

ALASKA LABOR RELATIONS AGENCY
1016 WEST 6th AVENUE, SUITE 403
ANCHORAGE, ALASKA 99501-1963
(907) 269-4895 Fax (907) 269-4898

INTERNATIONAL ORGANIZATION)
OF MASTERS, MATES & PILOTS,)
AFL-CIO,)

Complainant,)

vs.)

STATE OF ALASKA,)

Respondent.)

INLANDBOATMEN'S UNION OF)
THE PACIFIC, ALASKA REGION 1,)
INTERNATIONAL LONGSHORE AND)
WAREHOUSE UNION,)

Complainant,)

vs.)

STATE OF ALASKA,)

Respondent.)

MARINE ENGINEERS' BENEFICIAL)
ASSOCIATION, AFL-CIO,)

Complainant,)

vs.)

STATE OF ALASKA,)

Respondent.)

CASE NO. 15-1668-OTH

DECISION AND ORDER NO. 304

We decided this "Motion for Clarification" after considering documents filed by the parties and reviewing the record in the original dispute in this matter. The record closed on September 11, 2015, after we received the unions' motion, subsequent documents (emails) from the State, and upon

completing deliberations after the parties informed the Agency they had not settled their disagreement.

Digest: The Motion for Clarification filed by the International Organization of Masters, Mates and Pilots, AFL-CIO; Marine Engineers' Beneficial Association, AFL-CIO; and the Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union is granted in accordance with this decision. The reimbursement for food and beverages in the amount of \$7.94 is calculated based on the retail price of food and beverages on the fast vehicle ferries.

Appearances: Rhonda Fenrich, attorney for Complainants International Organization of Masters, Mates and Pilots, AFL-CIO; Marine Engineers' Beneficial Association, AFL-CIO; and Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union; Kent Durand, Labor Relations Analyst, for Respondent State of Alaska.

Board Panel: Lynne Curry, Vice Chair; and Tyler Andrews, Board Member.¹

DECISION

Background and Statement of the Case

The International Organization of Masters, Mates and Pilots, AFL-CIO, Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union, and Marine Engineers' Beneficial Association, AFL-CIO (the unions) each filed unfair labor practice charges against the State of Alaska (the State). The unions alleged, among other claims, that the State committed unfair labor practices by unilaterally changing a mandatory subject of bargaining. Specifically, the unions contended that the State, without negotiating, stopped a nine-year practice of providing free meals and beverages to the unions' bargaining unit employees aboard the State's fast vehicle ferries (FVF's), the M/V Fairweather, and the M/V Chenega. The State denied the claims and argued that there was never a past practice of providing meals on board the FVF's.

Agency hearing officer Jean Ward investigated the complaints and found probable cause existed under AS 23.40.110(a)(5) and (1) to support a violation.² We subsequently heard the dispute over a four-day period in Juneau.

¹ Board Member Matthew R. McSorley participated on the panel in the original decision and order in this matter. However, his term expired on March 1, 2015. This Motion was filed and submitted to the remaining panel members when Mr. McSorley was not on the Board. Therefore, Board Members Curry and Andrews, the other two panel members on Decision and Order No. 303, participated in the determination of this Motion pursuant to AS 23.05.370(b).

² See "Notice of Preliminary Finding of Probable Cause" for case numbers 13-1633-ULP, 13-1635-ULP, 13-1636-ULP, 13-1637-ULP, each dated November 21, 2013.

After the hearing ended in the initial dispute, the parties filed written closing arguments. We completed deliberations and issued a decision and order, concluding that the State committed an unfair labor practice violation.³ We ordered the State to pay affected employees \$7.94 for food and beverages for each shift they worked on the fast vehicle ferries.

The parties subsequently negotiated but could not agree on whether the \$7.94 amount should be based on its wholesale or retail value. Consequently, the unions filed this motion for clarification, asking to clarify whether the amount ordered was for wholesale or retail (resale) value of the food and beverage.

Issues

1. Is the unions' motion for clarification timely?
2. If we find the unions' motion timely, is the \$7.94 amount awarded in Decision and Order No. 303 for food and beverage on board the fast vehicle ferries, to be calculated based on the retail value or the wholesale value of the food and beverages?

Findings of Fact

1. Decision and Order No. 303 outlines the history and facts of the original dispute in this matter. By way of brief summary, the unions filed unfair labor practice charges against the State, contending that the State, without negotiating, stopped a nine-year practice of providing free meals and beverages to bargaining unit members on board the fast vehicle ferries M/V Fairweather and M/V Chenega. After investigation, the agency's hearing officer found probable cause, and we heard the dispute in Juneau, taking testimony, evidence and arguments. After the parties filed written closing arguments, we deliberated and issued a Decision and Order. See *International Organization of Masters, Mates & Pilots, AFL-CIO vs. State of Alaska*, Case Nos. 13-1633-ULP, 13-1635-ULP; *Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union vs. State of Alaska*, Case No. 13-1636-ULP; *Marine Engineers' Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 13-1637-ULP (*Consol.*), Decision and Order No. 303 (February 27, 2015).⁴

³ See *International Organization of Masters, Mates & Pilots, AFL-CIO vs. State of Alaska*, Case Nos. 13-1633-ULP, 13-1635-ULP; *Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union vs. State of Alaska*, Case No. 13-1636-ULP; *Marine Engineers' Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 13-1637-ULP (*Consol.*), Decision and Order No. 303 (February 27, 2015).

⁴ We incorporate Decision and Order No. 303 by reference into this decision.

2. In Decision and Order No. 303, we concluded that,

[A]ccess to the food court and food services on board the fast vehicle ferries is a condition of employment and a mandatory subject of bargaining. The State committed a violation by failing to negotiate before it notified the employees represented by the unions that they must pay for food and drink purchases aboard the fast ferries.

(Decision and Order No. 303, at 23).

3. Among other things, we determined that bargaining unit member access to the fast ferry food courts over a nine-year period developed into a practice and became bargainable under *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977) (*Kenai I*). (Decision and Order No. 303, at 23).

4. We next determined, based on the evidence submitted into the original hearing record, that the State owed each employee \$7.94 per day. This amount was based on estimated averages of food consumption on the state ferry system's mainline vessels.

5. In Decision and Order No. 303, we issued the following Orders relevant to this motion:

....

2. The State of Alaska and the unions are ordered to initiate good faith bargaining . . . within thirty days of this decision about employee access to the food court and the consumption of food and beverages by employees on the fast vehicle ferries, the M/V Chenega and the M/V Fairweather.

3. The State of Alaska is ordered, as of the date of this decision, to provide employees who are not receiving per diem on the M/V Chenega and the M/V Fairweather an amount not to exceed \$7.94 in food and beverage for each shift the employee works, until such time as the parties have, through negotiations, reached an agreement concerning the terms and conditions of employment for employees' access to the food courts on the fast vehicle ferries. The parties shall be at impasse if they have not reached agreement by August 30, 2015.

(Decision and Order No. 303, at 27).

6. In Order Number 3 cited above, we did not attempt to decide the basis for the \$7.94 amount; that is, we did not attempt to determine whether this amount should be based on the wholesale value or the retail (resale) value of the food.

7. After we issued Decision and Order No. 303, the parties negotiated but were unable to reach agreement on the value basis for determining the \$7.94 amount ordered.

8. The unions filed a "Motion for Clarification" on June 19, 2015. The State filed email responses on July 16, July 28, and September 10, 2015.

9. In the hearing associated with Decision and Order No. 303, Kerry Crocker, a passenger service worker in charge aboard the M/V Fairweather, testified that he purchases food and keeps track of sales. He checks the cash register and documents the food that is consumed. There is a fixed dollar amount for consumption by the crew. (Decision and Order No. 303 at p. 9, Findings of Fact numbers 40 and 41).

10. Crocker further testified that there was never an accurate count for crew food costs. The amount estimated was an average taken from amounts associated with the mainline vessels. (Decision and Order No. 303 at p. 10, Finding of Fact number 45).

ANALYSIS

1. Is the unions' motion for clarification timely?

In an email filed on July 17, 2015, the State questioned the timeliness of the unions' motion for clarification. The email asserts that "[t]he motion itself seems too late or out of order pursuant to [AS] 44.62.540." (July 17, 2015 email from Kent Durand). The State reiterated this assertion in a September 10, 2015 email, contending that the motion "far exceeds the statutory limitations set out in AS 44.62.540." (September 10, 2015 email from Kent Durand).

AS 44.62.540(a) provides in pertinent part: "The agency may order a reconsideration of all or part of the case on its own motion or on petition of a party. To be considered by the agency, a petition for reconsideration must be filed with the agency within 15 days after delivery or mailing of the decision."

We issued Decision and Order No. 303 on February 27, 2015. The unions filed their Motion for Clarification on June 19, 2015, well past the 15-day deadline. The State would be correct if AS 44.62.540(a) applied here, because the unions' request was filed well beyond the 15-day deadline imposed in that statute. However, for the following reasons, we find that statute inapplicable in this case. AS 44.62.540(a) applies to an agency reconsideration of a case. Here, we have not previously considered the value basis of the \$7.94 the State owes affected fast ferry employees. Consequently, there is nothing from the original decision and order to reconsider. Therefore, we find AS 44.62.540(a) inapplicable to the unions' request for clarification.

Under our regulations, motions are filed pursuant to 8 AAC 97.390. Under this regulation, there is no time limit for filing motions, whether filed before or after issuance of a decision and order. In Decision and Order No. 303, we ordered the parties to initiate good faith bargaining regarding access to the food court and consumption of food and beverages on the fast vehicle ferries. We also ordered the State to pay affected employees \$7.94 for food and beverages "until such time as the parties have, through negotiations, reached an agreement" on access to food courts on the fast vehicle ferries. We did not provide the parties a value basis for this payment. We then

placed a deadline for negotiations: "The parties shall be at impasse if they have not reached agreement by August 30, 2015." (Decision and Order No. 303, page 27, Order number 3).

Based on the August 30 deadline and on our not providing a value basis for payment in our original decision, we find it is reasonable for a party to file a motion to clarify or request that we determine the cost or value basis (wholesale or retail) for the amount we ordered the State to pay in food and beverage (\$7.94). This dispute over the value basis of the State's payment arose after issuance of Decision and Order No. 303. Because of the parties' inability to reach a compromise on the value, employees have not been paid as we ordered. We frankly did not anticipate a dispute on this issue; and again, we did not previously attempt to or decide this issue.

For the purpose of implementing the Order in Decision and Order No. 303, we believe that it would work an injustice to ignore the specific request for clarification filed by the unions, notwithstanding the effects of any time limits. If we do not decide this issue, the parties would not know (short of reaching a compromise) the value basis for the \$7.94 amount. Accordingly, we conclude we have jurisdiction under 8 AAC 97.390 and find the motion is timely. We will decide this issue now.

2. If we find the unions' motion timely, is the \$7.94 amount awarded, awarded in Decision and Order No. 303 for food and beverage on board the fast vehicle ferries, to be calculated based on the retail value or the wholesale value of the food and beverages?

As we have found the unions' motion timely, we next decide the value basis of the food and beverages the State must pay bargaining unit employees; that is, we will determine whether the State should base payment on the wholesale or retail value of the food and beverage.

We find that the amount we ordered the State to pay in D&O 303 was for purchase of items in the food court, at the retail amount charged by the State. In other words, the fast vehicle ferry employees may use the \$7.94 for purchase of items in the food court, including the vending machines, at the same cost as that charged by the State to members of the public. We believe it is easier to base the value on a retail charge than on a more fluctuating wholesale value.

We base this value on the record submitted in Decision and Order No. 303. We again strongly urge the parties to sit down together, negotiate in good faith, and reach compromise on an amount for food and beverage based on the current realities rather than dated historical data about consumption of food on the mainline ferries. (See, e.g., D&O 303, Finding of Fact number 45, at 10). The parties may negotiate a different value which may or may not, for example, include an employee discount. Until then, the State shall pay \$7.94 which may be used to purchase food and beverages at their retail value.

CONCLUSIONS OF LAW

1. The International Organization of Masters Mates and Pilots, AFL-CIO (MM&P), the Marine Engineers' Beneficial Association, AFL-CIO (MEBA), and the Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union (IBU) are organizations under AS 23.40.250(5). The State of Alaska's Marine Highway System is a public employer under AS 23.40.250(7).

2. This agency has jurisdiction to determine whether payment of \$7.94 per fast vehicle ferry employee is based on the wholesale or retail value of the food and beverages aboard the boats.

3. As complainants, MM&P, MEBA, and IBU have the burden to prove each element of their claim by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

4. The value of the food and beverages is based on the retail value charged by the State to the public, and for the retail cost of items in vending machines.

ORDER

1. *International Organization of Masters, Mates & Pilots, AFL-CIO vs. State of Alaska*, Case Nos. 13-1633-ULP, 13-1635-ULP; *Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union vs. State of Alaska*, Case No. 13-1636-ULP; *Marine Engineers' Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 13-1637-ULP (*Consol.*), Decision and Order No. 303 (February 27, 2015) is clarified to provide that the State shall pay employees who are not receiving per diem on the M/V Chenega and the M/V Fairweather \$7.94 in food and beverage, at the retail value of these items, for each shift the employees work, until such time as the parties have, through negotiations, reached an agreement concerning the terms and conditions of employment for employees' access to the food courts on the fast vehicle ferries.

2. The State of Alaska is ordered to post a notice of this decision and order at all work sites where members of the bargaining unit affected by the decision and order are employed, or, alternatively, personally serve each employee affected. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Lynne Curry, Vice Chair

Tyler Andrews, Board Member

APPEAL PROCEDURES

This order is the final decision of this Agency. Judicial review may be obtained by filing an appeal under Appellate Rule 602(a)(2). Any appeal must be taken within 30 days from the date of mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *International Organization of Masters, Mates & Pilots, AFL-CIO vs. State of Alaska*, Case Nos. 13-1633-ULP, 13-1635-ULP; *Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union vs. State of Alaska*, Case No. 13-1636-ULP; *Marine Engineers' Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 13-1637-ULP (*Consol.*) (15-1688-OTH) dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 1st day of October 2015.

Margie Yadlosky
Human Resource Consultant I

This is to certify that on the ____ day of
October, 2015, a true and correct copy of the
foregoing was mailed, postage prepaid to:
Rhonda Fenrich, MM&P, MEBA, & IBU
Kent Durand, State of Alaska

Signature