STATE OF WASHINGTON

PUBLIC EMPLOYMENT RELATIONS COMMISSION

INTERNATIONAL LONGSHOREMEN'S AND WAREHOUSEMEN'S UNION, LOCAL 50, Complainant, vs. PORT OF ILWACO, Respondent.	CASE NO. 2196-U-79-309 DECISION NO. 970-PECB FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

John Bukoskey, Organizer, appeared on behalf of the union.

Robert H. Lamb, attorney at law, appeared on behalf of the respondent.

International Longshoremen's and Warehousemen's Union, Local 50 (the Union) filed a complaint on July 27, 1979 with the Public Employment Relations Commission alleging that the Port of Ilwaco (the Port) committed certain unfair labor practices in violation of Chapter 41.56 RCW during negotiations for a collective bargaining agreement.

THE FACTS

During May and June of 1979, the Union and the Port were engaged in collective bargaining for a labor agreement. On many occasions, the Port negotiators informed the Union negotiators that any agreement reached at the bargaining table was tentative, subject to the approval of the Port commissioners. There is no indication that the Union objected to this procedure.

At one negotiating session the Port representative agreed to a provision in the contract which would require the Port to have just cause for the discipline of employees. The grievance procedure provided for non-binding arbitration. Later the Port negotiator informed their union counterparts that the commissioners insisted that the agreement reflect that the issue of just cause could not be appealable beyond the arbitration procedure to a court. The Port and the Union reached an impasse in negotiations, resulting from several differences, including the Port's insistence on the inclusion of the following provision in the contract:

Article XIV

Grievance Procedure

* * *

> 2. In the event of a breach of the Agreement by Employer, or by the Union (including any Employees who are represented by the Union), the party so breaching shall be liable to the nonbreaching party for reasonable attorneys' fees and other necessary expenses incurred by the nonbreaching party in connection with said breach.

The Union objected at the bargaining table to the inclusion of this provision, in part because in the Union's view it was a nonmandatory subject of bargaining.

POSITIONS OF THE PARTIES

The Union submitted no post-hearing brief and made no position statement at the hearing except for submitting a copy of the decision in National Labor Relations Board v. Davison, 318 F2d 550 (CA4, 1963). In its complaint, the Union alleged that the Port violated RCW 41.56.140(1), (2), and (4) when it arbitrarily changed an article that had been agreed to. It further asserted that the Port violated RCW 41.56.140(2) and (4) by conditioning the execution of the labor agreement on a legal liability clause which is a nonmandatory subject of bargaining.

The Port responds that there was no final agreement reached regarding the just cause provision, and that the legal liability clause is a mandatory subject of bargaining.

DISCUSSION

RCW 41.56.140 provides:

> It shall be an unfair labor practice for a public employer:
>
> (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
>
> (2) To control, dominate or interfere with a baragining representative.
>
> * * *
>
> (4) To refuse to engage in collective bargaining.

A. The Just Cause Clause

The refusal by an employer to execute a written contract incorporating any agreement reached, violates the duty to bargain in good faith. H. J.

Heinz v. NLRB, 311 U.S. 514 (1941). However, in the instant case a condition precedent to the finality of the agreement was admittedly understood by both parties to be the approval of the Port commissioners. Since the Port commissioners rejected the just cause clause as soon as it was brought to their attention, there was, in fact, no final agreement on that item and the Port was not bound to execute a written agreement incorporating that item. City of Richland, Decision No. 246 (PECB, 1977).

B. The Legal Liability Clause

RCW 41.56.030(4) provides:

> "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.

RCW 53.18.020 authorizes Port districts to enter into labor agreements "on matters of employment relations". RCW 53.18.010 defines employment relations as including, but "not limited to, matters concerning wages, salaries, hours, vacation, sick leave, holiday pay and grievance procedures."

In the context of the Educational Employment Relations Act, the Public Employment Relations Commission recognized that the duty to bargain is limited to the matters contained in that Act's definition of collective bargaining. Federal Way School District, Decision No. 232-A (EDUC, 1977). The Public Employees Collective Bargaining Act and the Port Employees Act require that the parties bargain about grievance procedures. That doesn't mean that all matters which remotely relate to grievance procedures are mandatory subjects for bargaining. For example, in NLRB v. Wooster Division of Borg-Warner, 356 U.S. 342 (1958), the Court held to be nonmandatory, an employer's proposal that its final offer in future negotiations be voted on by all members before the union struck. That proposal does bear some relationship to "no strike" clauses which have been accepted as mandatory subjects of bargaining; but the Court apparently found the relationship too remote. It held that the focus of the proposal was the relationship between the union and the employees, a permissive area. Similarly, the Commission has held that while layoff is a mandatory subject of bargaining, a school district need not bargain about its program in the event of layoff. It said:

> "... we reject the Union's argument here that all matters which may be included in or related to a layoff policy are mandatory subjects for bargaining. Each specific proposal must be evaluated independently." Federal Way School District, supra.

The N.L.R.B. has said that indemnity provisions, performance bonds, "save harmless" clauses, and union liability provisions are permissive subjects of bargaining since they are not matters which relate primarily to the working relationship between the employer and its employees. Hall Tank Co., 214 NLRB No. 154 (1974). A legal liability provision such as that proposed by the employer only relates to the grievance procedure or personnel matters in an indirect manner. It seeks to have the party which breaches the agreement, be it employer or union, pay for the "attorneys' fees and other necessary expenses incurred by the nonbreaching party in connection with said breach." This might include a wide variety of indeterminate costs including the salary of non-legal administrative personnel involved in the processing of the grievance. Does the statutory requirement to bargain concerning grievances require the parties to negotiate about the methods and personnel that the other side utilizes in its handling of grievances? I think not. The proposal is too much related to the internal administrative procedures of the parties, and is not sufficiently directly related to the grievance procedure or personnel matters. It is thus a permissive subject of bargaining.

The Port argues that in any event its actions were excused because, at the bargaining table, the Union failed to respond to the Port's request that the Union cite legal authority to support its position. The Union did inform the Port that it would not bargain the legal liability issue because it was a nonmandatory subject of bargaining. That was sufficient. By insisting to impasse on a permissive subject of bargaining, the Port violated RCW 41.56.140(1) and (4).

REMEDY

Having found that the Port was engaged in unfair labor practices in violation of RCW 41.56.140(1) and (4), it must be ordered to cease and desist from violation of the Act and to take certain affirmative action designed to effectuate the policies of the Act.

The Port refused to bargain collectively with the Union as the exclusive representative of the employees by insisting as a condition to entering into an agreement, on a matter which is a non-mandatory subject for bargaining. The Port is therefore ordered to bargain with the Union and, if an understanding is reached, embody such understanding in a signed agreement. So that those negotiations might proceed without further

impediment, the Port is also ordered to cease and desist from insisting on a legal liability clause.

FINDINGS OF FACT

1. The Port of Ilwaco is a port district within the meaning of RCW 53.18.010, and is a public employer within the meaning of RCW 41.56.030(1).

2. International Longshoremen's and Warehousemen's Union Local 50, is an employee organization within the meaning of RCW 53.18.010 and is a bargaining representative within the meaning of RCW 41.56.030(3).

3. In May and June of 1980, the Port and the Union were engaged in collective bargaining for a labor agreement.

4. During the course of the negotiations, on numerous occasions, the Port negotiators informed the Union negotiators that any agreements reached were tentative, pending the approval of the Port commissioners.

5. The Port and Union negotiators reached a tentative agreement on the subjects of just cause for discipline and arbitration. The Port negotiators later informed the Union negotiators that the Port commissioners rejected that agreement and that it would have to be modified.

6. The Port insisted as a condition to entering into an agreement, that there be included a provision requiring that the party which breaches the agreement be liable to the nonbreaching party for reasonable attorneys' fees and other necessary expenses incurred.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 53.18 and RCW 41.56.

2. By the events described in Findings of Fact 4 and 5, the Port of Ilwaco did not commit an unfair labor practice violation of RCW 41.56.140.

3. By the events described in Findings of Fact 6, the Port of Ilwaco insisted to impasse on a nonmandatory subject of bargaining, and thereby did commit an unfair labor practice violative of RCW 41.56.140(1) and (4).

ORDER

1. The Port of Ilwaco, its officers, agents, and representatives, shall immediately:

A. Cease and desist from:

(1) Refusing to bargain collectively with the International Longeshoremen's and Warehousemen's Union, Local 50 as the exclusive representative of all of its employees in the appropriate bargaining unit by insisting as a condition to the execution of a collective bargaining agreement, that the Union agree to a provision providing that the party breaching the agreement would be liable to the nonbreaching party for reasonable attorneys' fees and other necessary expenses.

(2) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights guaranteed by Chapter 41.56 RCW.

B. Take the following affirmative action which is necessary to effectuate the policies of Chapter 41.56 RCW.

(1) Upon request, bargain collectively with the International Longshoremen's and Warehousemen's Union, Local 50, as the exclusive representatve of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

(2) Post at its premises copies of the attached notice to employees marked "Appendix" for a period of sixty (60) days on bulletin boards where notices to employees are usually posted.

(3) Inform the Public Employment Relations Commission, in writing, within twenty (20) days from the date of this order, as to the steps taken to comply.

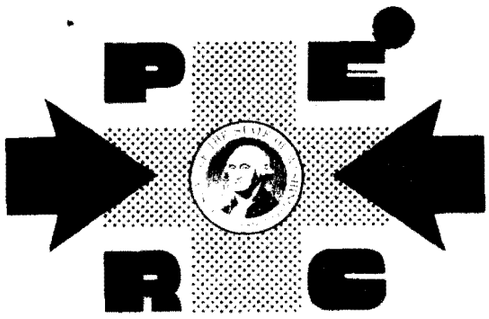
DATED at Olympia, Washington, this 24th day of September, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

Alan R. Krebs

ALAN R. KREBS, Examiner

APPENDIX



PUBLIC EMPLOYMENT RELATIONS COMMISSION

NOTICE

PURSUANT TO AN ORDER OF THE PUBLIC EMPLOYMENT RELATIONS COMMISSION, PORT OF ILWACO HEREBY NOTIFIES OUR EMPLOYEES THAT:

WE WILL NOT refuse to bargain collectively with the International Longshoremen's and Warehousemen's Union, Local 50 as the exclusive representative of all of our employees in the appropriate bargaining unit by insisting as a condition to the execution of a collective bargaining agreement, that the Union agree to a provision providing that the party breaching the agreement would be liable to the nonbreaching party for reasonable attorneys' fees and other necessary expenses.

WE WILL NOT in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights guaranteed by Chapter 41.56. RCW.

WE WILL, upon request, bargain collectively with the International Longshoremen's and Warehousemen's Union, Local 50, as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

DATED:_____

PORT OF ILWACO

BY:_____

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. Any questions concerning this notice or compliance with its provisions may be directed to the PUBLIC EMPLOYMENT RELATIONS COMMISSION, 603 Evergreen Plaza Building, Olympia, Washington 98504, telephone: (206) 753-3444.