



## OPINION

### **PROCEDURAL MATTERS**

The undersigned Interest Arbitrator was selected by the parties pursuant to the procedures specified in RCW 47.64.170(6)(a). A hearing was held before the Interest Arbitrator in Seattle, Washington, on August 30 and 31, 2010. Washington State Department of Transportation, Ferries Division (hereinafter “Employer“ or “WSF”) was represented by Washington State Assistant Attorney General David J. Slown. Office and Professional Employees International Union Local 8 (hereinafter “Union”) was represented by Union Representative Benita Hyder.<sup>1</sup>

At the hearing, the parties presented documentary evidence and called witnesses who testified under oath administered by the Arbitrator. A court reporter was present and the Arbitrator received a verbatim transcript of the proceedings. The parties agreed to file posthearing briefs and timely email briefs were received by the Arbitrator and the record was closed on September 14, 2010. The Arbitrator agreed at the hearing to deliver his Opinion and Recommendations no later than September 23, 2010.

### **BACKGROUND**

The Union represents 54 office and clerical employees of WSF. On August 19, 2010, the Union’s membership specifically rejected Article 11, Seniority, Layoff and Recall, and Article 17/Appendix A, Classification and Wage Rates, of the tentative

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<sup>1</sup> The Union’s brief was written by Sean M. Phelan, Esq., of the law firm of Frank Freed Subit & Thomas LLP.

agreement of the parties reached with respect to a successor to their 2009-2011 collective bargaining agreement (hereinafter "Agreement"). Thereafter, these two Articles were certified for interest arbitration by the Marine Employees' Commission (hereinafter "MEC") on August 25, 2010, and this proceeding ensued as provided in RCW 47.64.300.

## ISSUES

As concerns Article 11, Seniority, Layoff and Recall, whereas, except as to changes on which the parties reached tentative agreement in negotiations, the Union would leave the existing language of that article substantively unchanged from the expiring Agreement, the Employer proposes to add provisions distinguishing temporary from permanent layoffs, providing less notice to employees being temporarily laid off or subjected to a reduction of hours than is given in the case of permanent layoffs, basing temporary layoffs on "seniority within the job classification within the department" and denying temporarily laid off employees access to leave cash-outs where the layoff occurred for lack of funds as well as to bumping rights and placement on the layoff list.<sup>2</sup>

As regards Article 17 and Appendix A, Classification and Wage Rates, while the Union would continue both unchanged, including rolling over the 2009-2011 wages into

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<sup>2</sup> As to Article 11, the parties reached tentative agreement to insert a new section 11.1H entitled "Layoff List" and to add the words ""in February of each year and upon request thereafter" to that part of Section 11.2 that addresses when the Union will be furnished a copy of the seniority roster. Thus neither is before me. One other Union proposal appearing in its August 23, 2010, final proposal submitted to the MEC, i.e. to change the reference to gender from "his" to "his/her" in Section 11.4C, does not appear in the Employer's final proposal of the same date. Because Section 11.4C is not the only provision in Article 11 (see, e.g., Sections 11.2 and 11.4A) that presently uses only the masculine gender and neither party either proposed changing any other such reference or addressed Section 11.4C either at hearing or on brief, I have not considered it herein.

the 2011-2013 collective bargaining agreement, except as to effective dates set forth in both, the Employer also proposes suspending the step increases appearing in Article 17 and Appendix A of the expiring Agreement and giving employees no credit toward future step increases for the service accumulated during the term of the new contract.

## **DISCUSSION AND ANALYSIS**

### **Position of the Employer**

The Employer contends all its proposals require adoption by virtue of the dire financial straits in which both the State and WSF find themselves. In support of that position, it points to the language of Engrossed Substitute Senate Bill 6503 (hereinafter "ESSB 6503") requiring state agencies such as the Department of Transportation to develop compensation reduction plans or suffer ten layoff, or "furlough," days per year for all employees during the 2011-2013 biennium. It also emphasizes the fact that WSF is over budget by \$1.3 million in the current biennium and expected to be in the red by \$13.8 million in the 2011-2013 biennium when taking into account the decrease in gasoline taxes collected, the principal funding source for the entire Department of Transportation, occasioned by a reduction in travel by the public and increasingly fuel efficient vehicles. In the Employer's view, since the projected 2.5%-per-year increase in ferry fares, which make up 70% of the funds for ferry operations, is thus far unapproved by the Washington State Transportation Committee and the transfers from other accounts that historically have been used to make up for WSF's shortfalls are less likely to continue in light of the anticipated budget deficit of \$3 billion faced by the State in the

2011-2013 biennium, WSF will need to trim some \$5 million from its labor budget presently standing at \$268 million and doing so via the measures proposed is preferable to the alternative of permanent layoffs. While it concedes its hearing estimate of \$100 thousand in savings to be achieved in the next biennium from the freeze on step increases may be a bit high by virtue of the erroneous inclusion of certain employees, it argues that the savings are critical and, indeed, if not achieved by the suspension of both step increases and service accumulation during the next contract, will only require greater sacrifices in future biennia since the results of such failures are cumulative.

As concerns its proposed temporary layoff and hours reduction language, the Employer asserts such changes will afford it the necessary flexibility to address continuing financial needs as they arise, recognize the inherent differences between temporary and permanent layoffs, provide a contractual framework for assuring that qualified employees have the requisite skills to perform all necessary jobs in the event of layoffs and compare favorably with its contracts with Washington Federation of State Employees (hereinafter "WFSE") and the International Federation of Professional and Technical Engineers, Local 17 (hereinafter "IFPTE"), both of which, like the Union, represent shore-side ferry system employees.

### **Position of the Union**

The Union argues that the Employer's proposals regarding suspension of step increases and service accumulation cannot be justified. In support of that position, the Union notes that the wages of most of the classifications in the unit already lag severely behind their contemporaries at comparator employers according to the February 2010

statutorily-mandated MEC Salary Survey, that the employees in this unit already forewent any cost of living increases in both the current Agreement as well as the contract being negotiated and that employee retention will be made more difficult by adoption of those proposals. The Union also argues that to suspend step increases at a time employees are facing likely substantial health insurance cost increases is simply unreasonable. Lastly the Union asserts that proposing not counting employee time of service under the new contract toward future increases constitutes a blatant, unsupported attempt to bargain future contract terms and undercuts the concept of seniority, a cornerstone of collective bargaining agreements.

In response to the Employer's proposed layoff language, the Union argues that the Employer failed to demonstrate any justification for its proposals. Thus it contends that nothing in the record demonstrates a need to distinguish temporary layoffs and to shorten the notice period for any layoff to seven days, establishes any cost savings for any of the layoff proposals or substantiates the Employer's asserted need for some new framework to assure that qualified employees are available. In fact, according to the Union, WSF is already capable of forecasting and responding to layoff needs sufficiently in advance to continue to apply the 30-day notice presently embodied in the Agreement to all layoffs and its interest in ensuring the presence of qualified employees notwithstanding bumping rights is protected by the existing contract language making ability and qualifications superior to seniority without risking the potential for favoritism flowing from selection for layoff by job classification within departments. The Union also asserts that shortening the notice period to seven days would prevent it from bargaining

over the effects of such layoffs and reductions in hours. Lastly, the Union contends that precluding employee access to cash-outs, bidding and the layoff list removes the safety nets provided laid-off employees by the present Agreement.

**Statutory Guidance of RCW 47.64.320**

RCW 47.64.320(2) advises that “[t]he decision of an arbitrator . . . is not binding on the legislature . . . .” Thereafter, RCW 47.64.320(3) specifies:

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;

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

(d) Stipulations of the parties;

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

(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;

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

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

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

(j) The overall compensation presently received by the ferry employees, including direct wage compensation, vacation, 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.

### **Decision of the Arbitrator**

Having now had the opportunity to consider the entire record in this matter, including the final language proposals of the parties attached to their August 23, 2010, submissions to MEC and incorporated by reference herein as well as their arguments voiced at the hearing and on brief, and having applied the statutory factors set forth above, I have determined to agree with the Union as to the Employer's proposals to suspend step increases and service credit during the upcoming collective bargaining agreement and to agree in part with the Union and in part with the Employer as to the latter's proposals regarding temporary layoffs and reduction of hours. Although I have studied the entire record in this matter carefully and considered each argument and authority cited in the parties' briefs, the discussion which follows will center on those factors which I found either controlling or necessary to make my decision clear. In addressing the issues, I intend to deal with what I consider to be the more pressing matter of compensation first.

### **Article 17 and Appendix A - Classification and Wage Rates**

Initially, I am satisfied the Employer and indeed the State of Washington are facing difficult financial circumstances. Thus I find the projected budgetary shortfalls are real. While I share the Union's concerns regarding the reliability of the Employer's

estimates of the money to be saved by freezing step increases, changing as they did from a pre-hearing estimate of \$55 thousand to a concededly inflated \$100 thousand at hearing, it is undeniable that savings would be had by freezing step increases. It is also clear that all state agencies have been directed to reduce costs and that the Department of Transportation already has responded in part to that directive by selecting two employee furlough days, October 11, 2010, and March 11, 2011, notice of which was given on June 16, 2010. The question is the further extent to which employees in the present unit should be required to shoulder the burden of the necessary savings. Although unit employees have foregone cost of living increases for nearly four years, receiving only step increases as appropriate in the interim, and have joined other ferry system unions in agreeing to do so again in the 2011-2013 biennium, the Employer is requesting relevant members of the Union who would have been entitled to step increases during the term of the next contract to forego them as well.

In this connection, it must be remembered that all employees do not receive step increases every year or even every contract. Nor are they akin to cost of living increases; they are instead increases given to employees in recognition of their increased skills and qualifications gained over time that enhance their value to the Employer. According to Appendix A of the Agreement, unit members receive a step increase based on length of service after 6 months, 18 months, 30 months, 42 months, 60 months, 120 months, 180 months and 240 months. Thus some more senior employees would not be entitled to a step increase during the next contract. As nearly as I can tell from the parties' disputed lists of employees presently entitled to step

increases during the 2011-2013 collective bargaining agreement, approximately twenty-two such employees would be entitled to some \$79 thousand in additional wages by virtue of step increases during the period. When considered in light of the cost of living adjustments unit employees have foregone for nearly four years and will forego for more than two additional years, to deny them step increases during the 2011-2013 term places a very big burden on a limited number of employees for such a small savings to be achieved by the Employer when compared to WSF's \$733 million budget, especially at a time unit employees are facing the potential doubling of their health care costs as proposed by the State to the Health Care Super Coalition of labor organizations representing State employees.

While that may be a burden that other State employees can shoulder, such a finding cannot be made as to the employees in this unit who, according to the mandated MEC salary survey performed by the Hay Group, already lag behind employees performing similar functions in the relevant market. What that survey found was that, of the twelve WFS administrative classifications included in the survey, only one exceeded the market in weighted base pay and benefits, and then by only 1.7%, whereas four classifications were more than 20% behind, one by an astounding 29.8%, and the average deficit was over 18%. That situation, in my view, does not "promote just and fair compensation . . . for ferry system employees" as required by RCW 47.64.006. While I do not suggest that WSF must be a leader in wages and benefits in order to do so, it should at least be competitive lest it eventually stop attracting qualified employees to provide vital ferry functions to the public, thereby potentially running afoul of the further

requirement of RCW 47.64.006 to “protect the citizens of this state by assuring effective and orderly operation of the ferry system . . .” and the declaration contained in RCW 47.64.005 that “sound labor relations are essential to the development of a ferry and bridge system which will best serve the interests of the people of the state.” Thus I do not believe the Employer’s proposal to suspend step increases for the 2011-2013 biennium has been shown to be either practical or reasonable either in the absolute or in relation to the parties’ interests. *Seattle Police Officers’ Guild and City of Seattle*, PERC Case No. 10630-I-93-00228 (Corbett, 1995). Accordingly, I cannot recommend its adoption.

As regards the suspension of credit for service during the next contract, I reach the same conclusion. Like step increases, credit for service was negotiated years ago.<sup>3</sup> It is one of those promises on which employees rely when they commit to work for WSF. Unlike cost of living and market equity increases that generally are subject to renegotiation with each new contract, credit for gaining experience, and presumably proficiency, in one’s job over time, which directly serves the Employer’s interests as well, should be a benefit an employee can count on in making plans for the future. Moreover, as I believe the Union correctly argues, this Employer proposal attempts, concededly without the benefit of any analysis of the financial impact thereof if adopted, to impose future contract terms on the unit. Although I do not agree with the Union’s contention that the proposal significantly undercuts seniority since it would affect all unit members’ seniority to the same extent and impact only seniority considerations between existing

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<sup>3</sup> See, Union Exhibit No. 3, the parties’ January 1, 1968, to June 30, 1969, collective bargaining agreement.

and future employees, I do agree that it would have the unreasonable effect of keeping the wage of the average unit employee significantly behind the wages of those employed at comparator employers surveyed by the Hay Group for an even longer period of time. Thus I shall not recommend adoption of this Employer proposal.

#### Article 11 - Seniority, Layoff and Recall

This Employer proposal would permit the Employer to treat temporary layoffs or furloughs of up to thirty days and reductions in employees' workweeks to a minimum of twenty hours differently from permanent layoffs by requiring only seven day's notice thereof and precluding affected employees from gaining access to leave cash-outs where the layoff occurred for lack of funds as well as to bumping rights and placement on the layoff list. I respect the Employer's flexibility arguments regarding the need to address the matter of cost reductions via the additional tools of temporary layoff and hours-reduction language in the next contract. For its part, the Union, although not also suggesting such language in its proposals, has not argued against the concept. Thus I shall recommend its adoption.<sup>4</sup>

The Union has argued, however, and I agree that the Employer, with the multiple budget reviews and levels thereof testified to by Employer witnesses, should be capable of knowing its financial situation more than seven days in advance. While I can understand that the present overall financial condition of both the State and WSF is such

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<sup>4</sup> As presently written, the Employer's proposal regarding temporary reduction of hours and its proposal with respect to temporary layoffs, because the former fails to define the term "temporarily" and the latter fails to advise whether the 30-day period is per occasion or some other period such as a fiscal or calendar year, constitute potential sources of aggravation for the parties. However, as neither party has addressed those concerns in its case before the undersigned, I shall leave that to resolution by the parties in the event my recommendations are adopted.

that added flexibility to generate savings on very short notice may be desirable, the Employer failed to establish a demonstrable need for that level of flexibility. *City of Pullman and Pullman Police Officers' Guild*, PERC Case No. 9223-I-93-201 (Axon, 1991).

It is also clear from the testimony of Union witnesses that unit employees have legitimate concerns for their ability to address income fluctuations arising from short-notice layoff and hours-reduction decisions made by the Employer. Indeed, employees testified to their lack of reserves to tide them over, especially in view of the potentially much higher health insurance costs on the horizon. Thus, although the Employer's proposal compares favorably with the temporary layoff provisions contained in the contracts it presently has with WFSE and IFPTE, and there is much to be said in favor of consistency among WSF's various labor agreements, there is no showing in the record that any of the collective bargaining agreements the Employer has with the four other labor organizations besides this Union that are subject to MEC jurisdiction contains such language.<sup>5</sup> Accordingly, I shall recommend that the same thirty-day notice applicable to permanent layoffs be applied to temporary layoffs and reductions in hours.

Nor is it reasonable to expect an employee to be able to adjust to layoffs of up to thirty days and reductions in hours to a minimum of twenty hours per workweek without the emergency fallback provided by access to his or her accumulated leave balances, no matter whether the notice given is seven or thirty days. However, a common-sense approach does seem to require that it should not apply in every case of a layoff or hours

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<sup>5</sup> Those organizations are the Inlandboatmen's Union of the Pacific, Marine Engineers' Beneficial Association, Puget Sound Metal Trades Council and International Organization of Masters, Mates and Pilots.

reduction because of the administrative costs involved. Thus I believe this access should be triggered when an employee has accumulated five workdays of layoff or the equivalent reduction in hours during any fiscal year and I shall so recommend.

As concerns whether temporary layoffs or temporary reductions in hours should lead to bumping or placement on the layoff list, I agree with the Employer, once again because of the administrative costs to the Employer and lack of employee efficiency associated therewith, that such considerations would tend to offset the payroll savings sought by the Employer in effecting such temporary layoffs and reductions in hours. That means, of course, that I also believe it is proper to utilize seniority by classification within department as proposed by the Employer in the case of temporary layoffs or reduction of hours. To be clear, I recognize that this view conflicts with traditional pure seniority notions. However, it does not conflict so clearly with the theory behind modified seniority clauses such as the relative ability modified seniority language already appearing in Section 11.1B of the Agreement. Indeed, the presence of that language in Section 11.1B of the Agreement, which would have application to the new temporary layoff and hours-reduction language as well as to permanent layoffs, also causes me not to agree with the Employer's concerns for the lack of qualified employees to serve in these temporary cases. Thus that consideration received no weight in my deliberations. It is instead the recognition of the administrative costs and lack of employee efficiency necessarily associated with unit-wide seniority, bumping and placement on the layoff list in the case of temporary layoffs and reduction of hours that causes me to recommend adoption of those portions of the Employer's Article 11 proposals.

