STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the joint petition of:	)	
SEATTLE/KING COUNTY BUILDING AND CONSTRUCTION TRADES COUNCIL	)	CASE 11246-C-94-666
and	)	DECISION 5220 - PECB
SEATTLE SCHOOL DISTRICT	)	
For clarification of an existing bargaining unit.	)	ORDER CLARIFYING BARGAINING UNIT

Hafer, Price, Rinehart and Robblee, by Richard H. Robblee and Ann-Marie McKittrick, attorneys at law, appeared on behalf of the Seattle/King County Building and Construction Trades Council.

Perkins Coie, by Lawrence B. Hannah and Paul E. Smith, attorneys at law, appeared on behalf of the employer.

Schwerin, Burns, Campbell and French, by Cheryl French, attorney at law, appeared on behalf of the intervenor, International Union of Operating Engineers, Local 609.

On July 22, 1994, the Seattle School District and the Seattle/King County Building and Construction Trades Council jointly filed a petition for clarification of an existing bargaining unit with the Public Employment Relations Commission. They asserted that backhoe operator work belongs to a bargaining unit of employees represented by the Trades Council, and that another union had asserted a claim to that work on behalf of a bargaining unit which it represents. International Union of Operating Engineers, Local 609, was granted intervention in the proceedings. A hearing was held at Seattle, Washington, on November 29 and 30, 1994, before Hearing Officer J. Martin Smith. On January 4, 1995, the Trades Council filed a motion for dismissal along with a memorandum of authorities. The employer and Local 609 filed briefs by February 9, 1995.

BACKGROUND

The Employer's Organizational Structure

The employer's building repair and small construction projects are the responsibility of the Maintenance Section of its Facilities Department. The workforce in that section consists of skilled personnel, including many who perform traditional duties of the building trades crafts. The employer's maintenance workforce has recently numbered between 120 and 140 employees, but has varied in the past between 75 and 150 employees. Those employees are based at the employer's maintenance facility in south Seattle, but are dispatched to projects at various employer-operated facilities throughout the city of Seattle.

The employer's routine building operations, building cleaning, and groundskeeping functions are the responsibility of the Operations Section of its Facilities Department. The workforce in that section consists of about 350 employees with a variety of skill levels, ranging from sweepers to licensed boiler operators. The groundskeepers were separated from the Maintenance Section in 1982 and were based at the maintenance facility until a few weeks before the hearing in this matter, but now work out of a "north annex" facility. The custodians and custodian/engineers are assigned to the employer's various schools and facilities.

The Labor Organizations Involved

This dispute, and the history which precedes it, actually involves four labor organizations.

The Trades Council -
The Seattle/King County Building and Construction Trades Council (Trades Council) is an umbrella organization consisting of local unions having various national affiliations. The employer and the

Trades Council are parties to a "1992-95 Collective Bargaining Agreement" which is to remain in effect through August 31, 1995. That agreement was signed by officials of 13 local organizations:

Asbestos Workers Local 7
Bricklayers Local 2
Carpenters District Council
Carpet, Linoleum & Soft Tile Layers Local 1238
Cement Masons Local 528
International Brotherhood of Electrical Workers Local 46
Glaziers & Glassworkers Local 188
Building Laborers Local 242
Painters District Council
Plasterers Local 77
U.A. Plumbers & Pipefitters Local 32
Roofers Local 54
Sheet Metal Workers Local 66

All of the employees covered by that agreement work in the Maintenance Section of the employer's Facilities Department.

The Trades Council and 12 unions submitted a request for recognition to the employer in May of 1968, seeking to represent employees performing maintenance work on the employer's facilities.[1] The early history of bargaining between the employer and Trades Council was described in a previous Commission decision, as follows:

> On March 21, 1969, the council and the school district signed a collective bargaining agreement consisting of five articles and an appendix. The articles were titled "recognition", "compensation of employees", "procedure for adjusting compensation", "union security", and "duration". The duration clause specified that the contract would be in effect from March 21, 1969 through July 1, 1970, and further provided:
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> > This agreement is subject to notice for reopening or cancellation on or by May 1, of each year. In absence of notice, it will continue from year to year.

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[1] Allowing for minor adjustments of names, the list of unions in the 1968 request appears to be the same as that found in the 1992-95 contract, except that "Carpenters District Council" was not listed in the 1968 document.

> The appendix listed a number of construction labor contracts between members of the council and various private employers in King County. Under terms of the March 21, 1969 agreement, **compensation for school district employees represented by the council would be set according to the rates established in the areawide contracts** listed in the appendix. The March 21, 1969 agreement defined "compensation" to include wages, overtime, health and welfare, vacations, holidays, leaves and pensions. **When compensation was increased in one of the area-wide contracts, the appropriate union business agent was to notify the school district and increases would then be implemented.**
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> From March of 1969 through the early part of 1981, the school district followed the terms of the agreement and made changes in compensation when notified. During this period, **the agreement was not renegotiated.**

Seattle School District, Decision 1803 (PECB, 1984) [emphasis by **bold** supplied].

The 1969 contract bore signatures on behalf of same 12 local unions that co-signed the recognition request.[2] The documents from 1968 and 1969 make no reference to the International Union of Operating Engineers (IUOE), or to any local affiliate of that organization.

Collective bargaining agreements between the employer and Trades Council for 1985-88, 1988-90 and 1990-91 periods bore signatures on behalf of 12 local unions.[3] Again, there was no reference to the IUOE, or to any of its local organizations.

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[2] A finding of fact in Decision 1803 stated 18 unions were associated with the Trades Council, but this record does not confirm or explain that statement. International Association of Machinists, Local Lodge 289, was added to the coverage of the 1969 contract by an undated memo, but there is no subsequent reference to that union.

[3] The gap in contracts between 1969 and 1985 is explained by operation of the automatic renewal clause described in Decision 1803, supra. The Carpenters District Council was added to the list of signatories in 1985, but Plasterers Local 77 was omitted from the signatories at that time.

A collective bargaining agreement between the employer and Trades Council for 1991-92 had the same list of 13 unions that appears in the current agreement.[4] Again, there was no reference to the IUOE, or to any local affiliate of that organization.

Laborers International Union, Local 242 -
Hod Carriers and General Laborers Union, Local 242, has been a participant in the Trades Council at all times since 1968. It represents employees who perform work at the Seattle School District under the collective bargaining agreement between the employer and the Trades Council. At least in the recent past, the backhoe work at issue in this proceeding has been performed by employees who are members of Local 242.

International Union of Operating Engineers, Local 302 -
Local 302 is a construction local. At times in the past, the Seattle School District has had employees who were members of Local 302. None of the collective bargaining agreements between the employer and the Trades Council mention Local 302, however, and the record does not contain any written collective bargaining agreement between the Seattle School District and Local 302.

International Union of Operating Engineers, Local 609 -
Local 609 is a general maintenance local which only represents employees of the Seattle School District. The employer and Local 609 are parties to a three-year collective bargaining agreement that is effective until 1997, covering a bargaining unit of gardeners and custodians.[5] Local 609 has not been a participant in any of the transactions or contracts between the employer and the Trades Council.

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[4] Plasterers Local 77 returned to the list, after being absent since 1985.

[5] Local 609 also represents separate bargaining units of the employer's food service and security personnel.

The Backhoe Equipment

The employer owns two tractors equipped with backhoe attachments: One is a newer John Deere model which has recently been in the primary machine used; the other is an older Ford model that has recently been used only as a "spare" or for moving materials at the maintenance facility in south Seattle. Each of those machines also has a front-end loader bucket.

During the past few years, the backhoes have been operated an average of 20 hours per month or less. The backhoes are most often used to dig ditches for sewers or water supply systems. They are also used in site preparation for playground equipment, including digging footings and placing materials (such as woodchips and pea gravel). The front-loaders are also used to plant trees, to load trucks, and in the demolition of old playground equipment. Both backhoes are kept at the maintenance facility. The John Deere tractor is moved from one worksite to another by means of a large trailer, towed by a dump truck. The truck is driven by an employee who is represented by the Teamsters Union.

The employer also has a "farm tractor" and a "bobcat", each of which is equipped with a front-end loader of smaller capacity than the backhoe-equipped tractors. The smaller machines are used by groundskeepers represented by Local 609.

Staffing History

The employer's backhoe equipment has been operated in the past by employees assigned to its Maintenance Section. The principal operator of the backhoe since 1988 has been Lyle Conner, a member of Local 242 who is the foreman of the "laborers" trade under the Trades Council contract. The backup operator has been Verle Mead, who is also a member of Local 242 working as a laborer under the contract between the employer and the Trades Council.

Many years ago, a Seattle School District employee named Henry Austin operated the employer's backhoe equipment. He retired in 1982, but returned to work up to 39 hours per month for several years after his retirement.[6] There was testimony recalling that Austin was a member of Local 302, but the record does not contain any documentation establishing that his wages, hours or working conditions were negotiated by Local 302 with this employer.

In 1985, a Seattle School District employee named Norm Rammage was operating a tractor-based piece of equipment known as a "gang mower". A dispute arose between Local 302 and Local 609 concerning the mower work, and an IUOE international representative interceded to resolve that controversy. On July 25, 1985, an official of Local 302, an official of Local 609, and an employer official all signed a memorandum of understanding,[7] as follows:

> On July 25, 1985, the parties signatory to this agreement met to determine an equitable solution and settlement to a jurisdictional issue pertaining to the operation of a "gang mower" being utilized by Seattle School District #1, hereafter referred to as the District.
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> At this meeting the parties have agreed to the following four-part settlement:
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> 1. That the complete and total jurisdiction over the **operation of all mowing equipment, including the gang mower**, be transferred from Local 302 to Local 609 of the International Union of Operating Engineers, AFL-CIO. I.U.O.E. **Local 302 shall retain its customary craft jurisdiction over all other equipment traditional to its craft.**
> 2. The current operator of the gang mower shall be grandfathered into the existing Local

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[6] To the extent that their tenures overlapped, Lyle Conner performed the backhoe assignments for the three-fourths or more of each month that Austin did not work.

[7] Contrary to testimony that the document was prepared by the unions, a "PSK:krr" notation on the document suggests its author was employer official Phillip S. Knudsen.

> 609-A labor agreement under the new classification heading of Grounds Equipment Operator. The employee's revised pay rate shall be $11.28 per hour in addition to all other wage, benefit, leave and seniority considerations provided under the terms of the existing or future Local 609-A labor agreements. New employees for this position shall be selected in accord with the provisions of the Local 609-A agreement.
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> 3. The operator of the gang mower shall be responsible for the operation of said mower including operation of the attached front-end loader as assigned by the District. The gang mower operator may be assigned other gardener duties as conditions may warrant.
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> 4. A new job title shall be created, Grounds Equipment Operator, and shall be placed in the same rate range as Sub-Foreman Landscaping.
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> [Emphasis by underline in original; emphasis by **bold** supplied.]

There is no evidence that the Seattle School District's board of directors ever considered or ratified either: (1) a voluntary recognition of Local 302; or (2) the July 25, 1985 memorandum of understanding. Knudsen authorized a salary adjustment for Rammage to implement that agreement in September of 1985, however, and Rammage did change his membership from Local 302 to 609.[8]

On September 29, 1993, Local 302 and Local 609 jointly sent a letter to the employer, as follows:

> This letter is to inform you that the jurisdiction over the operations of the backhoe in the Seattle School District is being transferred

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[8] An "equipment operator" classification was not mentioned in the collective bargaining agreements between the employer and Local 609 until their 1991-94 contract. It appears in Appendix B-1 (the wage and salary schedule) of the current contract as an addition to a "sub-foreman landscape" job title which had been in the contracts between those parties dating back to at least 1983.

> from Local 302 of the International Union of Operating Engineers to Local 609 of the International Union of Operating Engineers. Local 302 shall retain its customary craft jurisdiction over all other equipment traditional to its craft.
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> This agreement was reached between the two Locals because of the Districts limited use of the backhoe. On July 25, 1985Local [sic] 302 and Local 609 of the I.U.O.E. settled a jurisdictional issue on the operation of the gang mower and front-end loader being used by the Seattle School District. This current transfer of jurisdiction to Local 609 is to enable the I.U.O.E. to supply a qualified operator to the District. The intent of this Agreement is to have an operator on staff eliminating the need to request an operator out of the hall on a day to day basis.

In a letter dated October 1, 1993, Local 609 proposed to expand the "equipment operator" job to include the backhoe work.

The employer responded by letter dated October 29, 1993, noting that the backhoe work had been performed for some time by a member of Local 242 working under the Trades Council contract, and that the employer had no contractual relationship with Local 302.

An exchange of further correspondence ensued, including the filing of a grievance by Local 609 in February of 1994. By May of 1994, the Trades Council had spoken up in opposition to arbitration of the matter under the collective bargaining agreement between Local 609 and the employer. The Trades Council and employer then filed the petition to initiate this proceeding in July of 1994.

In October and November of 1994, the employer and Local 609 exchanged further correspondence with and through the American Arbitration Association. On November 18, 1994, Arbitrator Gary L. Axon denied the employer's motion to dismiss the grievance as "not substantively arbitrable", but held the grievance in abeyance pending the outcome of this unit clarification proceeding.

POSITIONS OF THE PARTIES

The employer argues that unit clarification proceedings before the Commission are the only method to resolve a dispute involving two of the unions with which it has collective bargaining relationships. It contends the pending arbitration with only one of those unions is not a proper forum for resolving such a dispute. As to the merits of the dispute, the employer urges the backhoe work should be left with members of Laborers Local 242, under the agreement between the employer and the Trades Council.

Although it joined in initiating this proceeding, the Trades Council later argued that the Commission lacks jurisdiction to determine this controversy. It did not call or examine witnesses at the hearing in this matter.

Local 609 argues that this dispute should be resolved through the grievance and arbitration machinery of its collective bargaining agreement with the employer, reasoning that this dispute concerns a work assignment rather than the representation of employees. In the alternative, Local 609 argues that bargaining history shows the backhoe work falls within the "equipment operator" classification under its contract with the employer.

DISCUSSION

The Jurisdiction of the Commission

This dispute arises out of employment and collective bargaining relationships governed by the Public Employees' Collective Bargaining Act, Chapter 41.56 RCW. The state statute is patterned after the federal National Labor Relations Act, as amended by the Labor-Management Relations Act of 1947 (LMRA), but there are many differences between the state and federal laws. Several of those

differences are of particular importance in analysis of the issues presented in this case:

* Unlike sections 7 and 13 of the LMRA, Chapter 41.56 RCW does not confer or protect a right to strike. RCW 41.56.120 was enacted in the context of a holding by the Supreme Court of the State of Washington that strikes by public employees are unlawful under the common law. Port of Seattle v. International Longshoremen's and Warehousemen's Union, 52 Wn.2d 317 (1958). Thus, the state law does not tolerate "recognition strikes" in a manner comparable to the 30-day period allowed by Section 8(b)(7)(C) of the LMRA. In the event of any dispute concerning the representation of employees, RCW 41.56.050 directs that the matter be submitted to the Commission for a peaceful resolution through administrative adjudication.

* Chapter 41.56 RCW does not contain language comparable to the "construction industry proviso" found in Section 8(f) of the LMRA, which permits "pre-hire" recognition agreements. Regardless of how construction industry unions might be accustomed to operating in the private sector, the Commission must administer Chapter 41.56 RCW for building trades crafts employees under the same rights and procedures applicable to all other public employees.

* Chapter 41.56 RCW does not contain language comparable to Section 10(k) of the LMRA, under which the National Labor Relations Board (NLRB) is directed to withhold processing of unfair labor practice charges alleging violation of Section 8(b)(4)(D) of the LMRA, if the parties resolve (or take timely steps to resolve) a work assignment dispute. That must be considered in the context that Section 8(b)(4) is a limitation on the right to strike otherwise granted by the federal law. There was no need for our Legislature to write provisions duplicating strike-limiting provisions of the federal law, when it never granted any right to strike.

The Commission's Authority -

The Legislature delegated unit determination authority to the Commission in broad terms. RCW 41.56.060. Unit determination is

not a mandatory subject of collective bargaining in the usual mandatory/permissive/illegal sense. City of Richland, Decision 279-A (PECB, 1978), affirmed 29 Wn.App. 599 (Division III, 1981), review denied 96 Wn.2d 1004 (1981). Parties are not entitled to take unit determination issues to "impasse", and certainly are not entitled to engage in a strike or lockout to enforce their demands on unit determination issues. Spokane School District, Decision 718 (EDUC, 1979).

The Commission has exercised a firm hand in the resolution of disputes concerning the scope of bargaining units, and in the allocation of positions where two or more bargaining units have colorable claim to the work of those positions. See, King County, Decision 4569 (PECB, 1993). The Commission has also identified a close interrelationship between the description of a bargaining unit and the work jurisdiction claims of that bargaining unit:

> In a series of decisions over nearly the entire history of this agency, **the Commission and its staff have dealt with difficult problems relating to work jurisdiction claims closely tied to the descriptions of appropriate bargaining units.** The first of those cases, South Kitsap School District, Decision 472 (PECB, 1978), established the principle that an employer must give notice and provide opportunity for collective bargaining before transferring work historically performed within one bargaining unit to employees outside of that bargaining unit.15/ Hence, an employer and all unions representing its employees need to pay close attention to the work jurisdiction borderlines between bargaining units. [footnote omitted]
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> In a subsequent case, South Kitsap School District, Decision 1541 (PECB, 1983), a bargaining unit structure which bifurcated that employer's

15/ The situation in South Kitsap has come to be called "skimming" of unit work. The interests and legal principles in such a situation are fundamentally the same as when bargaining unit work is "contracted out" to employees of another employer. See, also, Fibreboard Paper Products, 379 U.S. 203 (1964).

> office-clerical workforce was found inappropriate, due to conflicting work jurisdiction claims which had arisen (and were likely to arise on an ongoing basis) in such an environment. Other unit configurations rejected on the basis of historical or potential fragmentation of work jurisdiction include City of Seattle, Decision 781 (PECB, 1979) and Skagit County, Decision 3828 (PECB, 1991), where separate units of part-time employees were found inappropriate because of conflicts with bargaining units of full-time employees performing similar work.

Castle Rock School District, Decision 4722-B (EDUC, 1994) [emphasis by **bold** supplied].

The Commission thus rejected an argument in Castle Rock that would have bifurcated a particular body of work, out of concern for creating an ongoing potential for work jurisdiction disputes.

Any argument that the present dispute "does not involve the representation of employees" is belied by Local 609's claim that Local 302 "ceded jurisdiction" to it. Such a theory certainly cannot be fit within the "assignment of work" category.

Any reluctance to use the NLRB's unit clarification procedures for work jurisdiction disputes appears to be directly related to the NLRB's specific (and limited) authority under Section 10(k). As noted above, that provision of the federal law is inapposite to parties and issues arising under Chapter 41.56 RCW.[9]

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[9] Upon the filing of a charge alleging a violation of Section 8(b)(4)(D) (i.e., "forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class"), the NLRB may respond with a hearing to take place within 10 days under Section 10(k). Such "statutory priority" cases are usually keyed by the threat of a strike. The NLRB may determine which union should be entitled to the disputed work. See National Labor Relations Board Casehandling Manual, 1989 edition, Sections 10208-10214.

Availability of Arbitration -
Local 609 urges the Commission to let an arbitrator resolve whether the backhoe work belongs to the custodian/grounds bargaining unit, based on the language of the contract(s). The fundamental problem with that approach is that, even if the dispute appears to involve an "assignment of work", it also involves the scope of appropriate bargaining unit monitored under RCW 41.56.060.

Parties may agree on unit matters, but such agreements are not binding on the Commission. City of Richland, supra. Arbitrators only draw their authority from the agreements of parties, so the Commission does not defer "unit" matters to arbitrators, and is not bound to consider or accept decisions issued by arbitrators on such matters.[10] For example, in Seattle School District, Decision 3979 (PECB, 1991), this employer asked the Commission to dismiss an unfair labor practice charge filed by Local 609, on the basis of an arbitration award arising out of another work jurisdiction dispute between Local 609 and the Trades Council. The arbitrator's award had embraced a settlement reached by Local 609 and Asbestos Workers Local 7, under which the disputed work was to be divided between two bargaining units. That solution was rejected as repugnant to the unit determination policies of the statute, however, citing City of Seattle, Decision 781 (PECB, 1979) and South Kitsap School District, Decision 1541 supra. The arguments for resolution of this controversy by arbitration or other arrangements agreed upon by some or all of the parties are thus without merit.

The Trades Council's motion for dismissal must be DENIED.

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[10] The Commission's policies on "deferral to arbitration" were restated in City of Yakima, Decision 3564-A (PECB, 1991). The Commission expressly refused to defer to arbitrators on issues other than "unilateral change / refusal to bargain" situations where the employer's conduct at issue in the unfair labor practice case was arguably protected or prohibited by an existing collective bargaining agreement.

Role and Authority of the IUOE Locals

The employer contends that the actions by International Union of Operating Engineers Local 302 to "cede jurisdiction" to Local 609 in 1985 and 1993 are without effect, because Local 302 had (and has) no collective bargaining relationship with the employer. The employer's position is well-taken.

Neither the fact that Seattle School District employees may have been members of Local 302, nor the fact that such employees may have been paid at a prevailing "construction" rate in the past establishes the existence of a collective bargaining relationship between the employer and Local 302. At a time when public sector collective bargaining was in its infancy,[11] the employer could well have been paying the prevailing rate based on a unilateral determination that it was the proper (now, "politically correct") thing to do.

The absence of any written record of any collective bargaining agreement between the employer and Local 302 is fatal. In State ex. rel. Bain v. Clallam County, 77 Wn.2d 542 (1970), the Supreme Court held that collective bargaining agreements under Chapter 41.56 RCW must be in writing to be valid. The Court reasoned that parties to such collective bargaining relationships are doing the public's business, and that written records preserve a more dependable history than the memories of surviving participants.

In view of the employer's agreement to pay the prevailing "construction" rates to at least some of its employees under its 1969 contract with the Trades Council, and in view of the curious reference to a larger number of union in Decision 1803, supra, the Executive Director has considered the possibility of an inference that the 1969 contract also bound the employer and Local 302. That

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[11] Chapter 41.56 RCW was first enacted in 1967.

analysis leads to a conclusion, however, that no such inference can be supported from this record:

* There is no affirmative evidence here that Local 302 was a member of the Seattle/King County Building and Construction Trades Council in 1969, or that it continued to be a Trades Council member throughout the time that Henry Austin was paid at the prevailing rate, or that it remained a Trades Council member when it purported to cede jurisdiction in 1985, or that it remained a Trades Council member when it purported to cede jurisdiction in 1993. A decision must be based on the evidence of record.

* Even if one were to assume that Local 302 was a member of the Trades Council in 1968 and 1969, the specificity of signatures on behalf of 12 unions in both the 1968 recognition request and the 1969 contract operate against an inference that those documents were to bind other unions.[12] Having been excluded from the paper trail between the Trades Council and the Seattle School District, Local 302 had no jurisdiction to "cede" to Local 609.

The "cede jurisdiction" transaction of 1985 was not binding on the Commission, even if one were to conclude that Local 302 had some status with the Seattle School District. In one of its earliest decisions in the unit determination arena, Kent School District, Decision 127 (PECB, 1976), the Commission explicitly refused to be bound by agreements between unions to sort out work jurisdiction among themselves. South Kitsap School District, Decision 1541, supra, and King County, Decision 4569, supra, represent a continuation of the same policy. It is the right of employees to select a union, not the right of unions to barter or exchange employees or work as if they were commodities.

The 1985 agreement on the gang mower clearly did not address the backhoe work at issue in the present case. Austin was still

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[12] A different conclusion might be available had those early documents been signed only by officials of the Trade Council itself. Those are not the facts, however.

working part-time for the employer in 1985, and the reference to a reservation of jurisdiction over other work by Local 302 in the 1985 memorandum of understanding provides basis for an inference that Local 302 was attempting to hold onto the backhoe work.

Even if one were to conclude that Local 302 had some status with this employer in 1985, there is no evidence of any ongoing collective bargaining relationship between the employer and Local 302 between 1985 and 1993. RCW 41.56.070 imposes a three-year limit on collective bargaining agreements, so any lingering effect of the document signed by an employer official in 1985 would have expired by 1988. Conner began doing the backhoe work as a member of Laborers Local 242 in 1988. By late 1993, when Local 302 purported to cede jurisdiction over the backhoe work to Local 609, more than three years had passed since the last possible Local 302 member/claimant had faded from the scene.

Based on the foregoing, it is concluded that Local 609 has not, and could not have, acquired any rights to the backhoe work from Local 302.

Unit Determination Criteria

The Legislature has delegated responsibility to the Public Employment Relations Commission to determine the appropriate unit(s) for the purposes of collective bargaining:

> RCW 41.56.060. DETERMINATION OF BARGAINING UNIT -- BARGAINING REPRESENTATIVE. The commission, after hearing upon reasonable notice, shall decide in each application for certification as an exclusive bargaining representative, the unit appropriate for the purpose of collective bargaining. In determining, modifying, or combining the bargaining unit, **the commission shall consider the duties, skills, and working conditions of the public employees; the history of collective bargaining by the public employees and their bargaining representatives, the extent**

> **of organization among the public employees, and the desire of the public employees. ...**
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> [Emphasis by **bold** supplied.]

The Commission has described the unit determination function in the following fashion:

> [T]he purpose [of unit determination] is to group together employees who have sufficient similarities (community of interest) to indicate that they will be able to bargain collectively with their employer. The statute does not require determination of the "most" appropriate bargaining unit. It is only necessary that the petition-for unit be an appropriate unit. Thus, the fact that there may be other groupings of employees which would also be appropriate, or even more appropriate, does not require setting aside a unit determination.
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> City of Winslow, Decision 3520-A (PECB, 1990) [emphasis by underlining in original].

Unit determinations are made on a case-by-case basis. The Commission makes unit determination rulings in the context of representation cases under Chapter 391-25 WAC, but has also adopted Chapter 391-35 WAC as a streamlined set of rules for "modifying" bargaining units where no question concerning representation exists. The Commission has found units consisting of "all of the employees of the employer" to be appropriate, as in Winslow. It has also given general affirmation to the propriety of dividing an employer's workforce into two or more bargaining units:

> Units smaller than employer-wide may also be appropriate, especially in larger work forces. The employees in a separate department or division may share a community of interest separate and apart from other employees of the employer, based upon their commonality of function, duties, skills and supervision. Consequently, **departmental (vertical) units have sometimes been found appropriate** when sought by a petitioning union. [Footnote omitted.] Alternately, employees of a separate occupational type

> may share a community of interest based on their commonality of duties and skills, without regard to the employer's organizational structure. Thus, **occupational (horizontal) bargaining units have also been found appropriate**, on occasion, when sought by a petitioning union. ...
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> City of Centralia, Decision 3495-A (PECB, 1990) [emphasis by **bold** supplied].

Commission precedent indicates a policy concern against unnecessary fragmentation of workforces. City of Auburn, Decision 4880-A (PECB, 1995);[13] Forks Community Hospital, Decision 4187 (PECB, 1992);[14] Skagit County, Decision 3828 supra;[15] City of Vancouver, Decision 3160 (PECB, 1989);[16] and Port of Seattle, Decision 890 (PECB, 1980).[17]

Application of Unit Criteria

Duties, Skills and Working Conditions -

The testimony was clear that the Maintenance Section purchased and maintains the backhoe-equipped tractors. They are stored at and dispatched from the Maintenance Section facility. When the backhoe-equipped tractor is moved to a work site, it is attached to

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[13] Two "technician" positions were accreted to an existing bargaining unit, rather than risk creation of another (fragmentary) bargaining unit.

[14] A proposed clerical/service/maintenance/technical unit would still have stranded other "technical" positions outside of the unit, and so was found inappropriate.

[15] A long-standing agreement to exclude certain employees from a bargaining unit was deemed null and void, based on a conclusion that it created a work jurisdiction conflict.

[16] The petitioned-for unit would have stranded employees in units too small for them to ever implement their statutory bargaining rights, and was therefore deemed inappropriate.

[17] A petitioned-for unit would have artificially divided the employer's office-clerical workforce into two or more separate bargaining units, and so was rejected.

a tractor-trailer combination operated by Maintenance Section personnel.

Operation of the backhoe has consistently been accomplished by Maintenance Section personnel, even during the period when that work was done by a member of Local 302. The backhoes are used to support the work of other Maintenance Section trades, such as plumbers working on sewer and water systems. The current backhoe operator, Lyle Conner, is also foreman of the ten laborer employees who staff furniture-moving and asphalt crews operating out of the Maintenance Section.

Traditional lines of craft work jurisdiction are generally observed by employer and Trades Council. Discussions about work jurisdiction are an ongoing occurrence in this workforce, including disputes between the Trades Council and Local 609.[18] If one were to infer or assume that Henry Austin was compensated pursuant to the contract between the employer and the Trades Council, that would reinforce a conclusion that the backhoe work belongs to that bargaining unit, and not to the bargaining unit represented by Local 609.

The existence of an incomplete position description for an "equipment operator" is not conclusive. A compensation analyst for the employer testified that Exhibit 20 was considered in the autumn of 1992, but was never adopted as official, inasmuch as the four signatures required for approval were still blank. She maintained that no job description for "equipment operator" existed for the Operations Section, where members of Local 609 are employed. The equipment operator classification mentioned in the contract between the employer and Local 609 is logically, if not directly, traceable to the gang mower issue.

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[18] Laborers 242 recently objected to the assignment of a Local 609 member to use the Bobcat with an auger attachment to dig holes for fence posts at a school worksite.

The fact that one or more employee currently represented by Local 609 have the skills to operate the John Deere backhoe does not justify a change of the work from one bargaining unit to another. The controlling inquiry relates to the requirements imposed upon them by the employer to obtain their job, and the assignments actually given to them by the employer. See, Olympia School District, Decision 799 (PECB, 1980).

Local 609 argues that the groundskeepers operate the smaller machines equipped with front-loader buckets, but the work is not the same.[19] The partial similarities do not rebut a conclusion that the operation of the backhoe equipment is closely related to the maintenance bargaining unit represented by the Trades Council.

History of Bargaining -
Backhoe work has always been done by employees working under collective bargaining agreement between the employer and the Trades Council. The employer provided evidence indicating that no employees outside of the Maintenance Section are assigned to use the backhoe. In particular, on no occasion has the John Deere tractor been assigned to an Operations Section employee in the bargaining unit represented by Local 609. As detailed above, the actions of Local 302 purporting to "cede jurisdiction" to Local 609 are not binding on the Commission.

Extent of Organization -
This employer has numerous bargaining relationships with unions representing various bargaining units. The Trades Council brings together the traditional building trades crafts in one bargaining unit, and there are procedures in that contract for resolving "jurisdictional disputes" internal to that bargaining unit. A

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[19] It is evident from the testimony that neither the Bobcat nor farm tractor can perform the large-trench tasks that can be accomplished with the backhoe attachments on the John Deere and Ford tractors.

decision which placed some tasks traditionally performed within the Maintenance Section and the Trades Council bargaining unit into the Local 609 bargaining unit would create an intolerable potential for work jurisdiction issues whenever the backhoe was used.

The stated purpose of Local 302 and Local 609 was to enable the creation of a full-time position. It is true that backhoe work is only part of assigned tasks for Lyle Conner, but that is not a basis to upset the employer's internal structure or the alignment of bargaining units. The ideal of a full-time position is speculative, at best. The employer was content to buy the John Deere tractor from the City of Seattle as a piece of used equipment, consistent with an expectancy of part-time use. Local 242 and the Trades Council appear to have been content to having Lyle Conner perform backhoe work as only part of his assignments. It is not at all clear that assignment of the backhoe work to Local 609 would fill the gap between the historical usage of the backhoe (20 hours or less per month) to full-time (i.e., 173 hours per month).

Desires of Employees -
Where it is found that any of two or more different bargaining unit configurations could be appropriate, the Commission implements the "desires of employees" aspect of the statutory unit determination criteria by conducting a unit determination election. See WAC 391-25-530(1). See, City of McCleary, Decision 4503 (PECB, 1994); Globe Machine and Stamping, 3 NLRB 294 (1937). There is no occasion for a unit determination election in this case, because the unit configuration sought by Local 609 is inappropriate.

Conclusion

The backhoe work will remain within the work jurisdiction of the Trades Council. An arbitrator draws his authority from the agreements of the parties, and is without authority to address this matter.

FINDINGS OF FACT

1. The Seattle School District is operated pursuant to Title 28A RCW, and is a public employer within the meaning of RCW 41.56.030(2).

2. The Seattle/King County Building and Construction Trades Council, a bargaining representative made up of 13 organizations which are themselves bargaining representatives within the meaning of RCW 41.56.030(3), is the exclusive bargaining representative of certain building trades crafts employees working in the Maintenance Section of the Facilities Department of the Seattle School District. Laborers Local 242 is, and has at all relevant times been, a participating union in the Trades Council.

3. The Seattle School District owns two tractors equipped with backhoe attachments. Those machines were purchased by, and are maintained and dispatched by, the employer's Maintenance Section. At all times pertinent hereto, operation of the backhoe-equipped tractors has been by employees of the Maintenance Section. The work performed with the backhoe-equipped machines is generally in support of or in connection with work of other Maintenance Section employees represented by the Trades Council. Since 1988, operation of the backhoe-equipped tractors has been by employees who are members of Local 242 working under the collective bargaining agreement between the employer and the Trades Council.

4. International Union of Operating Engineers, Local 302, represents employees in the construction industry in the Seattle area. One or more members of Local 302 were employed by the Seattle School District in the past, but the last such employee retired in 1982 and ceased returning for part-time work in 1988. There is no written record of a collective

bargaining relationship or collective bargaining agreement between the Seattle School District and Local 302.

5. International Union of Operating Engineers, Local 609, a bargaining representative within the meaning of RCW 41.56.030-(3), is the exclusive bargaining representative of certain employees of the Seattle School District, including a bargaining unit of custodians and grounds employees working in the Operations Section of the employer's Facilities Department. Employees represented by Local 609 operate a "bobcat" and a tractor smaller than the employer's backhoe-equipped tractors, but have never been assigned to operate the backhoe machines.

6. In 1985, Local 302 purported to "cede jurisdiction" to Local 609 with respect to operation of a gang mower. That controversy had no relation to the operation of the backhoe-equipped machines. An agreement signed by Local 302, Local 609 and the employer appears to have led to the eventual inclusion of an "equipment operator" rate in the collective bargaining agreement between Local 609 and the employer.

7. In 1993, Local 302 purported to "cede jurisdiction" to Local 609 with respect to operation of the backhoe machines. A dispute has subsequently arisen between the employer, the Trades Council, and Local 609, concerning the work jurisdiction over the operation of the backhoe machines.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter pursuant to RCW 41.56.060 and Chapter 391-35 WAC.

2. The actions by Local 302 purporting to "cede jurisdiction" to Local 609 are without force and effect, in the absence of any

evidence of a written collective bargaining agreement between Local 302 and the employer under RCW 41.56.030(4).

3. The actions by Local 302 purporting to "cede jurisdiction" to Local 609 are without force and effect, inasmuch as they are an infringement on the unit determination authority of the Commission under RCW 41.56.060, and provide a result which is repugnant to the purposes and policies of Chapter 41.56 RCW.

4. Based on the duties, skills and working conditions of the employees, the history of bargaining and the extent of organization within the employer's workforce, the operation of the backhoe-equipped machines is properly allocated under RCW 41.56.060 to the bargaining unit of Maintenance Section employees represented by the Trades Council.

NOW, THEREFORE, it is

ORDERED

The operation of the backhoe shall remain within the work jurisdiction of the bargaining unit represented by the Trades Council.

Issued at Olympia, Washington, on the 10th day of August, 1995.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

MARVIN L. SCHURKE, Executive Director

This order will be the final order of the agency unless appealed by filing a petition for review with the Commission pursuant to WAC 391-35-210.