation and its effects. The union's letter included mention of "successorship", and asked that the employer withdraw the RFPs.

Schroeder responded to the union's request for information with a letter dated April 18th, indicating that the RFP had already been provided to a local union member. Schroeder refused to supply

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[6] By virtue of resolution 16498, the County Commissioners sought to:

> [S]olicit proposals from parties who desire to be considered for a personal services contract to provide ticket sales and a refreshment concession at the M/V Guemes Ferry Terminal in Anacortes. ...

The refreshment concession was for an espresso stand.

preliminary drafts of the RFP, stating that they were not relevant to the parties' ongoing negotiations. Schroeder invited the union to submit "its own proposal in response" to the employer's RFP, but it is not clear whether that was a call for the union to submit a formal proposal in response to the RFP or a call for the union to modify its proposals in bargaining.

The April Meetings -

When the parties met for contract negotiations on April 22, 1997, the union's attorney, Elizabeth Ford, joined the union's bargaining team. She reiterated the union's demand to bargain the decision to contract out the work. The union also indicated that the RFP should be withdrawn, on the basis that it interfered with the bargaining process. Indeed, the union believed that the employer had already made critical and irreversible decisions in this matter. The union demanded all cost calculations prior to the RFP, all responses to the RFP, and minutes and notes from assorted Board of County Commissioners meetings. The employer's response was, in essence, that it always intended to negotiate the decision and effects to contract the service, but that it would not abandon or withdraw the RFP.

There was additional verbal wrangling between the parties at the April 22 meeting:

- Braymer characterized the employer's position as "subsidized union-busting".

- Schroeder is quoted in the minutes as saying "If you are going to have a labor agreement depends on whether we are going to have a private provider. If there is a private provider, the Union contract would be moot."

- The union complained about the "surveillance" of the ferry employees by sheriff's department personnel.

- The union indicated it would be willing to negotiate the remainder of the open contract items, and would be willing to set new meeting dates. Schroeder indicated that the employer could agree to meet again, but preferred a time when the RFP information was available. The parties agreed to meet again on April 25, 1997.

The parties discussed a number of topics when they met on April 25, 1997, including Articles 3, 4, 12, 13, and 14 of their contract, overtime, compensatory time, and the use of part-time employees. The union revised its proposals, returning to the language of the expired contract in several respects.

Further Negotiations and a Tentative Agreement -
On May 22, 1997, the parties reached agreement on a number of issues that had been addressed in their contract negotiations, including: Recognition, Union Security, Discrimination, Scope, Visitation, Strikes and Lockouts, Grievance Procedures, Vacations, Sick Leave and others.[7]

The employer's spokesperson opened a bargaining session on June 9, 1997, with complaints about the union's filing of this unfair labor practice complaint and a motion for temporary relief. There was also discussion about whether too much negotiation was being done in local newspapers. The union re-stated its rejection of the employer's proposed section 3.05, above, on the basis that it seemed to allow the employer to contract out operation of the *M.V. Guemes*.

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[7] See Exhibit 2, 'Minutes".

During an all-day bargaining session on July 1, 1997, the parties reached agreement on a number of issues concerning work hours, holidays and overtime.[8] Near the conclusion of that session, the parties realized that they had reached agreement on all open items except for the contracting out. The employer had even dropped its proposal to have the word "privatization" included in section 3.05. The minutes of that meeting reflect the following discussion at about 4:00 p.m. on that day:

> Stephanie [Wood] advised that the last interview [of a private operator responding to the RFP] was held on Monday and the IBU attorney has requested financial information from the County. The accounting people have agreed to a meeting either next week or the following .... Scott said, with all the concessions we are giving today, we thought this would be moot. I **talked to Bob Shellenberger of Alaska Marine about his intentions regarding hiring the crew. We are here making a good faith effort to keep these jobs intact** and it is not just for show. We are serious in trying to be reasonable.... **Stephanie said, it is my understanding that we will have that discussion.** Mike Woodmansee said he would come and show you the comparison figures and answer your questions. There may be some areas where you will not agree about costs and **you will be given the opportunity to talk about it.** ...

[Emphasis by **bold** supplied.][9]

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[8] See, Exhibit 19. The parties borrowed heavily from a contract between the union and Washington State Ferries (WSF) for the language of Rules 3.01, 3.02, 3.03 and 3.04 of the July 1, 1997 agreement.

[9] Alaska Marine corporation later became Pacific Maritime, which bid on the Guemes ferry operation. Shellenberger's response on the intent to hire is unknown. Woodmansee is an official of Skagit County.

The parties agreed to reduce their agreements to written form, and Braymer promised to have the bargaining unit take ratification votes on the tentative agreement as soon as possible.[10]

The Privatization Proposals -

By July 1, 1997, or soon thereafter, the employer had received four proposals from private firms, and had extensive interviews with two firms: Pacific Maritime and Horluck Transportation, Inc. Their estimated costs for providing the ferry service were compared to the $564,156.90 in costs that Skagit County had incurred for providing the service in 1996. The results of that analysis were shared with the union at a meeting on July 24, 1997. In essence:

- Pacific Maritime estimated a savings to the employer of about $120,000 per year;
- Horluck Transportation offered to do the same service at a $158,000 per year savings to the employer.

Based upon estimated savings of "at least $50,000 per year", the employer was sufficiently encouraged to pursue the next step in the contracting out procedure, which was described as a request for competitive bids. Braymer testified that the union was invited to comment on the cost comparisons at the July 24 meeting, but "chose not to do so".

On August 15, 1997, Wood sent a letter to Braymer, requesting a written response which, "detailed [the union's] comments regarding the comparison and ... ideas on how the County's operation might be more competitive with the proposals received".[11] Braymer did not

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[10] This and subsequent references to a "tentative agreement" relate to a proposed contract for 1997 through 1999, which was admitted as Exhibit 24 in this record.

[11] Exhibit 18.

make a written response, but agreed to schedule another meeting for August 28, 1997.

The August 28, 1997 Meeting -

The parties' meeting on August 28, 1997, was limited to a discussion of the contracting out issue. Schroeder was joined by Mike Woodmansee and a member of the Board of County Commissioners, Robert Hart. Woodmansee indicated the employer was down to three choices:

1. The employer could accept the proposal made by Pacific Maritime; or

2. The employer could accept the proposal made by Horluck Transportation; or

3. The employer could reject the proposals of both private operators and continue the service with county employees.

The union complained that the employer could have required that contractors hire the existing crew, if it simply wanted out of the ferry business. The union also asserted that the employer should have asked for more concessions during the contract negotiations, to which Wood responded that it was too late for the employer to change its bargaining proposals after it received the responses to the RFPs.

The union questioned whether the employer would follow through with the tentative agreement, since contracting out was still being considered. Schroeder is quoted as saying, "If the union ratifies the tentative agreement it will increase the gap between current operations and the proposals...", and that there would be an "employee transitioning process" if the employer decided to contract out the operation. Schroeder also stated that the

employer could make a "last, best and final offer", and could implement that proposal if it was not accepted by the union. This would, he predicted, "mitigate the effects of contracting out if that becomes necessary". The meeting broke up without resolution, amid talks of further meetings.

Breakdown of Negotiations -

On September 2, 1997, the Board of County Commissioners rejected a union request to "delay" discussion of contracting out the ferry operation. It also refused to sign the collective bargaining agreement negotiated by the parties.

In a September 19 letter to Braymer, Wood questioned why the union hadn't contacted the employer for a meeting soon after August 18. Wood stated the employer's position, as follows:

> I would like to reiterate that the ratification of the tentative bargaining agreement will not resolve the outstanding issue of whether to contract out the operations of the ferry. Given the substantial difference between the cost of the County's current operations and the proposals the ratification of the agreement will only serve to fix the Union's position in terms of costs of service, and make continued operation of the ferry by County personnel financially unacceptable.

Wood's September 19th letter further declared that the employer would consider the parties to be at impasse, after September 24th, "over whether to contract out the ferry system". The Union did not request another meeting, nor did it make another proposal.

Wood sent another letter to Braymer on September 29, 1997, stating at that time:

> We are at impasse and the County will proceed to make a decision regarding the ferry opera-

> tions. I will inform you as to the decision the County makes.

Braymer responded with a letter to Wood dated October 1, 1997, stating that the bargaining unit did not see,

> ... any possibility of more cost reductions than those which were achieved at the bargaining table.... The Negotiation Committee has reviewed the tentative agreement and I have enclosed a copy for you to see if it is its final form. If so, please let me know as soon as possible so that I may send it out for the ratification vote.

On October 10, 1997, union attorney Ford wrote to employer attorney Schroeder, stating that the union would not respond further, that a tentative agreement had been reached, and that the employer was increasing its demands for additional concessions in violation of Chapter 41.56 RCW. Ford asked that the employer "foreswear" attempts to contract out the ferry operation, and that it sign the tentative agreement.

As of the time the hearing was held in this matter, in November of 1997, neither party had ratified the tentative agreement and the employer had neither accepted nor rejected any proposal to contract out the ferry operation.

POSITIONS OF THE PARTIES

The union contends the employer engaged in unlawful interference, in violation of RCW 41.56.140(1), by stationing police officers on board the ferry to conduct surveillance of the bargaining unit employees' activities and conversations with ferry patrons. The union contends that the employer has negotiated in bad faith, in violation of RCW 41.56.140(4) by: (1) Refusing to provide informa-

tion which the union considered necessary to respond to plans to contract out the ferry service; (2) Woods' September letter indicating that ratification of the tentative agreement would actually be a waste of time, because of the substantial differences between the current operation and the proposed private operation; and (3) escalating demands for union concessions after a tentative agreement was reached on all issues but prior to a ratification vote being taken. As to the latter, the union contends it was only after a complete agreement had been reached on other issues that the employer made it clear that the contracting out idea was proceeding along a separate track from the negotiations on the successor collective bargaining agreement, and cites Island County, Decision 857 (PECB, 1980); Entiat School District, Decision 1361 (PECB, 1982); and Snohomish County, Decision 1868 (PECB, 1984). The union particularly relies on Royal School District, Decision 1419 (PECB, 1982), where an employer was found guilty of a "refusal to bargain" violation when it entered into a contract without telling the union that the negotiated terms would cause the layoff of some of the bargaining unit employees. The union also cites Spokane County, Decision 1868 (PECB, 1984), where a "refusal to bargain" violation was found on the basis that the employer raised a contracting out issue at an advanced stage of negotiations. The union objects to the employer's "piecemeal" approach to negotiations, citing, Fremar Corp., 224 NLRB 1411 (1976).

The employer responds that it did not intend to interfere with the rights of bargaining unit members by placing a deputy sheriff aboard the *M.V. Guemes* on the day it announced it was considering contracting out the ferry operation. The employer urges that the union's contentions about the disclosure of information should fail, because the union did not amend its complaint in this unfair labor practice case to allege a failure to provide information, and that such documents not yet provided fall beyond the requirements of the public records law at RCW 42.17.310. The employer asserts

that it did not present the union with a fait accompli, that it bargained in good faith by agreeing to negotiate the collective bargaining agreement to conclusion while leaving the contracting out decision separate, and that the parties have reached a lawful impasse in bargaining on the contracting out issue.

DISCUSSION

The Surveillance Allegation

It is an unfair labor practice for an employer to "Interfere with, restrain or coerce public employees in the exercise of their rights guaranteed by this chapter." RCW 41.56.140(1). Employer spying on, or "surveillance" of, employees' union activity has consistently been found to be a basis for interference violations. See, City of Seattle, Decision 3066 (PECB, 1988), and cases cited therein. The problem with employer surveillance lies in its creating feelings of anxiety among the employees, by conveying a message of, "You're being watched in your lawful union activity".[12] A violation will even be found where an employer creates an impression of surveillance, without actually engaging in such conduct. City of Longview, Decision 4702 (PECB, 1994).

The response to the employer's "did not intend" defense in this case is that proof of an intent to interfere is not required to find a violation of RCW 41.56.140(1). Numerous Commission precedents have stated and restated the proposition that an

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[12] Longview involved the employer inserting itself into a union meeting that was clearly protected activity under the statute. The same analysis might apply where an employer appears to use a camera or video recorder while employees participate in peaceful, informational picketing or other union demonstration, even if there is no film or tape in the camera.

interference violation occurs if the disputed conduct is **reasonably perceived by employees** as a threat of reprisal or force or promise of benefit associated with their protected union activity. That said, it does not mean the union sustained its burden of proof on the limited facts presented in this case.

Chapter 41.56 RCW does not protect or confer a right to strike,[13] and certainly does not protect public employees from the consequences of misconduct such as damaging employer property or operations. The message conveyed by the presence of deputy sheriffs on March 28th and 29th was, "We don't want any trouble in this work-place today." Since no union meeting, peaceful informational picketing or other lawful union demonstration was planned to take place on *M.V. Guemes* on March 28th or 29th, there was no reasonable basis for employees to perceive the presence of the law enforcement officers as surveillance of any lawful union activity. The rather benign presence on the ferry led only to a "no-incident" report filed the next day. No employee was disciplined by the employer or charged with any criminal offense.

Only Captain Ron Panzero was present at the negotiations meeting held the morning of March 28th, and his testimony is instructive:

> Q. [By Ms. Ford] How did the presence of the sheriff's deputy on the vessel affect you?
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> A. [By Mr. Panzero] Well, more than anything probably the fact that the County didn't trust us was probably the biggest issue for me personally. Otherwise the Sheriff was there just doing a job so I guess I didn't feel threatened by that. ...
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> Transcript, page 164.

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[13] See, RCW 41.56.120.

As in City of Seattle, supra, the employer "agent" had a legitimate business reason to be aboard the vessel, and to watch for unprotected sabotage or disruptions. The union has thus failed to sustain its burden of proof to show interference with **protected** union activities. Toutle Lake School District, Decision 2474 (PECB, 1987). No violation of RCW 41.56.140(1) is found here.

The Union's Requests for Information

The duty to bargain includes an obligation to provide information requested by the other party to a bargaining relationship for the purposes of contract negotiations or administration. City of Bellevue, Decision 3085-A (PECB, 1989), affirmed 119 Wn.2d 373 (1992); City of Bremerton, Decision 6006-A (PECB, 1998).

After the March 28, 1997 negotiation session, where it was informed the employer was contemplating contracting out the ferry operation, the union made a timely request for documents in order to bargain effectively regarding that issue. It was not until the hearing in this case that the employer produced most of the documents requested by the union.[14] The employer notes, however, that neither the complaint nor any amendment in this proceeding alleged a "refusal to provide information" violation. The employer's point is well-taken.

In the preliminary ruling of July 30, 1997, the Executive Director framed the issue in this case as involving the employer's "contracting out of ferry service, without bargaining with the exclusive bargaining representative". Review of the complaint and

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[14] Even then, the employer still refused to provide the union with: (a) Preliminary drafts of the RFP which it sent out; and (b) documents it described as "internal communications" between employer officials and their attorney regarding the ferry matter.

two amended complaints reveals no allegation that the employer refused to honor a request for information.[15] It has been held that an unfair labor practice allegation not pleaded in a complaint or motion to amend cannot be raised for the first time in a post-hearing brief. METRO, Decision 2197 (PECB, 1985). The union will not be permitted to bootstrap a new allegation into this case on the theory that a "refusal to provide information" was critical to its claim that the employer unfairly bargained the contracting out issue.[16]

Refusal to Bargain the Contracting Out Decision

Mandatory Subjects of Bargaining Generally -
Employers are generally obligated to bargain decisions to contract out bargaining unit work. City of Kelso, Decision 2120-A (PECB, 1985)[Kelso I]. The duty to bargain contracting out decisions was reviewed exhaustively in City of Seattle, Decision 4163 (PECB, 1992). The traditional "contracting out" vernacular was replaced by "privatization" terminology in Port of Seattle, Decision 4989 (PECB, 1995), but the legal principle remains the same.

Although the phrase may have been mentioned in a bargaining session in March, there is no evidence that Skagit County ever seriously considered "getting out of the ferry business". Under any of the proposals actively considered by the employer, the *M.V. Guemes* would continue to ply the channel between Anacortes and Guemes Island, owned and subsidized by Skagit County. That distinguishes

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[15] Indeed, the Union's claim, now and always, is that the parties reached a tentative agreement based upon what the union knew and understood between March 28 and July 1, 1997.

[16] In view of this conclusion, the Examiner does not address the employer's defense that it has furnished most of the material requested by the union.

this case from City of Kelso, Decision 2633-A (PECB, 1988) [Kelso II], where the employer surrendered, by means of the annexation process, all taxing and operating authority regarding the same fire suppression operations which it had unsuccessfully attempted to contract out in Kelso I. On the facts presented here, there is no question that the employer merely intended to replace its union-represented employees who worked on the *M.V. Guemes* with employees hired by a contractor. Those facts clearly align this case with Fibreboard Paper Products Co. v. NLRB, 379 U.S. 203 (1964). There is no doubt that the topics brought to the bargaining table -- and imbedded within the employer's RFP and notice to Guemes Island patrons -- are mandatory subjects of bargaining under RCW 41.56.030(4).

The Employer's Bargaining Obligation as to This Decision - RCW 41.56.140(4) required the union and employer to face up to certain standards for bargaining. Both parties are obligated to meet, confer and negotiate in good faith. There is no question that Skagit County had an obligation (and a stated willingness) to bargain both the ***decision*** and ***effects*** of contracting out the ferry operation. There is an *admission* in the record that the employer and union reached tentative agreement as to a replacement labor contract for 1997-99. The employer now seems to argue that, once a labor contract is negotiated, no other obligations exist with respect to the exclusive bargaining representative. This is not the case.

- The Employer Was Required to Give Notice. Numerous precedents establish that an employer must give notice to the exclusive bargaining representative of its employees prior to implementing changes of mandatory subjects of bargaining. Many employers run afoul of RCW 41.56.140(4), by failing to accomplish this task. Whatever rumors might have been circulating -- e.g., about Charles Tewalt and Jan Keiser

venturing to Pierce County to study the private carrier operating the county-owned ferry there -- were not sufficient to put the union on notice of an opportunity for bargaining. Skagit County did manage to give appropriate notice, however, at the bargaining table on March 28, 1997. Although the comment about "getting out of the ferry business" proved to be misleading, as discussed above, the short meeting held on that day put the union on notice that the employer was considering contracting out of bargaining unit work, and that a potential impact upon the bargaining unit was imminent. Giving proper notice does not, however, determine whether the employer presented the union with a fait accompli or otherwise bargained in good faith.

- The Employer Did Not Obtain a Contractual Waiver. An employer can lawfully seek language in a labor agreement which gives it an explicit right to contract out services. In Port of Edmonds, Decision 844-B (PECB, 1980) (reversed on other grounds), the employer sought a broad management rights clause which included reservation of a right to lease out services, and the Commission acknowledged that such language could have constituted a "waiver" of bargaining rights if a contract had ever been consummated. In this case, the employer's December proposal was an attempt to create a "waiver" of a type that could have insulated the employer in the event that it later contracted out the ferry operation. That proposal was still on the bargaining table on March 28th, when the employer announced it was considering contracting out the ferry service. On July 1st, the employer agreed to amend sections 3.01 and 3.02, which address layoffs and recalls but not whether the employer retained any right to contract out the ferry service. Nor did the parties reach "impasse" with respect to the proposed privatization language -- the employer withdrew it from the bargaining table before they reached a

tentative agreement on or about July 1, 1997. See, Mason County, Decision 3706-A (PECB, 1991), and cases cited therein. Therefore, based upon what occurred at the bargaining table, the employer did not gain a contractual right to issue the RFP or to enter into a contract with a private carrier.

- Did the Employer Provide a Meaningful Opportunity to Bargain? The opportunity to bargain must be meaningful, and not merely a general set of discussions in the abstract. In this case, however, the employer pursued a three-track approach to the problem, by: (1) continuing to negotiate with the union on a successor collective bargaining agreement, even to the point of reaching a tentative agreement; (2) taking political action before giving the collective bargaining process an opportunity to operate; and (3) issuing an RFP which prejudiced certain bargainable issues prior to any meaningful opportunity for collective bargaining with the union.

Negotiating the Agreement —

On the first track, we have the bargaining which transpired in the context of negotiating a successor agreement. The employer argues in its brief that "there was no agreement to link any successor agreement with resolution of the privatization decision", but that argument is without merit. While an employer may reach impasse with a union over a mandatory topic of bargaining, it cannot reach impasse over a statutory duty to bargain. Here, the employer cannot rely upon an impasse over a failure to "reach agreement" linking the contracting out issues *outside* of the labor contract to language *inside* that contract.

From the perspective of the exclusive bargaining representative, its duty was to represent its members for all issues within the framework of a collective bargaining agreement, and to sign a contract covering all of those issues. The employer has the same

obligation[17]. The Employer cannot change that perception with legal slight of hand.

The "privatization" language proposed by the employer in December of 1996 was little discussed until March 28th. The Examiner can only conclude that the privatization issue was inextricably linked to the labor agreement during that period of time. But when attorney Schroeder joined the negotiations on March 28th, a new rationale was forthcoming: Schroeder characterized the RFPs as being merely a "preliminary intent to explore alternatives to the current operation". Rather than clearly describing a "two track" negotiation of the successor contract and contracting out possibility, he invoked Chapter 41.56 RCW and this agency's "guidelines" by saying, "[T]his action will have an impact on bargaining unit members...". Employer expressed a willingness to notify the union and to bargain the contracting out possibility, and it apparently was Schroeder who inquired, at the end of this short meeting, as to when the parties could meet again.

Speaking for the union, Scott Braymer was not willing to set a date soon. Braymer did raise a "successorship" for negotiation, however, asserting that any contractor should have to assume the union's labor agreement with Skagit County. As of March 28th, with a contracting out proposal on the table in bargaining, there was a linkage with the negotiations for the successor contract.

There was linkage, too, the next week, when Braymer wrote two letters to employer official Stephanie Wood. The first requested documents relevant to the contracting out issue; the second reiterated the union's stance that "[T]he county must bargain over the decision to subcontract the work, as well as the effects of

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[17] See, State ex. Rel. Bain v Clallam County, 77 Wn.2d 542 (1970), and City of Fife, Decision 5645 (PECB 1996).

that subcontracting on the employees." The union thus met its obligation to make a timely demand for bargaining over the decision to contract out, distinguishing this case from Lake Washington Technical College, Decision 4721-A (PECB, 1995), where a union official grumbled about a proposed change and alleged a contract violation, but did not make a demand for bargaining.

The "linkage" appeared to continue on April 18th, when Schroeder's letter advised the union that the RFP document was readily available to union officials at Mt. Vernon. He then wrote:

> On another matter, I would like to emphasize that the Union is invited to submit its own proposal in response to the County's Request for Proposal. As you know, no decision has been made on the future operations of the Guemes ferry and the County would appreciate any input the Union might have on this issue.

Was there a hidden message here? What was the import of "on another matter", when the union could legitimately have thought the negotiations for the successor contract was the only "matter" under discussion between the parties? Did the employer expect the union to convert itself into a "competitive bidder" in the same shoes as private contractors such as Horluck Transportation and Pacific Maritime? Or was the employer asking in vague terms for more concessions at the bargaining table? None of these open questions are answered by Schroeder's letter.

The "linkage" also seemed to continue on April 22, 1997, when the parties next met for contract negotiations. Union attorney Ford clearly reiterated Braymer's demand for bargaining on both the decision to contract out and the effects of any such action. Schroeder again stated that the employer was willing to negotiate both the decision to contract out and its effects, and stated that proposals and data had not come in as yet. Addressing Braymer, he

indicated "[W]here we need to focus is, are there issues that relate to the decision to privatize operation of the ferry that we can effectively negotiate and talk about with the union representatives[?]..." At that point, Braymer returned to the union's preference for "successorship" if a decision was made to contract out the ferry operation,[18] but Schroeder continued with an explanation that made it clear the employer was laying another track for its course of action:

> What rights do you [the union] have? ... If we do go to another provider, what other options for employment would there be? ... We are here to deal with all employees and all categories. **If you are going to have a labor agreement depends on whether we are going to have a private provider. If there is a private provider, the Union contract would be moot**.... [I]t seems like an inefficient use of time, but if the Union would like to schedule a session to proceed **while this other issue proceeds on a parallel track**, that would be fine. In a week there should be some information back on the RFPs..."

Exhibit 2 [emphasis by **bold** supplied].

Even in the light of that statement by Schroeder, the union's decision to negotiate further and perhaps reach tentative agreement on a successor contract still made labor relations sense. The union properly ignored the employer's April 18 suggestion that it submit a "competitive proposal" (whether as part of a "parallel track" or as an "other matter"), since the union's obligations are exclusively encompassed by its collective bargaining rights and

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[18] The record is not clear as to whether Braymer knew, at this point, of the "employee list" provision of the RFP. If he did know, it would not have foreclosed him from asking for successorship as part of the exclusive bargaining representatives' duties. In any event, the employer's attorney seemed not to have heard Braymer's request, and he never addressed it.

obligations under Chapter 41.56 RCW.[19] That duty is not altered merely because the employer had attempted to sever a "linkage" between negotiations for a successor collective bargaining agreement and negotiations regarding the contracting out idea.

When the employer received responses to its RFP, it had an obligation to provide the union with the results and to notify the union of what further concessions it desired as a basis to abandon the contracting idea. The employer clearly failed in this area:

- The union was shown the cost comparison data on July 24th, and was "invited" to comment on the cost proposals, but the employer was not forthcoming with any specific demands for concessions.

- On August 15th, the employer insisted on a written response to the proposals of Horluck Transportation and Pacific Maritime. Having reached a tentative agreement following negotiations in which it had insisted that a savings of $50,000 per year was politically necessary, the employer made a significant shift of position in appearing to ask the union file to invent ways to "match" the offers of the private firms. But the employer simultaneously insisted that the union ratify the July 1 tentative agreement, with Schroeder telling Braymer that the employer could declare impasse and implement its last contract offer "if the union did not ratify the deal soon".

- When the parties met late in August, Schroeder was telling the union that ratifying the contract "increases the gap between current operations and the proposals...". When the union pointed out that the employer had not proposed more conces-

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[19] The Examiner determines that there is neither "gotcha" or "waiver by inaction" based upon these facts. The union did what it was required to do.

sions, Wood sought to take cover under a ground rule calling for no proposals after the third session, while ignoring that the RFP responses received much later clearly constituted changed circumstances that should, in good faith, have been presented to the union.

- In September, Wood was again telling the union that "ratification of the tentative bargaining agreement will not resolve the outstanding issue of whether to contract out the operations of the ferry".

Hence, the Employer steadfastly found a "linkage" of the two tracks of negotiations when it suited its pre-determination to contract-out.[20] Put another way, the employer's efforts to engage in two-track negotiations was one track too many. With an opportunity to be confused so threatening, it is small wonder that the union invoked the unfair labor practice procedure here.

Political/Public Action In Advance of Bargaining -
On the second track, the employer took the contracting issue to the public before giving the collective bargaining process any time in which to operate. Specifically, the employer sent a letter to the Guemes Island constituency and issued a press release on March 27th, each announcing its effort to contract out the ferry operation.

Close study of the terms used in the employer's March 27th announcements provides basis for an inference that the employer had already made up its mind about its employees. In the context of a statement in the letter to the "Property Owners and Residents" of Guemes Island that, "as you know, the County currently owns and operates the site *using County workers...*" [emphasis by *italics*

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[20] As with a master magician, sometimes the links were together, sometimes they were not. Such slight-of-hand is not bargaining in good faith.

supplied] language pointing out that the scope of the RFP was for a contractor to provide personnel to operate the ferry supports an inference that the employer was already expecting that there would be different personnel under the new arrangement. Interestingly, this phrase is absent from an otherwise similar release sent to the news media. Further support for such an inference is drawn from the instructions given to the law enforcement officers assigned to ride the ferry, who were told to anticipate confrontations between ferry users and the ferry crews. It thus appears that the employer had some special political agenda in seeking to hold out the possibility of a change of ferry *personnel* to the directly-affected clientele, notwithstanding its collective bargaining responsibilities under Chapter 41.56 RCW.

Eventually, the Board of County Commissioners accepted a recommendation of the public works staff to contract out the *M.V. Guemes* operation, and passed a resolution ordering the staff to commence negotiations with Pacific Coast Maritime, Inc. for a contract for operation of the ferry. Such contract was then to be executed by the Board. The Board memorialized its belief that,

> [T]he Ferry Proposal Review Committee determined that contracting out of ferry operations was feasible, and that **private contractors submitting proposals either met or exceeded the County's requirements** for safety, customer service, professional knowledge and experience, compliance with regulations and reduction in costs; [and] **having provided the Inlandboatmen's Union of the Pacific, which represents the current operations workers at the ferry, engaged in discussion and negotiation** regarding a decision on the operations of the ferry; [and] WHEREAS several months of good faith negotiations **resulted in an impasse between the parties** regarding the decision on the operation of the ferry in late September. ...

Exhibit 40 [emphasis by **bold** supplied].

The previous announcements to the ferry users and to the press had, of course, made it very difficult for the employer to turn back from its announced intention to contract out the operation. Indeed, the early public pronouncements about the issue are consistent with the employer seeking political support for a decision already made, even though its proposal to add "privatization" to the management rights clause was still an unresolved issue at the bargaining table at that time.

In an additional move on its political track, the employer also promised the Guemes Ferry Advisory Committee that it "would be involved" in the ultimate decision. Combined with the issuance of the letter to ferry users, the press release and the RFP, the employer appears to have taken a road with no return - it was both politically committed to this constituent organization, even though it was statutorily obligated to negotiate with the union concerning the wages, hours and working conditions of employees who, it appears, the employer was quite ready to discard as expendable.

Bargaining the terms of the RFP -

The essence of a "fait accompli" is that the employer has taken an action which has such an impact on bargaining unit employees that no requests for information or counter-proposal by their union within the collective bargaining process can counteract its effects or adequately protect its employees. As the Commission said in North Franklin School District, Decision 3980-A (PECB, 1993):

> The collective bargaining process cannot be effective in resolving conflicts if it is not given a chance to operate, and a union will not be put in the futile position of attempting to bargain the unraveling of a change already made.

We are dealing here with more than the contracting out of a few bargaining unit positions; it could scarcely be more material that

the employer had taken action to eliminate the entire bargaining unit. No accompli can be so faited as that. The only analogous action would be for an employer to threaten a union with closure of the plant unless the union takes a contract as offered. Somerville Mills, 308 NLRB 425 (1992); Elliott Turbomachinery Co., 320 NLRB 141 (1995); Dorsey Trailers Inc. 321 NLRB ---(1996).

The key issue here is whether the employer provided an opportunity for bargaining on key elements of the RFP, and whether the employer entered the negotiations with an open mind indicative of good faith. Again, the Examiner finds the employer fell short of its obligations in this area:

- Braymer mentioned "successorship" during the brief March 28th meeting where the union was first advised that the employer was considering contracting out. The employer nevertheless issued the RFP in early April, with the following provision:

> Section 6.0 Preparation of Proposal: ... 1. A Proposed Compensation form showing [price] [addenda] 2. Respondent must be in compliance with the current US Government regulations mandating chemical drug and alcohol testing.. **3. Respondent must submit a list of NAMES OF PROPOSED EMPLOYEES necessary to operate the Ferry including back-up personnel along with a copy of each employees' U.S. COAST GUARD LICENSE and RESUME.**

[Emphasis by **bold** supplied.]

Since none of the existing employees were out-of-work at that time, and since there is no evidence that any of them were already moonlighting for any of the potential private contractors, that requirement effectively precluded the possibility that existing employees would be an ongoing part of the *M.V. Guemes* operation. The employer thus prejudiced any bargaining on the union's demand for "successorship" (or even on a later-

described union interest of preserving the jobs of its members) in the RFP which it issued prior to bargaining, and presented the union with a fait accompli on this important issue, in violation of Chapter 41.56 RCW.

- Braymer asked the employer to withdraw the RFP, and return to the status quo, when he agreed to meet on April 22nd. It appears from the exhibits that the union was doing things that were expected, predictable, and required. It made a timely demand to bargain the decision and its effects; it demanded information needed for that bargaining. The employer could have backed off on the RFP at that point, but it did not.

- Ford argued on April 22nd that the employer should withdraw the RFP. Braymer reiterated that the union desired "successorship" if the operation was contracted out. Either Schroeder did not want to hear about successorship, or he ignored the fact that the RFP already issued had set in motion a process that would almost certainly yield a 100% replacement of the existing employees. Indeed, Schroeder told the union on April 22nd that the collective bargaining agreement would be "moot" if the employer decided to contract out the service. That was not indicative of good faith on the clearly mandatory subject of job security for the existing employees.

- The union pursued its successorship / job security interest even though the employer had ignored the issue. The minutes for the July 1 bargaining session when the parties reached a tentative agreement include the following key passage quoting Braymer:

> I **talked to Bob Shellenberger of Alaska Marine about his intentions regarding hiring the crew. We are here making a good faith effort to keep these jobs**

> **intact** and it is not just for show. We are serious in trying to be reasonable.

Even though the results of the RFP process were not complete at that time, and even though the employer had earlier amended its RFP to back off from requiring submission of a list of employees with a proposal,[21] the employer still did not exhibit any willingness to deal with the union's successorship and job security concerns.

- Again on August 28th, with a member of the Board of Commissioners in attendance, the union implied that the employer could have won the union's consent for contracting out the ferry operation if it had merely provided for the new operator to employ the existing employees. Once more, however, the employer failed or refused to address that issue.

Schroeder's responses characterizing the RFP as something other than "competitive bids", and stating that the employer wasn't sure any private provider was interested in the work, simply don't wash. The Examiner has made a thorough review of the RFP, with the following results: The RFP did **not** anticipate a "second-chance" to negotiate, but was, by its terms, a request for competitive bids. Schroeders' statement that competitive bids would "soon" be sought is misleading in light of the specific language:[22]

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[21] The Employer amended the RFP, saying in the final version that the contractor was to submit a list of names of proposed employees necessary to operate the Ferry, including back-up personnel along with a copy of each employee's U.S. Coast Guard license and resume "**within 10 days of being notified** of the Employer's intent to award a Personal Services Agreement.

[22] See employer brief at pg. 1 "Skagit County bargained in good faith with the IBU by coming forward with a potential subcontracting alternative, not a fait accompli, and expressed willingness to negotiate over

> Section 8.0 Award of Contract ... The County reserves the right to **accept any Proposal**, reject any and all Proposals, to advertise for new proposals or to take any other such action deemed by the County to be in the best interests of the County. The County further reserves the right to delay any decision regarding whether or not to award this contract for up to 120 days ... **Once a decision is made, the County will notify the successful Respondent by letter, mailed to the address shown on his/her proposal**, that his/her proposal has been accepted and that he/she may enter into the PSA.
>
> ...
> Section 10.0 Execution of Contract: The successful respondent must sign the PSA furnished by the County and return it within twenty (20) calendar days after the date of **notification that his/her Proposal has been accepted** along with all other required bonds, proof of insurance, if applicable, and other documents required by the County.

The employer certainly appears to have created a power of acceptance on its part. The fact that the employer retained a right to reject all proposals or to delay award of a contract does not diminish or negate the fact that it set in motion a process which could create a contractual relationship with a respondent without further bids.

Further evidence that the RFP was a bid request is found in Mike Woodmansee's comment, on August 28th, that the employer was "trying to determine **whether or not to accept the proposal** of one of the private entities or to continue to use employer resources to operate the Ferry...". Although there were additional interviews with at least some of the carriers after responses to the RFP were

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> both the subcontracting decision as well as the effects of any potential decision on bargaining unit personnel...."

submitted, the employer did not solicit "additional bids" or proposals from Horluck Transportation or Pacific Maritime.[23]

Taken together, the employer's actions regarding the RFP effectively limited the process to two bidders, neither of which sought to retain the existing employees. The employer's foreclosure of bargaining on successorship and job security issues was inconsistent with its obligations under Chapter 41.56 RCW.

Did the Parties Reach a Contract or an Impasse?

The employer received responses to its RFP on or about May 5, 1997, but did not immediately submit cost figures to the union or make specific demands for union concessions. Acting without much information, the union made several concessions. The parties then reached what they both described as a tentative agreement on July 1, 1997. A review of the record confirms an inescapable fact: There was nothing further for the parties to negotiate. The employer's proposal on "privatization" had been dropped in favor of layoff language; the new contract was to remain in effect through 1999. The parties agreed to reduce their tentative agreement to written form; a draft document was prepared. Wood's letter of September 29th is an admission that a tentative agreement had been reached. An analysis of who "won" or "lost" at the bargaining table is irrelevant: Both parties agreed on what the terms of employment would be, so long as the bargaining unit members remained employees of Skagit County. It would strain credulity beyond the limits of the English language to make any other finding than that the parties reached agreement in July of 1997.

But the employer refused to ratify the agreement. It is clear that it moved the target by insisting upon additional proposals from the

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[23] In addition, the RFP contained a provision with an automatic "price-increase" for the contractor, equal to about 70% of the CPI increase for Seattle's index.

union after July 1st, and by escalating its demands for concessions beyond those that could, and should, have been sought by July 1st. The cases relied upon by the union, including Island County, Decision 857 (PECB, 1980), Entiat School District, Decision 1361 (PECB, 1982), Royal School District Decision 1419 (PECB, 1982), Snohomish County, Decision 1868 (PECB, 1984), and Spokane County ,Decision 2167-A (PECB, 1985), support a conclusion that the employer acted in bad faith after July 1st.

On and after July 1, 1997, various employer representatives used the term "impasse" in relation to aspects of this controversy. That term was inapt with regard to the lack of agreement on separate tracks for negotiation. Having reviewed the parties' responses,[24] the Examiner concludes that discussion of "impasse" and

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[24] After the parties filed briefs, the Examiner asked for written statements on whether *M.V. Guemes* is a "public passenger transportation system" for which interest arbitration is required under RCW 41.56.492.

The Employer responded that RCW 41.56.492 must be read as a whole, and that the only systems covered are those operated by a metropolitan municipal corporation, county transportation authority, public transportation benefit area, or city. It asserts Skagit County has not created a "county transportation authority" under RCW 36.57.020, because the powers ceded to an independent entity would be very limited. It also distinguishes ferries from "public passenger transportation systems" on the basis that Chapter 36.54 RCW provides for the purchase and maintenance of FERRY systems by counties. It also argues that Chapters 35.58 and 36.57A RCW infer surface, rather than marine, transportation systems.

The union contends RCW 41.56.492 applies, that the failure to create a "county transportation authority" is ultra vires under RCW 36.57.030, and that the ferry is a "public passenger transportation system" under State ex rel. King County v Murrow, 199 WA. 685 (1939). The union urges that interest arbitration is in trade for the right to strike under RCW 41.56.492.

The employer replied that it does not have to create a "county transportation authority", because Chapter 36.54 RCW is permissive so the more general Chapter 36.57 RCW does not apply. It also contends that, even if the ferry receives money from the county road fund and motor

unilateral implementation was also inapt under either RCW 41.56.123 (which would apply if the unit is not eligible for interest arbitration, and prohibits unilateral changes during the first year following expiration of a collective bargaining agreement) or RCW 41.56.492 (where any unilateral change would be prohibited).[25]

Conclusions

The record shows an unacceptable pattern of employer behavior since December of 1996. While its proposal to allow "privatization" of the work of this bargaining unit may have been honestly made, it created a linkage of the contracting out issue with the collective bargaining agreement. Although the employer gave advance notice of the contracting out idea to the union in March of 1997, its nearly simultaneous notices to ferry users and the news media support a

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vehicle fuel taxes, it doesn't receive money from the vehicle excise and sales taxes used to fund "public passenger transportation systems".

The union's analysis may create a definitional conundrum which was not intended by the Legislature. Ferries are not mentioned in RCW 41.56.492. Even though the Murrow court said public ferries are part of the county road system, Chapter 36.54 RCW explicitly provides for the operation of ferry systems by counties without mention of a need to create "county transportation authority". In Litz v Pierce County, 44 WnApp. 674 (1986), where Ketron Island residents sued seeking more ferry service to an island without public roads, the court denied relief on the basis that the county could determine the level of service under Chapter 36.54 RCW.

[25] See, City of Seattle, Decision 1667-A (PECB, 19). In an interest arbitration setting, a party who is unable to persuade their opposite number of the merits of a proposed change that is not controlled by an existing collective bargaining agreement may invoke mediation. If the issue remains unresolved, it will be certified for interest arbitration. If that process results in an award approving the proposed change, it will be implemented; if the change is rejected in arbitration, it will not be implemented. There is no occasion for unilateral change absent a waiver of bargaining rights.

conclusion that the decision to contract out was much farther along than the lip service given at the bargaining table. Without providing an adequate opportunity for bargaining, and without replying to the union's announced concern, the employer issued an RFP which prejudiced the union's bargaining rights and constituted a fait accompli as to the successorship (job security) issue.[26] The employer's April 18 request for the union to respond to the RFP "with its own proposal" exceeded the bounds of the collective bargaining relationship which existed between these parties under Chapter 41.56 RCW. The employer's failure to be forthcoming with specific cost information and specific proposals for concessions left the union to operate in a vacuum, and were not indicative of good faith. The employer's later attempt to treat the contracting out issue as separate from the negotiations for a successor agreement was an artificial distinction which compounded the employer's failure to make timely demands for concessions before the parties reached a tentative agreement. The employer's demand for "comment on the cost comparisons" on July 24, 1997, and the August 15, 1997 demand by Stephanie Wood for a written response to the private providers' proposals, pursued the employer's erroneous concept of a separate "track" for bargaining, while ignoring that the obligation to bargain extends beyond just the language of the collective bargaining agreement. This was especially true where the employer had initially sought to negotiate the issue entirely within the confines of a successor contract.[27] The employer's threats of impasse and unilateral implementation were inapt when

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[26] We are dealing here with "contracting out", but that characterization of the overall issue does not absolve the parties from having to debate and reconcile solutions to subordinate issues such as "successorship" and/or "job security" concerns.

[27] Former senator Mike Mansfield commented that complex issues were not resolved through "cracking imaginary whips [but] through an honest facing up to the problems."

made. The union fulfilled its duty for an "honest facing up" to the privatization issue; the employer did not.

REMEDY

The purpose of a remedial order issued under RCW 41.56.160 is to put the injured party back in the position they would have occupied if there had been no violation of the law. In this case, the employer lawfully gave notice of its contracting out proposal on March 28, 1997, and the union must confront that reality and the fiscal and political pressures on which it was based. On the other hand, the employer ran afoul of the law almost immediately after it gave notice to the union, and certainly when it issued the RFP which disregarded the union's indicated interest in bargaining for successorship and/or job security rights for its members. The withdrawal of the public announcements and unlawful RFP, and the rejection of all responses received to that RFP (and/or contracts accepted on the basis of that RFP) are a minimum that is needed to level the playing field for further bargaining.

The following Order reflects restoration of the situation to that which should have existed when the parties signed their tentative agreement on July 1, 1997,[28] with an additional safety net based upon Municipality of Metropolitan Seattle, Decision 2845-A (PECB, 1988), affirmed 118 Wn.2d 621 (1992). If the union ratifies the tentative agreement, the employer will be obligated to consider it for ratification under the good faith standard of Chapter 41.56 RCW

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[28] An argument could be made that the clock should be turned back to the close of the parties' March 28, 1997 negotiations session, and the parties should proceed with their bargaining relationship from that base. That would, however, ignore that the parties resolved a number of issues in apparent good faith, and thus could open up issues that should not have to be revisited.

(and in the context that no viable RFP or proposals from private operators remain in existence). If the contract is ratified, the parties will proceed under its terms; the employer would need to notify the union if it still desires to pursue the contracting out idea as a matter which is not controlled by the parties' contract, and would need to provide opportunity for bargaining before issuing any new RFP. If the tentative agreement is rejected by the employer, the parties would return to the bargaining table from their July 1, 1997 positions; if they are not able to resolve their differences, either party will be entitled to invoke mediation, and interest arbitration may result under METRO, supra, if the situation persists.

FINDINGS OF FACT

1. Skagit County is a political subdivision of the state of Washington, and is a public employer within the meaning of RCW 41.56.030 (1). Among other services, the employer owns and has historically operated a ferry service between Anacortes and Guemes Island. The vessel currently used in that service is named *M.V. Guemes*.

2. The Inlandboatman's Union of the Pacific, a bargaining representative within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of the operations and maintenance personnel employed by Skagit County in the operation of the *M.V. Guemes*.

3. The employer and union were parties to a collective bargaining agreement which expired on December 31, 1996.

4. The employer has, from time to time, considered the possibility of contracting out the operation of the *M.V. Guemes* to a

private carrier. In 1996, a new public works director made inquiries on that subject and employer officials made a visit to a similar county-owned ferry operation in Pierce County. Although no notice was given to the union at that time, members of the bargaining unit were shown copies of the data on the private operation of the ferry in Pierce County.

5. The parties began negotiating a successor collective bargaining agreement. In initial proposals exchanged in December of 1996, the employer proposed a modification of the management rights clause of the contract, to include language allowing the employer to "privatize" the operation of the *M.V. Guemes*. The union resisted that change of the contract language.

6. At a bargaining session for a successor contract held on March 28, 1997, the employer's attorney notified the union that the county "was going out of the ferry business". The union was surprised by that announcement and expressed concern about successorship, but the parties did not have substantive negotiations on the contracting out issue at that time.

7. On March 28, 1997, the employer issued news releases to the media and disseminated a letter to residents of Guemes Island, each announcing the proposal to contract out the operation of the M.V. Guemes. The letter directed to ferry users implied that a new crew of employees was anticipated.

8. On or soon after March 28, 1997, the employer prepared and distributed requests for proposals (RFP) which required bidders to specifically identify, by name, the employees they would use in operating the M.V. Guemes.

9. The employer assigned law enforcement officers to ride on the *M.V. Guemes* on March 28, 1997 and the next day, and instructed

them to watch for misconduct by bargaining unit employees. No union meeting or other union activity was planned for or occurred in that time period. The law enforcement officers filed a "no incident" report.

10. The union made timely and adequate requests of the employer for copies of the RFP, drafts of the same document, inter-county memoranda which led to the RFP, and all other material which led to the employer's decision to contract out the ferry operation. The union also made a timely and adequate request for bargaining on the decision to contract out and its effects, and asked the employer to withdraw the RFP.

11. The employer failed or refused to withdraw the RFP, but it agreed to continue negotiations on a successor collective bargaining agreement. The parties held negotiations sessions on April 18 and 22, May 22, and July 1, 1997.

12. Notwithstanding its initial proposal to negotiate privatization within the context of the negotiations for a successor contract, the employer later sought to isolate the contracting out issue as a separate track for negotiations. On April 18th, employer officials referred to the contracting out issue as "another matter"; on April 22nd, employer spokespersons implied that reaching a labor contract would not bar the employer from selecting a private carrier. The employer invited the union to "make a proposal" in response to its RFP, but no framework was ever laid out for the union to do so. The union never explicitly agreed to treat the contracting out issue as a separate matter.

13. By early May of 1997, the employer had received four responses to its RFP. Two of those seemed to provide substantial savings, of which one was from the operator of the county-

owned ferry in Pierce County. The union made responses at the bargaining table, and agreed to contract items which it felt saved the employer substantial money over a three-year agreement.

14. By July 1, 1997, the parties reached tentative agreement on a successor collective bargaining agreement. The employer had dropped its demand for explicit contract language permitting it to "privatize" all or part of the ferry operation. The parties agreed to stronger layoff language in the contract based upon seniority, by adapting language from a contract between the union and the Washington State Ferry System. A draft of a complete contract was prepared.

15. On August 15, 1997, the employer insisted that the union make a proposal in response to the proposals submitted by private firms in response to its RFP. At the same time, the employer did not come forth with specific proposals for the union to consider in collective bargaining.

16. On September 2, 1997, the Board of County Commissioners turned aside a union requests that: (1) the employer to sign the tentative agreement reached by the parties on July 1st;, and (2) that the employer abandon its negotiations with Pacific Maritime. Instead, the Board of County Commissioners authorized its staff to begin discussions with the successful bidder to take over the operation of the *M.V. Guemes*.

17. After urging the union to ratify the tentative agreement, the employer announced in September of 1997 that ratification of the parties' tentative agreement would not forestall the employer from contracting out the operation of the *M.V. Guemes* to Pacific Maritime. The employer also warned that it would declare impasse over both the contract negotiations and the

contracting out issue, and that it would implement a contract with a private operator.

18. The statements and demands made by and on behalf of Skagit County up to October 10, 1997, encompass additional issues and demands over and above those agreed to by the parties in the tentative agreement reached on July 1, 1997.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this case under Chapter 41.56 RCW and Chapter 391-45 WAC.

2. The law enforcement officers assigned to monitor the M.V. Guemes operation were instructed to watch for employee misconduct that would not have been protected activity under Chapter 41.56 RCW, so their assignment and presence was not reasonably perceived by employees as an interference with their lawful union activities, and the employer did not thereby commit any violation of RCW 41.56.140(1).

3. The Inlandboatmen's Union of the Pacific made a timely request for bargaining on both the decision to contract out the operation of the M.V. Guemes and the effects of any such decision, so that the union did not waive its bargaining rights under RCW 41.56.030(4) by inaction.

4. Both the concern for "successorship" stated by the union on March 28, 1997, and its later statements concerning saving the jobs of the members of its bargaining unit, raised concerns about tenure of employment which were mandatory subjects of collective bargaining under RCW 41.56.030(4).

5. By issuing a request for proposals which prejudiced the union's concerns about tenure of employment, without having provided adequate opportunity for collective bargaining on the contracting out decision; by demanding that the exclusive representative make proposals outside of the context of the parties' collective bargaining relationship; by treating the contracting out issue as a separate track for negotiations, without the consent of the union; by failing and refusing to ratify the tentative agreement reached by the parties; and by in fact escalating its demands for concessions after the tentative agreement was reach, but without having made specific demands for such concessions; Skagit County has failed to bargain in good faith under RCW 41.56.030(4), and has thereby violated RCW 41.56.140(4).

6. The employer's egregious course of conduct will warrant imposition of an extraordinary remedy under RCW 41.56.160, in the event the employer fails to normalize the parties' bargaining relationship by ratification and implementation of the tentative agreement reached by the parties.

ORDER

Skagit County, its officers and agents, shall immediately take the following actions to remedy its unfair labor practices:

1. CEASE AND DESIST from:

   a. Presenting proposed changes, and particularly issuing requests for proposals which prejudice the bargaining rights of its employees concerning their job security, without having provided opportunity for good faith

collective bargaining, as per RCW 41.56.030(4), on the employment tenure concerns raised by the union.

b. Failing to negotiate in good faith with the Inlandboatmen's Union, as per RCW 41.56.030(4), with respect to the operation of the *M.V. Guemes*.

c. Relying upon ground rules for negotiations which are not a mandatory subject of collective bargaining, including ground rules limiting the introduction of new proposals, as a basis for failing to bargain in good faith as per RCW 41.56.030(4).

d. In any other manner, interfering with, restraining or coercing its employees in their exercise of their collective bargaining rights secured by the laws of the State of Washington.

2. TAKE THE FOLLOWING AFFIRMATIVE ACTION to effectuate the purposes and policies of Chapter 41.56 RCW:

a. Withdraw the Request for Proposals for operation of the *M.V. Guemes* which was issued on or soon after March 28, 1997, and reject or cancel all bids and contracts resulting from that process.

b. Upon being notified, in writing, that the Inlandboatmen's Union of the Pacific has ratified the tentative agreement reached by the parties on July 1, 1997, give good faith consideration to ratification of that tentative agreement as the collective bargaining agreement between the parties.

c. If the tentative agreement reached by the parties on July 1, 1997, is approved by both parties, implement that agreement according to its terms.

d. If the tentative agreement reached by the parties on July 1, 1997, is not approved by the employer, bargain in good faith with the Inlandboatmen's Union of the Pacific concerning whatever differences exist between the parties as the basis for rejection of that tentative agreement, and further:

i. If no agreement is reached through bilateral negotiations within sixty (60) days, either party may request the Public Employment Commissions Relations to provide the services of a mediator to assist the parties.

ii. If no agreement is reached by using the mediation process, and the Executive Director, on the request of either of the parties and the recommendation of the assigned mediator, concludes that the parties are at impasse following a reasonable period of negotiations, the parties shall submit the remaining issues to interest arbitration using the procedures of RCW 41.56.450, et seq, and the standards for employees other than fire fighters. The decision of the neutral chairman of the interest arbitration panel shall be final and binding upon both parties.

e. If the tentative agreement reached by the parties on July 1, 1997, is not approved by the union, bargain in good faith with the Inlandboatmen's Union of the Pacific concerning whatever differences exist between the parties

as the basis for rejection of that tentative agreement. The parties may utilize the Commission's mediation services under Chapter 391-55 WAC, but paragraph 2(d)(ii) of this Order shall not be applicable under such circumstances.

f. Post, in conspicuous places on the employer's premises where notices to all employees are usually posted, copies of the notice attached hereto and marked "Appendix". Such notices shall be duly signed by an authorized representative of the above-named respondent, and shall remain posted for 60 days. Reasonable steps shall be taken by the above-named respondent to ensure that such notices are not removed, altered, defaced, or covered by other material.

g. Read the notice required by the preceding paragraph into the record of an open, public meeting of the Board of County Commissioners of Skagit County, and permanently append a copy of that notice to the official minutes of the meeting where the notice is read.

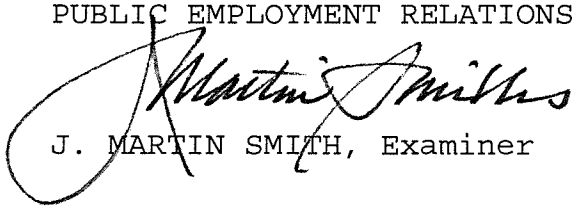
h. Notify the above-named complainant, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time provide the above-named complainant with a signed copy of the notice required by the preceding paragraph.

i. Notify the Executive Director of the Public Employment Relations Commission, in writing, within 20 days following the date of this order, as to what steps have been taken to comply with this order, and at the same time

provide the Executive Director with a signed copy of the notice required by the preceding paragraph.

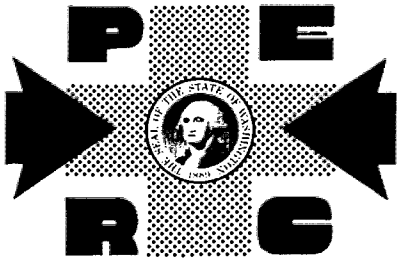
Issued at Olympia, Washington, on the 2nd day of July, 1998.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



J. MARTIN SMITH, Examiner

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-45-350.



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, A STATE AGENCY, HAS HELD A LEGAL PROCEEDING IN WHICH ALL PARTIES WERE ALLOWED TO PRESENT EVIDENCE AND ARGUMENT. THE COMMISSION HAS FOUND THAT WE HAVE COMMITTED UNFAIR LABOR PRACTICES IN VIOLATION OF A STATE COLLECTIVE BARGAINING LAW, AND HAS ORDERED US TO POST THIS NOTICE TO OUR EMPLOYEES:

WE WILL withdraw the Request for Proposals for operation of the M.V. Guemes issued on March 28, 1997 and will cancel all bids and contracts resulting from that process;

WE WILL, upon being notified in writing that the Inlandboatmen have ratified the July 1, 1997 tentative agreement, give good faith consideration to ratification of that tentative agreement as the collective bargaining agreement between the parties, and if approved by both parties will implement that agreement according to its terms;

WE WILL, if the existing tentative agreement is not ratified, bargain in good faith with Inlandboatmen's Union in an effort to reach a successor collective bargaining agreement;

WE WILL NOT fail to negotiate with Inlandboatmen's Union the decision and effects of contracting out the Guemes Island-Anacortes ferry run and operation of the M.V. Guemes, including contracting-out, privatization, successorship, job security and other forms of the contracting out issue;

WE WILL NOT, in any other manner, interfere with, restrain, or coerce our employees in the exercise of their collective bargaining rights under the laws of the State of Washington.

DATED: _____

SKAGIT COUNTY

BY: _____
Authorized Representative

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE.

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material. Questions concerning this notice or compliance with the order issued by the Commission may be directed to the Public Employment Relations Commission, 603 Evergreen Plaza Building, P. O. Box 40919, Olympia, Washington 98504-0919. Telephone: (360) 753-3444.