Washington State Ferries (Inlandboatmen's Union of the Pacific), Decision 12134-C (MRNE, 2016)

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

WASHINGTON STATE FERRIES, Complainant, vs. INLANDBOATMEN'S UNION OF THE PACIFIC, Respondent.	CASE 25078-U-12-6427 DECISION 12134-C - MRNE DECISION OF COMMISSION ON REMAND FROM SUPERIOR COURT

Morgan B. Damerow, Assistant Attorney General, and *E. Earl Key*, Assistant Attorney General, Attorney General Robert W. Ferguson, for Washington State Ferries.

Robert H. Lavitt, Attorney at Law, Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, for the Inlandboatmen's Union of the Pacific.

On July 12, 2016, the Thurston County Superior Court issued a decision in the Washington State Ferries' appeal of *Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134-A (MRNE, 2015). The Court remanded the matter to the Commission with instructions to strike the portion of the Commission's decision that the Court found to be a misstatement of the law on page 7.

In Decision 12134-A, the Commission affirmed the Findings of Fact, Conclusions of Law, and Order issued by the Examiner. In the text of Decision 12134-A, the Commission explained its reading of *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d 338 (1986). In conformity with the Court's order, the portion of Decision 12134-A that the Court found to be in error is deleted and we enter the following revised decision.

The Washington State Ferries (employer) filed an unfair labor practice complaint alleging that the Inlandboatmen's Union of the Pacific (union) breached its good faith bargaining obligation by

insisting to impasse on nonmandatory subjects of bargaining. Examiner Erin J. Slone-Gomez conducted a hearing and concluded that the union did not refuse to bargain by insisting to impasse on nonmandatory subjects of bargaining because the union did not advance either disputed provision—Appendix A, Rule 5.02 or Appendix B, Rule 3.06—to interest arbitration.[1] Neither party appealed the Examiner's decision.

The Commission may, on its own motion, review any order issued under Chapter 391-45 WAC. WAC 391-08-640(1)(d) and (4). After the appeal period passed, the Commission reviewed the Examiner's decision. The issue raised by the complaint was an important one that presented a case of first impression that the Commission has not previously addressed. On September 10, 2014, Executive Director Michael Sellars notified the parties that the Commission was exercising its discretion to review the decision.

The parties were allowed to file briefs and response briefs, which we have considered. During the period between the Commission taking review and the parties filing their briefs, related agency decisions were discovered. We requested that the parties consider addressing those decisions in their briefs.

The issue, as framed by the preliminary ruling, is whether the union refused to bargain in violation of RCW 47.64.130(2)(c) and, if so, derivatively interfered in violation of RCW 47.64.130(2)(a) by insisting to impasse on proposals regarding relief employees, which were alleged to involve nonmandatory subjects of bargaining.

After carefully considering the record, briefing, and existing case law, we affirm the Examiner. The employer's unfair labor practice complaint alleged that the union bargained to impasse on nonmandatory subjects of bargaining. The union did not insist to impasse on either disputed provision. The only party that moved the disputed issues to impasse was the employer—the complaining party. There are other avenues available to the employer should it desire to delete

---

[1] *Washington State Ferries (Inlandboatmen's Union of the Pacific)*, Decision 12134 (MRNE, 2014).

language or change a practice involving what it believes to be a nonmandatory subject of bargaining.

BACKGROUND

The employer and union are parties to a collective bargaining agreement covering all Deck, Terminal, Shoregang, and Information Department employees. While the majority of employees work a fixed schedule at one of the employer's terminals, some employees work in relief and on-call positions. Relief employees are employees who work on a year-round basis and are offered at least 40 hours of work per week in the Terminal Department and 80 hours of work per work period in the Deck Department. Relief employees work shifts for employees who are not scheduled to work or work various assigned shifts.[2]

Appendix A of the collective bargaining agreement contains rules for Deck Department personnel. Appendix A, Rule 5 outlines rules for relief deck employees. The collective bargaining agreement contains a detailed procedure for dispatching relief employees by seniority. Rule 5.02 provides for "a minimum of forty (40) deck department AB relief personnel and six (6) OS relief personnel."

Appendix B of the collective bargaining agreement contains rules covering Terminal Department employees. Appendix B, Rule 3 outlines rules for terminal employee vacations and relief employees. Rule 3.06 provides for a minimum number of relief employees to work at each terminal.

The Negotiations Giving Rise to the Unfair Labor Practice Complaint

In the spring of 2012, the employer and union began negotiating a 2013-2015 collective bargaining agreement. The employer's initial proposal included deleting a portion of Appendix A, Rule 5.02 and deleting all of Appendix B, Rule 3.06 because the employer perceived those rules to be permissive subjects of bargaining.

---

[2] Exhibit 1, Rule 1.14.

The union did not agree that including the number of relief and on-call employees in the collective bargaining agreement were permissive subjects of bargaining. The union rejected the employer's proposal and did not agree to delete the language.

The parties engaged in mediation.[3] The parties did not reach an agreement in mediation. The employer and union submitted issues for certification to interest arbitration. The employer submitted Appendix B, Rule 3.06 among its list of issues for certification to interest arbitration. Neither the employer nor the union submitted Appendix A, Rule 5.02 for certification to interest arbitration. On August 14, 2012, Executive Director Michael Sellars certified the parties to interest arbitration.[4] Appendix B, Rule 3.06 as submitted by the employer was certified to interest arbitration. Appendix A, Rule 5.02 was not certified to interest arbitration since it was not submitted for certification.

On August 15, 2012, the employer filed its unfair labor practice complaint alleging that the union insisted to impasse on nonmandatory subjects of bargaining. On August 16, 2012, the unfair labor practice manager issued a preliminary ruling for union refusal to bargain by insisting to impasse on alleged nonmandatory subjects of bargaining.

ANALYSIS

Applicable Legal Standards

Bargaining Procedures

The collective bargaining law for marine employees of the Washington State Department of Transportation sets forth the impasse procedures for the covered employees. The employer and union must bargain impasse procedures. RCW 47.64.200. If the employer and the union are unable to agree on impasse procedures, then "the impasse procedures provided in RCW 47.64.210 and 47.64.230 and 47.64.300 through 47.64.320 apply." *Id.*

---

[3] Case 24916-M-12-7502.

[4] Case 25033-I-12-0601.

The parties may request that the Commission appoint a mediator. RCW 47.64.210. The parties may agree to "waive mediation and proceed with binding arbitration as provided for in the impasse procedures agreed to under RCW 47.64.200 or in 47.64.300 through 47.64.320, as applicable." RCW 47.64.230. If—after negotiations and, when applicable, mediation—the mediator recommends the parties are at impasse, "*all impasse items shall be submitted to* arbitration under this section. The issues for arbitration shall be limited to the issues certified by the executive director." RCW 47.64.300(1) (emphasis added).

Duty to Bargain

The employer and a union representing ferry system employees "shall meet at reasonable times to negotiate in good faith with respect to wages, hours, working conditions, and insurance, and other matters mutually agreed upon." RCW 47.64.120(1). The employer shall not bargain over the rights of management as identified in RCW 41.80.040. RCW 47.64.120(3).

Whether a particular subject is a mandatory subject of bargaining is a mixed question of law and fact for the Commission to decide. WAC 391-45-550. To decide, the Commission applies a balancing test on a case-by-case basis. The Commission balances "the relationship the subject bears to [the] 'wages, hours and working conditions'" of employees and "the extent to which the subject lies 'at the core of entrepreneurial control' or is a management prerogative." *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of Richland)*, 113 Wn.2d 197, 203 (1989). The decision focuses on which characteristic predominates. *Id.*

While the balancing test calls upon the Commission and its examiners to balance these two principal considerations, the test is more nuanced and is not a strict black-and-white application. Subjects of bargaining fall along a continuum. At one end of the spectrum are grievance procedures and "personnel matters, including wages, hours and working conditions," also known as mandatory subjects of bargaining. RCW 41.56.030(4). At the other end of the spectrum are matters "at the core of entrepreneurial control" or management prerogatives. *International Association of Fire Fighters, Local 1052 v. Public Employment Relations Commission (City of*

Richland), 113 Wn.2d at 203. In between are other matters, which must be weighed on the specific facts of each case. One case may result in a finding that a subject is a mandatory subject of bargaining, while the same subject, under different facts, may be considered permissive.

An interest arbitration eligible party can bargain to impasse and seek interest arbitration of a mandatory subject of bargaining. *City of Bellevue*, Decision 11435-A (PECB, 2013). A party commits an unfair labor practice violation when it bargains to impasse over a permissive subject of bargaining. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 338. It is well established that if a subject of bargaining is permissive, parties may negotiate, but each party is free to bargain or not to bargain and to agree or not to agree. *Pasco Police Officers' Association v. City of Pasco*, 132 Wn.2d 450 (1997); *Whatcom County*, Decision 7244-B (PECB, 2004). Including a permissive subject of bargaining in a collective bargaining agreement does not render that subject mandatory. *See Allied Chemical and Alkali Workers of America, Local 1 v. Pittsburgh Plate Glass Company*, 404 U.S. 157 (1971). Agreements on nonmandatory subjects of bargaining "must be a product of renewed mutual consent" and expire with the parties' collective bargaining agreement. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 338.

Suspension of Interest Arbitration

If a party believes that a nonmandatory subject of bargaining is being advanced to interest arbitration, it may file an unfair labor practice complaint against the party that insisted to impasse on the nonmandatory subject. The party claiming that a nonmandatory subject of bargaining is being advanced to interest arbitration must have communicated its concern to the other party "during bilateral negotiations and/or mediation." WAC 391-55-265(1)(a).

The objecting party must file and process an unfair labor practice complaint prior to the conclusion of the interest arbitration proceedings if the party advancing the proposal has not withdrawn or cured the proposal. *Id.* If a preliminary ruling is issued under WAC 391-45-110, the executive director suspends the certification of the disputed issues for interest arbitration. WAC 391-55-265(1)(c).

The suspension of the issues remains in effect until a final ruling is made on the unfair labor practice complaint. *Id.* If any issues were unlawfully advanced or affected by unlawful conduct, the issues shall be stricken from the certification issued under WAC 391-55-200, and the party advancing the proposal shall only be permitted modified proposals that comply with the remedial order in the unfair labor practice proceedings. WAC 391-55-265(2)(a). If the suspended issues were lawfully advanced, the suspension shall be terminated and the issues shall be remanded to the interest arbitration proceedings for a ruling on the merits. WAC 391-55-265(2)(b).

Notably, the rule does not address conduct for allegations of bargaining permissive subjects to impasse that were not advanced to interest arbitration. If an issue were bargained to impasse but then not advanced to interest arbitration, there would be no need to suspend the certification.

Application of Standards

The issue presented in this case, while addressed in other agency decisions, has never been considered by the Commission. That question is whether a claim for refusal to bargain by insisting to impasse can be made against a party who does not submit those disputed issues to interest arbitration.

At the outset, the Commission notes that the parties cite to and discuss the holding in *Klauder*. Agency cases have broadly interpreted *Klauder* and cite it for propositions that are not in the case. *See Washington State Ferries*, Decision 11242 (MRNE, 2011); *City of Bellevue*, Decision 11435-A. This creates confusion that we feel compelled to address.

The parties in *Klauder* included a provision in their collective bargaining agreement for interest arbitration of disputes over future collective bargaining agreements. *Klauder v. San Juan County Deputy Sheriffs' Guild*, 107 Wn.2d at 339. In negotiations for a subsequent agreement, the employer proposed removing the interest arbitration provision. *Id.* at 340. At interest arbitration, the arbitrator continued to include the interest arbitration provision. *Id.* The Supreme Court found that the arbitrator exceeded his authority by perpetuating the interest arbitration provision in the collective bargaining agreement. *Id.* at 344-345.

Klauder stands for three propositions. First, parties need not bargain over permissive or nonmandatory subjects, "including those that deal with the procedures by which wages, hours and the other terms and conditions of employment are established." *Id.* at 341-342. Second, interest arbitration provisions are permissive subjects of bargaining. *Id.* at 342. Third, "[i]t is an unfair labor practice to bargain to impasse over a nonmandatory subject." *Id.*

In this instance, Chapter 47.64 RCW dictates the impasse procedures. All impasse items shall be submitted to impasse arbitration under RCW 47.64.300. RCW 47.64.300(1). Only those items certified by the executive director of this agency can proceed to interest arbitration. *Id.* Typically, allegations that a party has unlawfully insisted to impasse over a permissive subject involve issues that have been certified for interest arbitration. When we decide those cases, we first determine whether any issue certified is mandatory or permissive because the issue of whether impasse exists has been answered by the inclusion of the issue in the certification for interest arbitration. Under the facts of this case, we determine first whether impasse existed. If so, then we will examine whether the issues are mandatory or permissive.

In this case, the employer proposed deleting or modifying two rules in the collective bargaining agreement on the basis that those rules were nonmandatory, or permissive, subjects of bargaining. The union disagreed, asserting the rules were mandatory subjects of bargaining. The parties did not reach agreement. The union did not submit either rule to interest arbitration. The employer submitted one of the two rules to interest arbitration.

For interest arbitration eligible parties, a refusal to bargain by insisting to impasse only occurs where the party advances a nonmandatory subject of bargaining to interest arbitration. *City of Lynnwood*, Decision 7637 (PECB, 2002); *City of Richland (International Association of Fire Fighters, Local 1052)*, Decision 1225 (PECB, 1981); *see also Spokane International Airport (International Association of Fire Fighters, Local 1789)*, Decision 7889-A (PECB, 2003).

From the failure of the union to submit Appendix A, Rule 5.02 to interest arbitration, we must conclude that the union did not insist to impasse on Appendix A, Rule 5.02. With respect to

Appendix B, Rule 3.06, the employer—the complaining party—submitted the issue for certification to interest arbitration. Therefore, the union did not insist to impasse on a nonmandatory subject of bargaining and did not commit an unfair labor practice. As a result, we need not address whether the provision is a mandatory subject of bargaining.

Conclusion

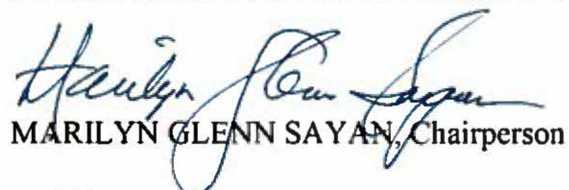
The statute requires that all impasse items be submitted to interest arbitration. The union did not submit the disputed issues to interest arbitration. The union did not refuse to bargain by insisting to impasse on nonmandatory subjects of bargaining.

ORDER

The Findings of Fact, Conclusions of Law, and Order issued by Examiner Erin J. Slone-Gomez are AFFIRMED and adopted as the Findings of Fact, Conclusions of Law, and Order of the Commission.

ISSUED at Olympia, Washington, this 4th day of August, 2016.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



MARILYN GLENN SAYAN, Chairperson

THOMAS W. McLANE, Commissioner

MARK E. BRENNAN, Commissioner

PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
THOMAS W. McLANE, COMMISSIONER
MARK E. BRENNAN, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

RECORD OF SERVICE - ISSUED 08/4/2016

DECISION 12134-C - MRNE has been mailed by the Public Employment Relations Commission to the parties and their representatives listed below:

BY: VANESSA SMITH

CASE NUMBER: 25078-U-12

EMPLOYER: WASHINGTON STATE FERRIES
ATTN: FRANKLIN PLAISTOWE
OFFICE OF FINANCIAL MANAGEMENT
2ND FL RAAD BLDG
128 10TH AVE SW
PO BOX 47500
OLYMPIA, WA 98504
labor.relations@ofm.wa.gov
(360) 407-4140

REP BY: MORGAN B. DAMEROW
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DRIVE SW
PO BOX 40145
OLYMPIA, WA 98504-0145
morgand@atg.wa.gov
(360) 586-2466

E. EARL KEY
OFFICE OF THE ATTORNEY GENERAL
7141 CLEANWATER DR SW
PO BOX 40145
OLYMPIA, WA 98504-0145
earlk@atg.wa.gov
(360) 664-4167

PARTY 2: INLANDBOATMEN'S UNION OF THE PACIFIC
ATTN: PETER HART
1711 W NICKERSON ST STE D
SEATTLE, WA 98119
peter@ibu.org
(206) 284-5040

REP BY: ROBERT H. LAVITT
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT LLP
18 W MERCER ST STE 400
SEATTLE, WA 98119-3971
lavitt@workerlaw.com
(206) 285-2828