

I. PROCEEDINGS

The Washington State Department of Transportation, which operates the Washington State Ferries (the State) and the Puget Sound Metal Trades Council (the Union) were unable to agree to a term of a new Collective Bargaining Agreement scheduled to take effect on July 1, 2011. The parties have agreed to all other provisions of that Collective Bargaining Agreement. The remaining issue was certified for interest arbitration by the Marine Employees Commission (MEC) and submitted to neutral arbitrator Jane R. Wilkinson for resolution. An evidentiary hearing was held in Seattle, Washington, on August 25, 2010. Each party had the opportunity to present evidence, examine and cross-examine witnesses and submit closing arguments regarding their respective positions. The proceeding was stenographically recorded by a court reporter; the arbitrator received the transcript on August 27, 2010.

II. STATUTORY AUTHORITY AND CRITERIA

The statutory criteria for interest arbitration awards found in RCW 47.34.320 were amended by the Washington State Legislature in 2010. The Code Reviser has not yet formally incorporated those amendments into the Revised Code of Washington. Therefore, the provisions set forth below were taken from the marked up legislative enactment itself, Engrossed Substitute House Bill 3209, Chapter 283, Laws of 2010, as amended by the Senate and signed by the Governor on April 1, 2010.

Sec. 15. RCW 47.64.320 and 2006 c 164 s 14 are each amended to read as follows:

(1) The mediator, arbitrator, or arbitration panel may consider only matters that are subject to bargaining under this chapter, except that health care benefits are not subject to interest arbitration.

(2) The decision of an arbitrator or arbitration panel is not binding on the legislature and, if the legislature does not approve the funds necessary to implement provisions pertaining to compensation and fringe benefit provisions of an arbitrated collective bargaining agreement, is not binding on the state, the department of transportation, or the ferry employee organization.

(3) In making its determination, the arbitrator or arbitration panel shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:

(a) The financial ability of the department to pay for the compensation and fringe benefit provisions of a collective bargaining agreement;

(b) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;

~~(b)~~ (c) The constitutional and statutory authority of the employer;

~~(c)~~ (d) Stipulations of the parties;

~~(d)~~ (e) The results of the salary survey as required in RCW ~~(47.64.220)~~ 47.64.170(8);

~~(e)~~ (f) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;

~~(f)~~ (g) Changes in any of the foregoing circumstances during the pendency of the proceedings;

~~(g)~~ (h) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; ~~(and)~~

~~(h)~~ (i) The ability of the state to retain ferry employees;

(j) The overall compensation presently received by ferry system employees, including direct wage compensation, vacations, holidays and other paid excused time, pensions, insurance benefits, and all other direct or indirect monetary benefits received; and

(k) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

(4) This section applies to matter before the respective mediator, arbitrator, or arbitration panel.

III. ISSUE IN DISPUTE

The Employer proposed the inclusion of the following new language in Article 25 (Passes and Meals), to which the Union would not agree:

Section 5. The Employer will comply with all applicable federal and state tax regulations regarding the use of passes.

IV. BACKGROUND INFORMATION

The Union is the joint crafts labor organization representing the International Brotherhood of Electrical Workers, Local 46, International Association of Machinists and Aerospace Workers, Local 79, United Brotherhood of Carpenters and Joiners of America, Local 1184, Sheet Metal Workers International Association, Local 66, International Brotherhood of Teamsters, Locals 117 and 174, International Brotherhood of Boilermakers, Iron Shipbuilders, Blacksmiths, Forgers and Helpers, Local 104 and United Association of Journeymen & Apprentices, of the Plumbing and Pipefitting Industry, of the U.S. and Canada, Local 32.

There are about 107 employees represented by the Union and they primarily work at the Eagle Harbor shipyards on Bainbridge Island.

For a very long time, Union members have received free passes on the ferry system for both work-related and personal use, including for the use of their spouses and dependents. In addition, retirees receive free passes for life. Harry Thompson, IBEW Local 46 Business Representative and Executive Secretary of the Puget Sound Metal Trades Council, testified that between 40% and 50% of bargaining unit members commute to Bainbridge Island on the ferry. The peak season one-way fare is \$14.85, and off-peak is \$11.00. Thus, the pass's value for just commuting could be in excess of \$5,000 per year to those bargaining unit members who live on the King County side of Puget Sound.

Until recently, the State has lacked the means to track the use of passes to determine the usage in various categories: (1) employees commuting to work, (2) employees commuting between job sites as part of work, (3) retiree use and (4) personal use (which includes family use). With the use of bar scanners, the State can now track usage by employees commuting between job sites. It apparently cannot track retiree use and the evidence was not clear whether it could distinguish commuting use by employees for their recreational use.

The State has never reported the value of these passes to the Internal Revenue Service as taxable income. However, testimony indicated that about two years ago, State officials began having concerns about whether the value of these passes to employees and retirees was taxable, or taxable in part, under the federal Internal Revenue Code. However, it only recently began to search for an answer. As of the date of hearing, the State has arranged to procure the services of an outside tax attorney to render advice. It has not yet met with the attorney but had plans to begin discussions during the week following the hearing. The State has not taken any steps to procure a ruling from the Internal Revenue Service (IRS) and it does not have any immediate plans to do so. Presumably it will have in hand the advice of the tax expert by the July 1, 2011, start date of the new Collective Bargaining Agreement.

The State proposed the language at issue here in anticipation of possible advice that some or all of the value of the pass benefits should be taxable as income. It readily admitted, however, that at this juncture, it cannot make any sort of educated guess or prediction as to what its tax lawyer's opinion will be. The State simply asserted at hearing that some or all of the value of the pass may or may not be subject to federal income tax.

The State has proposed and apparently secured this tax compliance language in other Collective Bargaining Agreements of ferry system workers who have free passes.

V. ARGUMENTS OF THE PARTIES

The State: The State argued that this language simply memorializes its ability to do what the law requires. It objects to the Union's request that it first obtain an IRS ruling. There is no guarantee the IRS will be willing to give such a ruling. It does not know if the IRS will apply sanctions after delivering a ruling requiring taxation, and it does not know how the IRS will expect it to implement an affirmative ruling and whether it can comply with the IRS's expectations. In short, it would rather not deal with the IRS. It is a complicated issue with several categories of usage that must be examined. If one or more categories of usage are considered taxable income, then implementation will be the next hurdle for the State, the challenge being to determine the value of usage, by employee (or retiree) to each member of the taxable categories.

The State explained that by July 1, 2011, effective date of the proposed language, the taxability issue should be sorted out by its outside attorney and internal resources.

The State maintained that if the Union does not agree with the professional advice it receives, it is free to file a grievance to contest the position taken.

The Union: The Union explained that its membership rejected the proposal because the State was unable to explain the need for the language and the impact it would have on bargaining unit members.

Employees have already agreed to a wage freeze for the next contract cycle, in addition to having their wages frozen since 2008. In particular, those employees who commute are apprehensive about having the value of the passes included as taxable income.

The Union stated that it would agree to the language if the State had already obtained a ruling from the IRS. The Union asserted that it would be willing to jointly seek a ruling with the State. It will not agree to adhere to an opinion of an inside or outside tax attorney because of the likely conservative (i.e., “play it safe”) bias that underlies such advice and because of the probability that there would not be a consensus among tax attorneys. The IRS is the entity that will have the final say on the issue.

Addressing the statutory interest arbitration factors, the Union considered comparability the most important. It examined the contracts of ferry workers for the Golden Gate Ferries, the Alaska State Ferries and the Black Ball Ferry Line, and found no such language in those agreements, even though they include free pass language. Two of the three contracts have savings clauses.

Finally, the Union noted the arbitrator’s analytical views on addressing new non-economic proposals, which places the burden on the proponent to show there’s a problem needing fixing, the proposal addresses that problem, and the benefit outweighs the detriment. The State hasn’t shown a problem yet; in fact, in two years, it has not even engaged a tax advisor. The language is unnecessary because if it is shown that pass benefits are taxable, it could invoke the Savings clause of the Collective Bargaining Agreement.

VI. DISCUSSION AND ANALYSIS

Interest arbitration is inherently a legislative process. When considering monetarily unquantifiable proposals, the undersigned arbitrator takes the same sort of approach that a lawmaker takes (or should take) when considering proposed legislation that changes the status quo. First, there must be a sound reason for the proposal. In other words, a problem exists or is likely to arise that needs fixing. Second, the proposed language should target the problem so as to fix it. If it does not, the language will be at best, ineffective. If the language is imprecisely or too broadly written (or otherwise poorly drafted), it could give rise to unintended consequences downstream. Third, the Arbitrator must find that the benefit of the proposed language outweighs

its detriment. This also is where the statutory interest arbitration criteria come into play. It is logical to place the burden on the proponent to present evidence supporting these considerations.

Quantitative language dealing with wages and benefits does not require this kind of analysis because the proposals and the resulting dispute are largely over numbers, that is the cost to the employer and the benefit to employees, which ordinarily can be precisely expressed or calculated in monetary terms. Further, these things are at the core of the collective bargaining agreement and must be periodically addressed. Drafting issues are less likely to occur and arbitrators can simply delve into the statutory criteria to evaluate wage and benefit proposals.

The State's proposal seems innocuous. It is a given that as an employer, it must comply with the requirements of the Internal Revenue Code for the taxation of income and benefits.

However, the State concedes that the problem the language is intended to address, that being the taxability of free passes, is not an immediate problem. Rather, it is one that could rise during the next contract cycle. While its foresight might otherwise be commended, in this case, I am troubled. First, ferry system employees have had free passes for many years, and the potential taxability of the same has not concerned the State. There was testimony that the issue came across the State's radar about two years ago. During most of those two years, it did nothing to address the problem. Only recently did it obtain authorization to seek the advice of an outside tax specialist and as of the date of the hearing, a first meeting had been scheduled but had not yet occurred. The State's behavior tends to belie its contention that this is pressing issue. The State presented no evidence as to the likelihood that the IRS will consider some or all of the pass benefit to be taxable. It simply stated that there may or may not be a taxation problem. Thus, I am not convinced that the State has identified a problem that is more likely than not to arise.

Next, the language proposed by the State does not actually address the parties' disagreement. The dispute here is *not* over the State's ability to implement withholding on

taxable income or to include the same on employees' W-2 forms. Yet this is what the language addresses. Rather, the dispute is over the advice that the State *might* obtain, and how it *might* react to that advice. There are numerous "what ifs" inherent in this dispute and at this point, it is a hypothetical dispute. The Union's concern is whether the State will receive and accept conservative advice. It posits that the State's tax advisor will err on the side of caution and advise the State to consider much of the benefit taxable. It also is concerned that it will have no input into the decision-making. The Union maintains that it will only be satisfied with an IRS opinion that delineates the taxability of the pass benefit.

I do not fault the State for seeking, at this juncture, the advice of an outside tax expert. That is the typical course taken by public and business entities – they go to their tax specialists for advice on how to proceed. I believe seeking an IRS ruling is the exception, rather than the rule. Further, the Union may be overly suspicious of this expert advice. I accept the State's assertion that an opinion favoring the taxability of the passes does not serve its interests just as it does not serve the interest of its employees. The State recognizes the economic burden that taxation would impose on its employees and this could lead to discord. Further, although not addressed at hearing, I presume that implementing withholding would entail some cost, including the cost of tracking usage and the cost of making revisions to the State's payroll software. In addition, as the State fears, it could give rise to liability for failing to withhold from wages in the past. Although I appreciate the logic in the Union's suspicion that outside tax advice will come with a conservative bias, I am not convinced that this will necessarily be the case. It is not a given that an outside tax expert will err on the side of caution. Tax advisors are accustomed to providing advice on tax strategies that entail a degree of acceptable risk to the client. And, the Union is certainly free to seek a second opinion from a different tax expert and proceed accordingly from there.

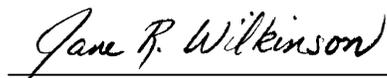
As I stated earlier, the language proposed by the State does not address the underlying dispute between the parties. Nor, in my opinion, does it accomplish anything. In my view

(although I realize I cannot speak for other arbitrators), the State has the inherent right to comply with the Internal Revenue Code when it comes to taxable benefits. It does so now even though there is no contract language that gives it this right. Further, its implementation of withholding pursuant to this inherent right, or pursuant to the language it proposes, would not foreclose the Union's ability to dispute the State's position on the taxability of these benefits.

Most of the statutory criteria are inapplicable to this dispute and the parties presented almost no evidence relating to those criteria. However, the Union presented comparator evidence that supported its position. That evidence was not disputed by the State.

I conclude that the State's proposal does not address an immediate problem, nor does it actually address the potential problem. It is unnecessary language as well. I am unwilling to clutter up a collective bargaining agreement with even innocuous language and therefore, I will not award the State its proposal.

September 16, 2010



Jane R. Wilkinson
Labor Arbitrator