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INTERNATIONAL ORGANIZATION OF)
MASTERS, MATES, & PILOTS, PACIFIC)
MARITIME REGION ILA, AFL-CIO,)
)
Complainant,)
)
vs.)
)
STATE OF ALASKA,)
)
Respondent.)
)

Case No. 04-1303-ULP

DECISION AND ORDER NO. 271

The board heard this dispute on December 2, 2004, in Juneau. The Board based its decision on the evidence admitted and testimony presented during the hearing. Hearing Examiner Mark Torgerson presided.

Digest: The State of Alaska committed an unfair labor practice when it unilaterally changed a term or condition of employment without bargaining to impasse.

Appearances: Gabriel Terrasa, attorney for Complainant Masters, Mates and Pilots (MM&P); Nancy Sutch, Labor Relations Analyst for the State of Alaska (State).

Panel: Gary P. Bader, Chair; Randall Frank and Dennis Niedermeyer.

DECISION

Statement of the Case

MM&P filed an unfair labor practice complaint against the State for failure to bargain in good faith and interfering with employees' rights protected under AS 23.40.110(a)(1). MM&P contends that the State violated AS 23.40.110(a)(5) and (a)(1) by unilaterally implementing changes to compensation and other terms and conditions of

employment for deck officers aboard the M/V Aurora without bargaining to impasse. MM&P requests that we find the State committed an unfair labor practice and that we order the State to make affected employees whole. The State argues that the parties were essentially deadlocked, and its change was justified.

During the December 2 hearing, the Board asked the parties if they would like an opportunity to settle their dispute. The parties agreed to do so, and after hearing the remainder of witness testimony, the Board left the record open for settlement discussions until December 16, 2004. The parties faxed a notice the morning of December 16 that they were unable to reach settlement. The Board closed the record on December 16 and deliberated.

Issues

1. Were the parties at impasse? If not, did the State of Alaska commit an unfair labor practice when it implemented a change to the parties' expired collective bargaining agreement without bargaining to impasse?
2. If the State of Alaska committed an unfair labor practice, what is the remedy?

Findings of Fact

The panel, by a preponderance of the evidence, finds the following facts:

1. MM&P is recognized as the exclusive bargaining representative for deck officers employed by the Alaska Marine Highway System (AMHS).
2. The State of Alaska employs deck officers, represented by MM& P, throughout the State's ferry system.
3. The parties' collective bargaining agreement was effective from July 1, 2000, to June 30, 2003. (Jt. Exh.1). In January 2004 the parties commenced negotiations for a new agreement.
4. Prior to 2004, the State used the M/V Bartlett for ferry service in Prince William Sound. The State retired the M/V Bartlett from service and sold it after the 2003 season. The sale of the M/V Bartlett was part of the State's plan to bring a new ship into service. The State must retire an older ship when a new one comes on board. (Testimony of Captain Joe Martin).
5. In conjunction with the Bartlett's retirement, the State proposed to MM&P that the M/V Aurora operate in the Prince William Sound during the May-to-September period. On November 24, 2003, the State sent MM&P a request to negotiate the effects of relocating the M/V Aurora to Prince William Sound. (Jt. Exh. 3).

6. A disagreement arose over the State's proposed use of the M/V Aurora in Prince William Sound. The parties' collective bargaining agreement contained a section titled "Supplemental Agreement . . . RE: M/V Bartlett." (Jt. Exh. 1 at 32-34). This three-page supplement, known as the Bartlett Supplemental, amended Rules 12, 16-20, 22-23, and 25 of the parties' master collective bargaining agreement. The intent of the amendments to the master agreement was "to cover issues unique to the M/V Bartlett." (Jt. Exh. 1, at 32). The amendments covered wages, hours, and other terms and conditions of employment for deck officers assigned to the M/V Bartlett. The Bartlett Supplemental had been in effect since at least 1981. (Ronald Leighton testimony).

7. The master collective bargaining agreement lists several ships, including the M/V Bartlett and M/V Aurora, as covered by the master agreement. However, the Bartlett Supplemental covers only the M/V Bartlett.

8. The parties negotiated the M/V Aurora issue, but MM&P rejected the State's initial proposal. MM&P wanted the M/V Aurora covered by the master agreement during the Aurora's service in Prince William Sound. (Jt. Exh. 5, April 8, 2004, letter from Captain Steven Demeroutis to Art Chance, Labor Relations Director for State Department of Administration). The State wanted the Aurora covered by the Bartlett Supplemental. (Jt. Exh. 6, April 13, 2004 letter from Chance to Demeroutis). The State contended the Bartlett Supplemental should apply because the Aurora was providing service formerly provided by the Bartlett, and the route and run times were nearly identical. (*Id.*). The State sent MM&P a proposed Letter of Agreement to cover the M/V Aurora's service in Prince William Sound, but MM&P never signed the agreement.

9. The State transferred the M/V Aurora from service in Southeast Alaska to Prince William Sound on or about April 19, 2004. (Ronald Leighton testimony). At the time of this change, the State and MM&P were still negotiating for a new agreement that included discussions about the transfer of the M/V Aurora to Prince William Sound.

10. At a negotiating session on May 4, 2004, the parties discussed the M/V Aurora issue. The State submitted a proposed letter of agreement describing the M/V Aurora's service in the Southwest Alaska System, which includes Prince William Sound. (Joint Exh. 10). MM&P submitted a counterproposal to the State during the same session. (Joint Exh. 9). At the end of the negotiating session, the State's negotiator, Nancy Sutch, read a statement that declares in part: "Obviously we can't arrive at an agreement. We believe now as we believed in the beginning that the Bartlett Supplemental was to cover the run and route unique to [Prince William Sound]. We have been and will continue to operate the Aurora under that agreement." (MM&P Exh. 2).

11. The Aurora operated in Prince William Sound during the summer of 2004. The State paid the MM&P deck crews under the Bartlett Supplemental. Under this supplemental, the crews received different wages and worked different work schedules than if they had worked under the parties' master collective bargaining agreement.

12. The parties were not at impasse when the State transferred the M/V Aurora from Southeast Alaska to service in Prince William Sound.

ANALYSIS

1. Were the parties at impasse? If not, did the State of Alaska commit an unfair labor practice when it implemented a change to the parties' expired collective bargaining agreement without bargaining to impasse?

AS 23.40.110(a)(5) provides that a public employer may not “refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.” Moreover, “[c]onduct that violates AS 23.40110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1). *Alaska State Employees Ass’n/AFSCME Local 52, AFL-CIO vs. State of Alaska, Department of Administration, Division of Personnel/EEO*, Decision and Order No. 245, at 10, (Nov. 17, 1999); *Alaska Community Colleges’ Federation of Teachers, Local 2402, AFT, AFL-CIO v. University of Alaska*, Decision and Order No. 191, at 8 (Sept. 26, 1995) *aff’d* 3 AN-95-9083 CI (Alaska Super. Ct., September 26, 1995).¹

It is undisputed that the parties bargained for more than four months, from January to May 2004, in an attempt to reach accord on a new collective bargaining agreement. In fact, the parties were still bargaining for a new contract when the State transferred the M/V Aurora to Prince William Sound, away from its usual Southeast Alaska portage. The M/V Aurora’s transfer affected the wages, hours, and terms and conditions of employment of the ship’s deck officers.

Wages, hours, and terms and conditions of employment are a mandatory subject of bargaining. *Alaska State Employees Ass’n/AFSCME Local 52, AFL/CIO v. State of Alaska*, Decision and Order No. 158 at 15 (May 14, 1993), *aff’d*. *Alaska State Employees Ass’n v. State of Alaska*, 3 AN-93-05800 CI. AS 23.40.070(2) and AS 23.40.110(a)(5) obligate the State to bargain collectively in good faith with MM&P over these mandatory subjects of bargaining.

We found that the parties’ collective bargaining agreement had expired. However, the employer is prohibited from making unilateral changes to mandatory subjects of bargaining until the parties either reach a new agreement or reach impasse.² The parties must continue to bargain in good faith if they have not reached agreement on a new contract. The duty to bargain in good faith requires the parties to maintain the status quo until they

¹ See generally 1 Patrick Hardin and John Higgins, Jr., *The Developing Labor Law 4th ed.* (2001) at 82: “The Board has noted since its earliest days that ‘a violation by an employer of any of the four subdivisions of Section 8, other than subdivision one, is also a violation of subdivision one.

² “The expiration of the parties’ bargaining agreement does not release the employer from the duty to provide health benefits under the agreement.” (*Alaska State Employees Ass’n/AFSCME Local 52 vs. State of Alaska*, Decision and Order No. 158 at 15, May 14, 1993).

negotiate to impasse. *Intermountain Rural Electric v. NLRB*, 984 F.2d 1562, 1566, 142 L.R.R.M. (BNA) 2448, 2452 (10th Cir. 1993).

A unilateral change to a mandatory subject of bargaining alters the status quo. "Unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to bargain." 1 Patrick Hardin and John Higgins, Jr., *The Developing Labor Law*, at 773, (4th ed. 2001).

An employer's unilateral change in a term or condition of employment before the parties reach impasse in negotiations is an unfair labor practice even if the parties' agreement has expired. *Litton Financial Printing Div. v. NLRB*, 111 S. Ct. at 2221, 137 L.R.R.M. (BNA), at 2444-2445.³ A unilateral change by an employer to a mandatory subject of bargaining is normally considered a *per se* refusal to bargain. This is so even "though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end." *NLRB v. Katz*, 369 US 736, 743 (1962); 50 L.R.R.M. 2177 (1962). *See generally* I Patrick Hardin and John Higgins, Jr., *The Developing Labor Law*, at 773-783 (4d. ed. 2001).

The State transferred the M/V Aurora to Prince William Sound in April 2004. It unilaterally implemented the terms and conditions of employment for the deck officers aboard the Aurora that had been applied to the deck officers employed previously on the M/V Bartlett. In doing so, it unilaterally changed a mandatory subject of bargaining. Since the parties had not reached a new agreement, we must decide whether the parties had reached impasse when the State implemented the changed terms and conditions of employment in April 2004. The State contends the parties "had essentially reached a deadlock." (State's Prehearing Brief at 2). MM&P maintains that the parties were still negotiating at the time the State implemented the changes.

We agree with MM&P that the parties were not at impasse when the State transferred the M/V Aurora to Prince William Sound, and implemented the terms and conditions of employment that had applied to the deck officers on the M/V Bartlett. Absent impasse, necessity, or some compelling business justification, the State should not have the discretionary authority to implement a unilateral change to a mandatory subject of bargaining in an expired collective bargaining agreement without first negotiating to impasse. *Alaska State Employees Association vs. State of Alaska*, Decision and Order No. 245 (Nov. 17, 1999). *See Alaska State Employees Ass'n, AFSCME Local 52 vs. State of Alaska*, Decision and Order No. 158, at 17 (May 14, 1993). Instead, the State should continue to provide the benefits required under the master collective bargaining agreement, including compensation and other terms and conditions of employment.

The State contends it needed to operate the Aurora to provide service for Southwest Alaska communities. (*Id.*). This may be so, but it is not justification to pay M/V Aurora

³ Our regulation 8 AAC 97.450(b) states that "[r]elevant decisions of the National Labor Relations Board and federal courts will be given great weight in the decisions and orders made under this chapter and AS 23.40.070 – 23.40.260"

deck officers under the Bartlett Supplemental. We find no necessity or compelling business justification in this case.

We find that the parties were not at impasse at the time the State transferred the M/V Aurora to Prince William Sound in April 2004, and that MM&P proved by a preponderance of the evidence that the State's unilateral implementation constituted a per se violation of AS 23.40.110(a)(5). We also find that the State's conduct interfered with employees' rights protected under AS 23.40.080 in violation of AS 23.40.110(a)(1). Thus, the State committed an unfair labor practice when it violated AS 23.40.110(a)(5) and (1).

2. If the State of Alaska committed an unfair labor practice, what is the remedy?

MM&P requests that we order that the State to "cease and desist from the prohibited practices," and order that MM&P and its bargaining unit members "be made whole for all losses sustained as a result of the State's prohibited practices." (MM&P Hearing Brief at 4). AS 23.40.140 provides: "If the labor relations agency finds that a person named in the written complaint or accusation has engaged in a prohibited practice, the labor relations agency shall issue and serve on the person an order or decision requiring the person to cease and desist from the prohibited practice and to take affirmative action which will carry out the provisions of AS 23.40.070 -- 23.40.260.

In this case, we will order the State to cease and desist from the prohibited practice of operating the M/V Aurora under the Bartlett Supplemental, and to take affirmative action by making the affected MM&P bargaining unit members whole.

CONCLUSIONS OF LAW

1. The International Organization of Masters, Mates and Pilots is an organization under AS 23.40.250(5), and the State of Alaska is a public employer under AS 23.40.250(7).

2. This Agency has jurisdiction under 23.40.110 to determine whether the State of Alaska committed an unfair labor practice.

3. As complainant, MM&P must prove each element of its case by a preponderance of the evidence.

4. MM&P proved that the State of Alaska committed an unfair labor practice, under AS 23.40.110(a)(5) by unilaterally implementing a change in compensation and other terms and conditions of employment for deck officers aboard the M/V Aurora without bargaining to impasse. The State's conduct also interfered with employees' rights protected under AS 23.40.080 in violation of AS 23.40.110(a)(1).

ORDER

1. The State of Alaska is ordered to cease and desist those unilateral changes to terms and conditions of employment during bargaining that violated AS 23.40.110(a)(5);

2. The State of Alaska must take affirmative action that will carry out the provisions of AS 23.40.070 -- 23.40.260 by making the affected MM&P bargaining unit members whole;

3. The State of Alaska is ordered to cease and desist from infringing in any manner on the rights guaranteed under AS 23.40.070 - - 23.40.260;

4. The State of Alaska shall 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, serve each employee affected personally. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Gary P. Bader, Chair

Randall Frank, Board Member

Dennis Niedermeyer, 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 filing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the order in the matter of the *International Organization of Masters, Mates and Pilots vs. State of Alaska*, Case No. 04-1303-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 28th day of December, 2004.

Sherry Ruiz
Administrative Clerk III

This is to certify that on the 28th day of December, 2004, a true and correct copy of the foregoing was mailed, postage prepaid, to
Gabriel Terrasa, MM&P
Nancy Sutch, State of Alaska

Signature