

**ALASKA LABOR RELATIONS AGENCY  
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INLANDBOATMEN'S UNION OF THE )  
PACIFIC, ALASKA REGION; MARINE )  
ENGINEERS' BENEFICIAL ASS'N, )  
DISTRICT NO. 1-PACIFIC COAST )  
DISTRICT; AND INTERNATIONAL )  
ORGANIZATION OF MASTERS, MATES )  
AND PILOTS, )  
 )  
Petitioners, )  
 )  
vs. )  
STATE OF ALASKA, ALASKA MARINE )  
HIGHWAY SYSTEM, )  
 )  
Respondent, )  
 )

CASE NO. 92-103-ULP

**DECISION AND ORDER NO. 149**

Heard before the Alaska Labor Relations Board, Chairman B. Gil Johnson and member James W. Elliott, with Hearing Examiner Jan Hart DeYoung presiding, on October 30, 1992, in Anchorage, Alaska. Member Darrell Smith did not participate. The record closed on October 30, 1992.

Appearances:

Bruce B. Weyhrauch, Faulkner, Banfield, Doogan & Holmes, for petitioners Inlandboatmen's Union of the Pacific, Alaska Region, Marine Engineers' Beneficial Association, District No. 1-Pacific Coast District, and International Organization of Masters, Mates and Pilots; and Jim Johnsen, Labor Relations Analyst, for respondent State of Alaska, Alaska Marine Highway System.

Digest:

The remedy for refusal to bargain in good faith in violation of AS 23.10.110 is an order to cease and desist the refusal to bargain and an order to bargain in good faith upon a request. When the refusal to bargain involves unilateral action, the parties are, in addition, usually returned to the status quo ante. However, in this case to avoid unintentional interference with Coast Guard regulations and requirements, the Agency departs from the usual remedy and does not order return to the status quo ante.

**DECISION**

**Findings of Fact**

1. The Inlandboatmen's Union of the Pacific, Alaska Region; Marine Engineers' Beneficial Ass'n, District No. 1-Pacific Coast District; and the International Organization of Masters, Mates and Pilots are bargaining representatives of units of Alaska Marine Highway System employees.<sup>1</sup>

2. The State implemented a drug testing policy and procedure for the Alaska Marine Highway system on November 1, 1991. B. Cummings, Letter to F. Price (Nov. 1, 1991), Exh. 4.
3. Alaska Marine Highway System bargaining representatives were informed on April 13, 1992, that the State had implemented a discipline policy to supplement the drug policy. J. Johnsen, Letter to F. Price (April 13, 1992), Exh. 11, p.7.
4. The State did not provide the Alaska Marine Highway System bargaining representatives with an opportunity to negotiate the Alaska Marine Highway System policy and procedure for urinalysis drug testing and post/serious marine incident testing or the related disciplinary policy.
5. On March 27, 1992, the A.M.H.S. bargaining unit representatives jointly filed a complaint alleging that the failure to negotiate and the unilateral adoption of the drug testing policy violated AS 23.30.110.
6. On May 30, 1992, the A.M.H.S. bargaining unit representatives jointly amended their complaint to charge the State with a violation of AS 23.40.110 for its unilateral adoption of a discipline policy to supplement the drug testing policy.
7. The Alaska Labor Relations Agency concluded its investigation, and on May 14, 1992, issued a notice of accusation determining that probable cause existed to support the charges.
8. The impact on individual workers of the change in discipline policies was that termination, rather than a two-week suspension, was the discipline for a positive drug test. Such employees could become eligible for rehire in the future, but would lose benefits and accrued seniority.
9. Neither the parties' relationship nor their bargaining history in this case demonstrate antiunion animus.
10. On August 7, 1992, this Agency issued Decision and Order No. 141 in Inland-boatmen's Union of the Pacific v. State of Alaska, 92-070-ULP, which ordered the parties to bargain. As of October 30, 1992, the parties had negotiated two times and were scheduled to meet a third time on October 30, 1992.

### Discussion

At the hearing the State conceded that drug testing procedures and related discipline policies were negotiable. By doing so, the State conceded an obligation to bargain under AS 23.40.110(a)(5). The only question remaining for hearing before the Agency was the question of an appropriate remedy.

The usual remedy for a refusal to bargain in violation of AS 23.40.110 is an order to cease and desist from the refusal to bargain and, upon request, to bargain collectively over the particular term or condition of employment. Williamsburg Steel Products Co., 126 N.L.R.B. No. 39, 45 L.R.R.M.(BNA) 1300 (1960), enforcement denied sub nom. NLRB v. Katz, 289 F.2d 700, 47 L.R.R.M.(BNA) 2967 (2d Cir. 1961), rev'd 369 U.S. 736, 50 L.R.R.M.(BNA) 2177 (1962). If the refusal to bargain also includes unilateral action by the employer, the remedy usually includes restoration of the status quo ante and the employees are made whole for the loss of any benefits. American Lubricants Co., 136 N.L.R.B. No. 83, 49 L.R.R.M.(BNA) 1888 (1962). The usual rule, however, has exceptions. See e.g., Beacon Journal Publishing Company v. NLRB, 401 F.2d 366, 69 L.R.R.M.(BNA) 2232 (6th Cir. 1968), 417 F.2d 1060, 72 L.R.R.M.(BNA) 2639 (6th Cir. 1969). See generally 2 Patrick Hardin, The Developing Labor Law 1844-1846 (3rd ed. 1992).

Both parties asked the Agency to depart from the usual remedy because of special circumstances in this case. The bargaining representatives asked the Agency to order a specific time for bargaining to commence, to order the parties to meet six times in the six weeks following that date, and to order the parties to binding interest arbitration if no agreement were reached in that time. The State, on the other hand, asked the Agency not to restore the status quo ante because it could result in violation of Coast Guard regulations with serious consequences for the Alaska Marine Highway System.

### 1. Petitioners Argument

The Agency has the authority and discretion in appropriate circumstances to supervise an order to bargain closely as requested by the bargaining representatives in this case. AS 23.40.140. The bargaining representatives, however, have not provided sufficient evidence to support departure from the ordinary rule. The only evidence provided was testimony of the bargaining history following the Agency's Decision and Order No. 141. That evidence does not justify or require the close level of supervision requested in this case, and the Agency will not presume under these facts any future resistance or noncompliance with an order to bargain.

The request for an order for binding arbitration is more troublesome. AS 23.40.200 establishes the tools available to the parties to resolve impasse. Most employees have recourse to a strike. Other employees, for whom an interruption in services would pose a danger to the health, safety or welfare of the public, are prohibited from striking. AS 23.40.200(b) provides employees who may not strike with binding interest arbitration. At any impasse, the resources in AS 23.40.200 are available to employees. The bargaining representatives have presented no legal or factual basis for departing from AS 23.40.200.

## 2. State's Argument

The State's argument not to restore the status quo ante is premised upon Inlandboatmen's Union of the Pacific v. State of Alaska, Decision and Order No. 141 (Aug. 7, 1992). In that case the Agency declined to restore the status quo. The reason was the unforeseeability of the impact on individuals' workers compensation benefits and potential interference with this other regulatory scheme. Instead, the Agency ordered the parties to negotiate for individuals affected by the State's unilateral action.

The analogy is appropriate. In this case the source of the drug testing requirement is Coast Guard regulation. 46 C.F.R. § 16.201 (1991), Exh. 14, p. 185. To avoid interference with the Coast Guard's requirements and any unintentional effects on that system, the Agency in this case does not order the restoration of the status quo. In this case the restoration of the status quo would require reinstatement of employees discharged for a positive drug test. Because of potential interference with Coast Guard regulations, rather than order their reinstatement, this Agency orders the parties to negotiate an appropriate remedy.

## Conclusions of Law

1. This Agency has jurisdiction under AS 23.40.110 to consider this matter.
2. Failure to negotiate the terms and procedures of a drug testing policy and the related disciplinary policy violate the employers obligation to bargain in good faith under AS 23.10.110(a)(5).
3. The history of bargaining between the parties in the record does not support supervising negotiations in this case.
4. If the parties reach impasse, the employees may resort to the procedures appearing in AS 23.40.200.
5. The Alaska Labor Relations Agency will not restore the status quo ante when it orders the parties to bargain after a unilateral change in a term or condition of employment if such an order will interfere with another regulatory scheme. Inlandboatmen's Union of the Pacific v. State of Alaska, Decision and Order No. 141, at 22 & 24.

## ORDER

1. The State of Alaska is ordered to cease and desist from refusal to bargain over the drug testing and related disciplinary policies for the Alaska Marine Highway System employees;
2. The State of Alaska is ordered to bargain upon a request by an Alaska Marine Highway System bargaining representative;
3. The parties are to include in negotiations a remedy for the effects of the unilateral action by the State on the bargaining representatives and on any individual employees, including an effective date for any agreement reached; and

4. The State is ordered to post copies of this decision within 14 days after service in workplaces of unit members at locations, such as employee bulletin boards, reasonably chosen to give members actual notice of the decision.

## ALASKA LABOR RELATIONS AGENCY

B. Gil Johnson, Chairman

James W. Elliott, Board Member

### NOT PARTICIPATING

Darrell Smith, Board Member

### APPEAL PROCEDURES

An Agency decision and order may be appealed through proceedings in superior court brought by a party in interest against the Agency and all other parties to the proceedings before the Agency, as provided in the Alaska Rules of Appellate Procedure and the Administrative Procedures Act.

The decision and order becomes effective when filed in the office of the Agency, and unless proceedings to appeal it are instituted, it becomes final on the 31st day after it is filed.

### CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of Inlandboatmen's Union of the Pacific, Alaska Region; Marine Engineers' Beneficial Ass'n, District No. 1-Pacific Coast District; and Int'l Organization of Masters, Mates and Pilots v. State of Alaska, Alaska Marine Highway System, Case No. 92-103-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 3rd day of December, 1992.

Norma Wren

Clerk IV

This is to certify that on the 3rd day of December, 1992, a true and correct copy of the foregoing was mailed, postage prepaid to

Bruce Weyhrauch

Jim Johnsen

Signature

1By making this finding, we do not mean to resolve the question of the bargaining representative of the Alaska Marine Highway System licensed marine engineers at issue in State of Alaska v. Marine Beneficial Ass'n, et al., 92-123-ULP, and District No. 1, Marine Engineers Beneficial Ass'n/NMU(AFL-CIO) v. State of Alaska, 93-134-ULP. In those cases two factions of the Marine Engineers Beneficial Association (MEBA/NMU and PCD MEBA) claim to represent the Alaska Marine Highway System licensed engineers. PCD MEBA filed this action on behalf of the unit. MEBA/NMU was provided an opportunity to participate but did not enter an appearance.