DEPARTMENT OF LABOR
ALASKA LABOR RELATIONS AGENCY
P.O. BOX 107026
ANCHORAGE, ALASKA 99510-7026
(907) 264-2587
Fax (907) 264-2591

INLANDBOATMEN'S UNION OF THE PACIFIC,

Complainant,

vs.

STATE OF ALASKA (DOT-PF/AMHS),

Respondent.

Case No. 92-070-ULP

DECISION AND ORDER NO. 141

This matter was heard on May 8, 1992, in Juneau, Alaska, before the Alaska Labor Relations Board, with Hearing Examiner Jan Hart DeYoung presiding. The record closed on May 8, 1992. Board Member Gil Johnson was present at the hearing personnally, Board Member James Elliott, by telephone, and Chairman Darrell Smith by consideration of the record and tapes of the hearing.

Appearances:

John Burns of Schwerin, Burns, Campbell & French, for complainant Inlandboatmen's Union of the Pacific; Kathleen Strasbaugh, Assistant Attorney General, and Jim Johnsen, Labor Relations Analyst, for respondent State of Alaska.

Digest: An employer can commit an unfair labor practice by implementing a change to a condition of employment in a collective bargaining agreement without first negotiating to impasse. A labor organization can waive the right to bargain by failing to respond to an employer's notice of a prospective change.

DECISION

FINDINGS OF FACT

1. The Inlandboatmen's Union (IBU) is the bargaining representative for the unlicensed seamen employed by the State of Alaska on the Alaska Marine Highway System. Rule 2, 1990 - 1993 Agreement, at 1 (exhibit O).

2. Rule 9.01 of the collective bargaining agreement between the IBU and the State addresses injury and illness benefits:

> In lieu of Wages, Maintenance and Cure, remedies for unseaworthiness and other seamen's remedies, including Jones Act remedies, employees shall be entitled to Alaska Workers' Compensation benefits.

1990 - 1993 Agreement, at 7 (exhibit O).

3. Before 1983 the parties' agreement provided maintenance and cure as the benefit for injury and illness. The 1980 - 1983 agreement set the rate for maintenance and cure at $30.00 per day for injury and $22.50 per day for illness. Rule 9.04, 1989 - 1983 Agreement (exhibit A, at 2).

4. In 1983 the parties negotiated a change to the agreement's injury and illness benefits. Rule 9.01, which resulted from the 1983 negotiations, is identical to Rule 9.01 of the current 1990 - 1993 Agreement. Quoted in paragraph 2, supra. Letter of Agreement (Sept. 13, 1983) (exhibit B, at 1).

5. Donald Edward Liddle, former national president of the IBU, participated in negotiating the 1983 agreement. He stated that worker injuries were a high priority for the Alaska region because it was not satisfied with the State's payment history under seamen's remedy of maintenance and cure. His understanding in 1983 was that under federal law the IBU could not waive seamen's remedies for individual workers. He views the contract language providing workers' compensation benefits in lieu of seamen's remedies as a supplement to, rather than a substitute for, those remedies. He understood that, although the IBU could not release seamen's remedies, under the agreement the IBU was committed to encourage its members to pursue workers' compensation benefits as their primary remedy, for work-related injury. Workers' compensation benefits provide the advantage of security. The system is operated independently of management. Wage rates are predictable. A system is available to hear disputes. These factors made workers' compensation benefits desirable even though seamen's remedies offered potentially higher financial recovery for catastrophic injures.

6. The chief State spokesperson at the 1983 negotiations was Bruce Ludwig. Ludwig currently serves as business manager for the Alaska Public Employees Association (APEA). APEA is the bargaining representative for the State's supervisory unit, including those supervisors who could qualify, if injured, for seamen's remedies. Ludwig's recollection of the negotiations in 1983 was that the parties were aware that individual workers retained their seamen's remedies after workers' compensation benefits were added to the agreement. He stated that a bargaining goal of the State during these negotiations was to bring ferry workers closer to other State employees by bringing them into the State health care and benefits system and thereby increase their allegiance to the State. Providing workers' compensation benefits was consistent with this plan. Also, seamen's remedies were a product of admiralty law and the State did not have admiralty specialists on staff. A uniform system for worker injury benefits would be easier to administer.

7. Clois R. (Ron) Hamilton was on the negotiating team with Bruce Ludwig during the 1983 negotiations and was the chief spokesperson for the State during the most recent contract negotiations with the IBU. Hamilton understood "in lieu of" to mean "instead of" in Rule 9.01 of the 1983 Agreement. The 1983 negotiations occurred after a conference he attended with Bruce Ludwig in Anchorage in the early eighties where he was told that a seaman could waive his seamen's remedies by substituting another remedy if that remedy were an adequate substitute. Hamilton did not understand Rule 9.01 to mean that workers could still pursue seamen's remedies.

8. Rule 9.01 in agreements between 1983 and the present are similar. The 1985 - 1988 Agreement does not address unseaworthiness or Jones Act remedies:

> In lieu of Wages, Maintenance and Cure, employees shall be covered under Alaska Workers' Compensation benefits.

Exhibit C, at 2. After this agreement, the State sent a letter stating its understanding that omissions from the previous agreement were "cosmetic" and not intended to change the meaning of Rule 9.01. The letter states in part:

> As far as administration of the revised Rule 9 is concerned, you have assured me that Inlandboatmen's Union of the Pacific (IBU) advises its members that their Jones Act and other seamen's remedies were, for purposes of the contract, bargained away in exchange for Workers' Compensation. Further, you stated that it is the IBU's policy to discourage its State of Alaska members from pursuing seamen's remedies, especially in view of the fact that Workers' Compensation is usually advantageous to the employee. Finally, although the IBU certainly cannot stop one of its members from suing the State, if the individual is so inclined, it is my understanding from our conversation that the IBU does not assist such individuals with their lawsuits. Rather you view your role as limited to negotiation and administration of the collective bargaining agreement.

K. Clark, letter to H. Sarber (Dec. 12, 1985) (exhibit F, at 1).

9. In 1986 the State again sought clarification of the meaning of Rule 9.01. It sought concurrence from the IBU that "workers' compensation is the sole remedy available to Inlandboatmen's Union (IBU) members under Rule 9.01." Homer Sarber, the Regional Director for the IBU, signed the letter, showing his concurrence with this statement. K. Geariety, letter to H. Sarber (Dec. 18, 1986) (exhibit G).

10. The parties later returned to the Rule 9.01 language negotiated in the 1983 agreement. 1985 - 1988 Agreement, at 7 (exhibit D, at 2).

11. On August 30, 1991, the Alaska Supreme Court issued its decision in Dale C. Brown v. State, 816 P.2d 1368 (Alaska 1991), which found void the following provision in the collective bargaining agreement between the State and the Marine Engineers' Beneficial Association (MEBA):

> Employees shall be entitled to Alaska Workers' Compensation benefits in lieu of remedies for wages, maintenance and cure, unseaworthiness, and negligence for illness and injuries incurred while in the service of the Employer.

Id., at 1370 (date of agreement not provided). See also Rule 9.03, MEBA Master Agreement (1989/1992) (exhibit P, at 6), which provides:

> Engineers shall be entitled to Alaska Workers' Compensation benefits in lieu of remedies for wages, maintenance and cure, and remedies for unseaworthiness, and negligence for illness and injuries incurred while in the service of the Employer.

12. Rule 36.01 in the current 1990 - 1993 Agreement provides:

> If any Rule of this Agreement or any addendum thereto should be held invalid by operation of law or by any tribunal or body of competent jurisdiction, or if compliance with or enforcement of any Rule should be restrained by such body or tribunal, the parties shall enter into immediate collective bargaining negotiations for the purpose of arriving at a replacement of such Rule. [Exhibit O, at 47.]

13. Rule 35.01 in the current 1990 - 1992 Agreement provides:

> In the event operating conditions or service requirements arise due to length of voyage or other reasons not specifically covered by Agreement, the parties agree to negotiate immediately for the purpose of arriving at a mutually satisfactory supplemental agreement covering such operation. Should the parties fail to reach agreement Rule 14.07 shall not apply.

14. On September 24, 1991, Bruce Cummings, Director of Division of Labor Relations for the State sent Frank Price, Regional Director of the IBU, a letter advising of the decision in Dale C. Brown and stating,

> In essence, this decision invalidates the practice of providing Alaska Workers' Compensation Act (AWCA) benefits to State employees who are working as seamen in any classification. Instead, for these employees we must establish policies based on maritime law, with regard to rights to "maintenance and cure," a warranty of seaworthiness, and rights under the Jones Act.
>
> "Maintenance and cure" provisions are negotiable subjects for collective bargaining purposes. Please accept this letter as the state's request to bargain a maintenance and cure policy for seamen/employees in your bargaining unit. We wish to meet as quickly as possible to negotiate an agreement on this subject.
>
> In the interim, we must have a policy to deal with any maintenance and cure claims which arise. Pending the negotiation of a mutually agreed upon provision, the state is adopting the following policy: . . . .

The interim policy was based upon the maintenance and cure provisions appearing in the 1980 - 1983 Agreement before the parties had negotiated workers' compensation benefits. Exhibit A, at 2.

15. A State memorandum dated September 24, 1991, directs the adoption of a "maintenance and cure policy pending the negotiation of a mutually agreed upon provision." M. Keller, Memorandum (Sept. 24, 1991) (exhibit I).

16. Apparently the policy was not actually implemented until October 29, 1991, when vessel masters were notified of a change to the employee illness and injury report. M. Wilkens, Memorandum to Masters (Oct. 29, 1991) (exhibit J). The State stopped payment of workers' compensation benefits and substituted maintenance and cure at the rates announced in its September 24 letter.

17. After learning that an IBU member was affected by the policy, IBU Regional Director Price responded to the State by letter dated November 1, 1991. The letter states the IBU's view that workers' compensation benefits were the primary but not the sole avenue of obtaining seamen's remedies. It states that workers' compensation benefits did not "abrogate maintenance and cure or other remedies" but they provided "the vehicle and set the rate for maintenance and cure payments." (Exhibit K.) The letter further states that the Agreement was not in noncompliance with the Dale C. Brown decision and that an interim policy was unnecessary and therefore void. To conform Rule 9.01 to this understanding, Price requested negotiations to amend Rule 9.01 to delete "in lieu of." Id.

18. The parties have not negotiated the effects of Dale C. Brown.

19. Brad Thompson, Deputy Director of the Division of Risk Management, stated that the State had not paid any maintenance and cure benefits for injuries occurring after Rule 9.01 went into effect in 1983 until the State implemented the post-Dale C. Brown policy of paying maintenance and cure in the fall of 1991.

20. On November 7, 1991, IBU filed an unfair labor practice with this Agency alleging violations of AS 23.40.110(a)(1), (a)(2), and (a)(5). Exhibit M2.

21. About the same time IBU filed its unfair labor practice charge, it filed a grievance under step 2 of the grievance arbitration procedures in Rule 14 of the parties' agreement. Exhibit O, at 11. The grievance was bumped to step IV and IBU has requested arbitration. [Frank Price.]

22. This Agency investigated the charge and on December 5, 1991, issued a notice of accusation. The State filed a timely notice of defense on December 23, 1991.

DISCUSSION

The State and the Inlandboatmen's Union negotiated workers' compensation benefits into the collective bargaining agreement in Rule 9.01 as a benefit for worker injuries in 1983. The parties dispute whether by agreeing to Rule 9.01 they replaced or supplemented the seamen's remedies under maintenance and cure, unseaworthiness and the Jones Act.

The IBU takes the position that, because it did not have the legal authority to waive or release an individual's maritime remedies under federal law, Rule 9.01 has the effect of supplementing those remedies. The State's position is that the parties intended to substitute workers' compensation remedies for seamen's remedies, and Rule 9.01 had that effect until voided by the Alaska Supreme Court in Dale C. Brown v. State, 816 P.2d 1368 (Alaska 1991).

The term "seamen's remedies" is used here to describe three different remedies. Maintenance and cure is the remedy that provides a seaman room and board and medical treatment while injured or ill in the service of the vessel. Maintenance and cure is available whether or not the injury or illness is related to employment. The doctrine of unseaworthiness stems from the absolute and nondelegable duty to provide a seaworthy vessel. It provides damages for injuries resulting from the unseaworthiness of the vessel and can provide punitive damages. And last, under the Jones Act, a seaman has a cause of action for negligence and for damages under the Federal Employees' Liability Act. 46 U.S.C. § 688. The seamen's remedies can provide recovery far in excess of workers' compensation benefits. Dale C. Brown, 816 P.2d at 1371. However, in 1983 the IBU was dissatisfied with the State's payment history under seamen's remedies. Although seamen's remedies can exceed workers compensation benefits, workers' compensation benefits have the advantages of independence, predictability, and security. The parties therefore negotiated workers' compensation benefits as the agreement's remedy for worker injury and illness. After they took effect, these benefits were in fact the sole remedy

paid to injured IBU members until the decision in Dale C. Brown.

In 1991 the Alaska Supreme Court in Dale C. Brown found a similar term in another State collective bargaining agreement void as an unlawful attempt to trade traditional seamen's remedies for workers' compensation benefits. After this decision the State notified the bargaining representatives for affected employees that the contract clauses providing workers' compensation benefits to maritime employees were void and sought to negotiate a substitute. The States's September 24 letter to IBU declared that in the interim the State was adopting a policy of paying the seamen's remedy of maintenance and cure at the rates in the parties' last agreement providing maintenance and cure rates -- the 1980 - 1983 Agreement. Although the letter appears to announce an immediate change, the State did not implement it until October 29. The parties have not negotiated.

The IBU claims that the State's unilateral action without bargaining violates the State's duty to bargain in AS 23.40.110(a)(1), (a)(2) and (a)(5). The State claims that it complied with its duty to bargain when it sent its letter dated September 24 notifying IBU of the change and that IBU's inaction following that notice waived any right to bargain. In the alternative it argues that its failure to bargain before adopting the changes to Rule 9.01 was justified by the emergency created by the Court's ruling in Dale C. Brown and by the absence of discretion in adopting the change.

I. Background.

The law setting forth the State's obligations to its injured seamen was unsettled until recently. In 1981 the Alaska Supreme Court issued Anderson v. Alaska Packers' Ass'n, 635 P.2d 1182 (Alaska 1981), establishing that employers do not have any statutory obligation to provide workers' compensation benefits to employees performing the work of seamen. The Court held that a seamen's claim for injuries incurred while employed in traditional maritime work was for seamen's remedies subject to the exclusive maritime jurisdiction of the federal courts. State employees, however, may not sue the State in federal court because the Eleventh Amendment bars such suits. Collins v. State, 823 F.2d 329 (9th Cir. 1987). Because the State could not be sued in federal court, whether the State was obliged to pay seamen's remedies was uncertain until 1990.

In 1990, the Court found the State liable for seamen's remedies in State court. The Court held that the general waiver of sovereign immunity in AS 09.50.250 served to waive sovereign immunity for seamen's remedies and the State was liable in State court to a State worker for those remedies. State v. Robert Brown, 794 P.2d 108 (Alaska 1980). In Robert Brown the issue was whether the limitation of liability in the Workers' Compensation Act protected the State from liability for seamen's remedies. AS 23.30.055 provides that workers' compensation benefits are the exclusive remedy for worker on-the-job injuries in place of all other remedies. The Court concluded that AS 23.30.055 could not limit the State's liability for seamen's remedies without invalidly infringing on federal jurisdiction.

In the Supreme Court case that prompted this unfair labor practice charge, Dale C. Brown, a marine engineer had brought an action against the State in federal court under the Jones Act and the admiralty doctrine of unseaworthiness. The engineer had injured his knee on board a vessel performing seamen's duties. The federal court dismissed the action under the eleventh amendment 816 P.2d at 1370, citing Collins v. State, 823 F.2d 329 (9th Cir. 1987), and the engineer refiled in state court. The Supreme Court ruled that the State and the Marine Engineers Beneficial Association (MEBA) could not by contract abrogate maritime remedies of maintenance and cure, unseaworthiness and Jones Act even if the contract were understood and an adequate quid pro quo were substituted. The Court then ruled the contract term substituting workers' compensation benefits for seamen's remedies void.

II. Does Rule 9.01 substitute or supplement seamen's remedies.

The language ruled void in the MEBA agreement is very similar to the language in Rule 9.01. See paragraphs 2 & 11, supra. Like the MEBA term, Rule 9.01 very plainly substitutes workers' compensation benefits for seamen's remedies. Workers' compensation benefits are provided "in lieu of" seamen's remedies. The State's argument that "in lieu of" means "instead of" is supported by dictionary definition and the commonly understood meaning of the phrase.

IBU argues differently. While IBU does not argue that the words "in lieu of" mean something different from their ordinary meaning, it argues that it knew that the IBU as bargaining representative could not waive workers' individual rights to seamen's remedies under federal law. More significantly, it argues the State's negotiators shared that

knowledge. Paragraph 6, supra. IBU's argument is that by negotiating Rule 9.01 it intended to make a commitment to encourage unit members to pursue workers' compensation benefits when injured and to decline help to a member exercising seamen's remedies. It did not intend to extinguish seamen's remedies. Accordingly, IBU believes that Rule 9.01 remains valid because it merely supplements seamen's remedies; it does not supplant them. IBU's argument is that the trade was the problem in the contract term in Dale C. Brown and without the trade the MEBA contract term would not have been void.

The evidence demonstrates confusion over the meaning of Rule 9.01. The State sent two letters to resolve any uncertainty. In 1985 it states its understanding that workers' compensation is the sole remedy under Rule 9.01. See paragraph 8, supra. In 1986 it requests express concurrence with its understanding. See paragraph 9, supra. Although an argument could be made that the 1986 statement does not negate any remedies available independently of Rule 9.01, the inescapable inference is that the State's risk management division was seeking IBU's concurrence either to assess or reduce the State's risk of liability and its insurance or reserves needs. The most obvious construction of these documents is that they were intended to confirm that workers' compensation benefits were the sole remedy for IBU member worker injury. Significant is the absence of any evidence that IBU refuted that construction before the Dale C. Brown decision.

The history of payments to injured IBU members supports the State's construction. See paragraph 19. The State did not pay seamen's remedies until the Dale C. Brown decision. Because this history supports the plain meaning of the words in Rule 9.01, we will not rewrite them to conform to IBU's belief, which it failed to disclose at two opportunities, that they meant something different. We therefore conclude that Rule 9.01 substituted workers' compensation benefits for seamen's remedies.

If Rule 9.01 is construed to substitute Workers' compensation benefits for seamen's remedies, it is the same in all significant respects as the contract language voided in Dale C. Brown. See paragraphs 2 & 11, supra.

III. The Duty to Negotiate after Dale C. Brown.

Once the Supreme Court ruled that a nearly identical State collective bargaining agreement term was void, Rule 9.01 was either void or voidable. If a contract term is void or invalid, the parties have the duty and right to bargain a substitute under Rule 36 of the agreement. See paragraph 12, supra. In addition Rule 35 provides a duty and right to bargain if an event occurs that is not anticipated under the contract.

The IBU questions whether the State could invoke Rule 36 without a judicial ruling that Rule 9.01 was void. IBU argues that the State should have sought a declaratory judgment that Rule 9.01 was void before initiating negotiations. After Dale C. Brown, the parties should have been on notice that Rule 9.01 might be voidable if not actually void. In either case discussions and bargaining between the parties over the meaning of the case and its effect would have been appropriate. Whether the rule was void or merely voidable, clearly the parties were on notice of a serious question about the continuing validity of the Rule and that fact is sufficient to prompt the duty and right to negotiate under rules 35 and 36. The State's request to negotiate was appropriate and justified under the circumstances.

The duty to negotiate exists independently of Rules 35 and 36. AS 23.40.110(a) requires the parties to negotiate in good faith before any changes can be made to a collective bargaining agreement. Alaska Community College v. University of Alaska, 669 P.2d 1299, 1304 n.4 (Alaska 1983)(distinguished between permissive and mandatory subjects in ordering a remedy). The rule adopted by the NLRB is that the employer may not modify unilaterally a term in the collective bargaining agreement without first negotiating to impasse. See Jones Dairy Farm v. N.L.R.B., 909 F.2d 1021, 1027, 135 L.R.R.M.(BNA) 2050, 2055 (7th Cir. 1990).

Rule 9.01 needed to be changed after the Dale C. Brown decision. Under AS 23.40.110(a)(1) a change could not be made without first attempting negotiations.

The State does not appear to dispute seriously that there was a duty to bargain in this case. Instead, it argues that it satisfied its duty, raising the issues of waiver, emergency and lack of discretion in justification of its unilateral action.

IV. Did IBU waive its right to bargaining before the State acted unilaterally.

The State believes its letter of September 24 satisfied this obligation to negotiate before implementation. However, while the letter invited negotiations, at the same time it announced the adoption of an interim remedy. The State implemented a change, or at least it stated it had implemented a change, before allowing an opportunity to negotiate.

However, the duty to bargain is mutual. Thus, it is important to examine IBU's action. The IBU allowed approximately six weeks to pass before it responded to the State's letter. The IBU failed even to share with the State that it interpreted Rule 9.01 differently until November. Paragraph 17. For IBU not to respond promptly under these circumstances could have the effect of waiving any right to negotiate. N.L.R.B. v. Spun-Jee Crop., 385 F.2d 379, 383-387, 66 L.R.R.M. (BNA) 2485, 2488-2489 (2d Cir. 1967) (failure to request bargaining waives the right); U.S. Lingerie Corp., 170 N.L.R.B. 750, 67 L.R.R.M.(BNA) 1482 (1968) (where union had adequate notice of unilateral action yet made no attempt to bring issue to bargaining, it waived the right).

A union can waive its right to bargain by failing to respond to a request to bargain. A union's inaction after notice of an employer's intent to make a unilateral change waives the right to bargain. 1 Charles J. Morris, The Developing Labor Law 647-648 (2d ed. 1983). See e.g., International Ladies Garment Worker's Union v. N.L.R.B., 463 F.2d 907, 918, 80 L.R.R.M.(BNA) 2716, 2724 (D.C. Cir. 1972); AFCSME, Local 1893 v. State Board of Higher Education, 570 P.2d 388, 96 L.R.R.M.(BNA) 3192 (Or. App. 1977) (two weeks notice before change).

The obligation to demand to bargain or lose the right arises upon reasonable notice of the proposed unilateral change. An announcement contemporaneous with the change, however, is not sufficient notice. The reason is that a change announced as a fait accompli can reasonably be understood to make a demand for bargaining futile. N.L.R.B. v. National Car Rental, 672 F.2d 1182, 1188, 109 L.R.R.M.(BNA) 2832, 2837 (3d Cir. 1982). See also, American Distribution Co., 715 F.2d 446, 451, 115 L.R.R.M.(BNA) 2046, 2049-2050 (9th Cir. 1983), cert. den., 466 U.S. 958, 116 L.R.R.M.(BNA) 2096 (1984); 1982-1988 Supp. Charles J. Morris, The Developing Labor Law 332 (2d ed. 1989); N. Hungerford, H. Drummonds, & P. Gamson, The Continuing Duty to Bargain: Two Views 45-46 (Labor Education And Research Center, University of Oregon Monograph, 1986).

The State's announcement that it was implementing an interim remedy made simultaneously with the request to bargain did not trigger the obligation to demand bargaining or waive the right by inaction. We therefore conclude that the IBU did not waive its right to bargain.

V. Did an emergency justify unilateral implementation.

The State justifies adopting an interim remedy on the basis of the need to respond immediately to fill the contract void left by the Supreme Court decision in Dale C. Brown -- immediate action was needed because the State lacked any authority to provide workers' compensation benefits after the contract term was void and some alternative was needed in the period before the parties could begin negotiations.

The first problem with this argument is that it presumes that the State was prohibited from paying workers' compensation benefits. The State insists that the Court in Dale C. Brown had determined that the workers' compensation board had no jurisdiction over injured seamen employed by the State but this statement is unsupported in that case or any of the other cases cited. In Robert Brown the Court noted that receipt of workers' compensation benefits did not result in a waiver of maritime remedies and any maritime remedies owed would be offset by workers' compensation benefits paid. It did not, however, prohibit providing the benefits. The claimant in Robert Brown was the first mate on a public safety vessel. He had sued the State, his employer, for seamen's remedies after first accepting workers' compensation benefits. The Court found that receipt of benefits did not bar the claim but could be offset against seamen's remedies owed. Slip Op. at 5, n. 1. Likewise in Dale C. Brown the Court prohibited the trade of seamen's remedies for workers' compensation but did not prohibit providing them. Such a prohibition may be the next logical step but neither the courts nor the workers' compensation board have yet taken it. Only a prohibition against providing workers' compensation benefits would create a genuine emergency.

Second, the State's actions do not support the existence of an emergency. The State did not actually implement the change until October 29. This one month delay could have provided an opportunity to negotiate with the union.

VI. Did the absence of discretion justify failure to bargain.

The State argues that it had no discretion after Dale C. Brown. An employer is not required to bargain before implementing a change in the terms and conditions of employment if it has no discretion or latitude in making the change. See E.E.O.C. v. American Telephone & Telegraph Co., 365 F.Supp. 1105, 1129 (E.D. Pa. 1973). The State may have lacked discretion on the question whether Dale C. Brown invalidated Rule 9.01. However, it had substantial discretion over a substitute for it. Several possibilities are obvious: using workers' compensation benefits rates as the rate for maintenance, adopting a uniform daily maintenance rate, or adopting a maintenance rate scale. Another possibility was providing injured workers the option to choose a remedy. The parties had wide latitude in fashioning a substitute remedy for worker injuries.

The State's solution to the problem posed by Dale C. Brown, paying maintenance and cure at 1980 - 1983 rates, was not compelled. The cases cited by the State, which allow unilateral implementation when the employer has no discretion, are not on point. State's responding brief, p.6.

AS 23.40.110(a)(5) provides an obligation to bargain before implementing a change in working conditions. The State therefore committed an unfair labor practice when it unilaterally implemented an interim remedy. The absence of a reasonable delay for negotiations between the date of the letter and the date announced for implementing the change is the key to finding an unfair labor practice charge in this case.

VII. Other charges.

In its accusation IBU charged violations of AS 23.10.110(a)(1) and (a)(2), in addition to a violation of the duty to bargain in subsection (a)(5). Subsection (a)(1) prohibits interference with the exercise of rights under PERA. Subsection (a)(2) prohibits domination or interference with formation, existence or administration of a union. The State's actions do not support a violation of either.

VIII. Remedy.

While we have found an unfair labor practice by the State, we want to emphasize the mutuality of the duty to bargain in good faith. IBU's failure to respond to the bargaining request allowed the unilateral change to be made and to continue. Both parties contributed in this case.

Because we find that the State committed an unfair labor practice, we next must decide the appropriate remedy. Clearly an order to bargain in good faith is appropriate. When or if the parties are unable to reach agreement after a good faith effort, in other words if the parties reach impasse, then and only then can the State implement its last offer. Ordinarily this Agency would reinstate the term or condition of employment that was changed pending negotiations. However, we are reluctant to issue an order that involves benefits to injured workers and another state regulatory scheme without a clear understanding of the impact of the ruling. We do not have that understanding on the record in this case. Therefore we do not in this case return the parties to the status quo before October 29. Instead, we order the parties to negotiate and to include in their negotiations those individual seamen affected during the period the State's interim policy was in effect.

CONCLUSIONS OF LAW

1. This Agency has jurisdiction to consider the unfair labor practice complaint filed by the Inlandboatmen's Union under AS 23.40.110 and Hafling v. Inlandboatmen's Union of the Pacific, 585 2d 870, 871 (Alaska 1978).

2. This Agency has jurisdiction to interpret and enforce the collective bargaining agreement under AS 23.40.210.

3. AS 23.40.110(a)(5) provides an obligation to bargain in good faith if a term in a collective bargaining agreement is found void or invalid.

4. The duty to bargain remedies for injured workers arose after the court issued Dale C. Brown.

5. An employer may not implement a contract term until impasse in bargaining is reached or the labor organization

waives its right to bargain.

6. The State did not provide a genuine opportunity to bargain before it implemented a change to Rule 9.01, covering injured workers' remedies, and therefore violated the duty to bargain in good faith under AS 23.30.110(a)(5).

7. The IBU's inaction in response to the request to bargain contributed to the failure of bargaining and the unfair labor practice.

8. The State's actions did not violate AS 23.40.110(a)(1) or (a)(2).

ORDER

1. The State and the Inlandboatmen's Union are ordered to bargain a substitute for Rule 9.01, including the retroactive application of that substitute to seamen receiving payments for worker injuries after October 29, the date the State unilaterally implemented a new remedy for injured workers.

2. The State is ordered to post copies of this decision fourteen days after service, in workplaces of IBU unit members at locations, such as employee bulletin boards, reasonably chosen to give members actual notice of the decision.

Date:

THE ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Board Chairman

James W. Elliott, Board Member

Darrell Smith, Board Member