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INTERNATIONAL ORGANIZATION)
OF MASTERS, MATES & PILOTS,)
AFL-CIO,)

Complainant,)

vs.)

STATE OF ALASKA,)

(1633 & 1635) Respondent.)

INLANDBOATMEN'S UNION OF)
THE PACIFIC, ALASKA REGION 1,)
INTERNATIONAL LONGSHORE AND)
WAREHOUSE UNION,)

Complainant,)

vs.)

STATE OF ALASKA,)

(1636) Respondent.)

MARINE ENGINEERS' BENEFICIAL)
ASSOCIATION, AFL-CIO,)

Complainant,)

vs.)

STATE OF ALASKA,)

(1637) Respondent.)

CASE NOS. 13-1633-ULP, 13-1635-ULP, 13-1636-ULP, 13-1637-ULP (Consol.).

DECISION AND ORDER NO. 303

We heard these unfair labor charges on July 21, 2014, to July 24, 2014, in Juneau. Hearing Examiner Mark Torgerson presided. We considered witnesses' testimony, and the parties'

exhibits and arguments, including those presented in post-hearing briefs. The record for this case closed on November 26, 2014, after final deliberations were completed.

Digest: The unfair labor practice charges filed by the International Organization of Masters, Mates and Pilots, AFL-CIO; Marine Engineers' Beneficial Association, AFL-CIO; and the Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union are granted in accordance with this decision. There was a past practice of providing access to the food courts on the fast vehicle ferries M/V Fairweather and M/V Chenega. This past practice, of providing food and drinks for crew members for nine years, is a mandatory subject of bargaining.

Appearances: Rhonda Fenrich, attorney for Complainants International Organization of Masters, Mates and Pilots, AFL-CIO, Marine Engineers' Beneficial Association, AFL-CIO, and Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union; Kent Durand, Labor Relations Analyst, for Respondent State of Alaska.

Board Panel: Lynne Curry, Vice Chair; Matthew McSorley and Tyler Andrews, Board Members.

DECISION

Statement of the Case

The International Organization of Masters, Mates and Pilots, AFL-CIO, Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union, and Marine Engineers' Beneficial Association, AFL-CIO (the unions) each filed unfair labor practice charges against the State of Alaska. The unions allege that the State committed unfair labor practices by unilaterally changing a mandatory subject of bargaining. Specifically, the unions contend that the State, without negotiating, stopped a nine-year practice of providing free meals and beverages to the unions' bargaining unit members aboard the State's fast vehicle ferries (FVF's), the M/V Fairweather, and the M/V Chenega. In addition, the International Organization of Masters, Mates and Pilots, AFL-CIO (MM&P) contends in case number 13-1635-ULP that the State retaliated against it by eliminating the free food on the M/V Fairweather after MM&P filed the unfair labor practice charge related to the M/V Chenega. The State denies the claims and argues that there was never a past practice of providing meals on board the FVF's.

Agency hearing officer Jean Ward conducted an investigation and found probable cause existed in support of the complaints under AS 23.40.110(a)(5) and (1).¹ In her Notice of Preliminary Finding of Probable Cause in case number 13-1633-ULP at 4-5, for example, Ward

¹ See "Notice of Preliminary Finding of Probable Cause" for case numbers 13-1633-ULP, 13-1635-ULP, 13-1636-ULP, 13-1637-ULP, each dated November 21, 2013.

stated that the parties disputed whether the State provided free meals on the fast vehicle ferries, and that factual disputes could not be resolved in her investigation. She added that employer-provided meals can be a mandatory subject of bargaining.

The Agency consolidated the three unions' complaints and held a hearing in Juneau.

Issues

1. Is access to food and beverages in the food court on the Alaska Marine Highway System's fast vehicle ferries a mandatory subject of bargaining? If so, did the State commit an unfair labor practice by unilaterally changing a practice of allowing access to the food courts and consumption of free food and beverages on the M/V Fairweather and M/V Chenega, without notice to or bargaining with the three affected unions?

2. Did the State retaliate against MM&P by stopping access to the food court on the M/V Fairweather in response to MM&P's filing an unfair labor practice related to the M/V Chenega?

Findings of Fact

1. The Alaska Marine Highway System (AMHS) is a component of the State of Alaska's Department of Transportation and Public Facilities. The AMHS operates a fleet of vessels that provide service from Canada to the Aleutian Chain. The AMHS initially utilized "mainline," (also called "conventional") vessels in its operation. These vessels usually operate 24 hours a day, seven days a week. Employees can be stationed onboard these vessels for several days or weeks, depending on the length of the assignment or voyage.

2. Three different unions represent the employees who work on the AMHS vessels. They are the International Organization of Masters, Mates, and Pilots, AFL-CIO (MM&P), the Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union (IBU), and the Marine Engineers' Beneficial Association (MEBA), an affiliate of the American Federation of Labor and the Congress of Industrial Organizations.

3. MM&P represents the licensed deck officers who work for the AMHS. (Captain Ron Bressette testimony).

4. IBU represents the stewards, ordinary seamen, bosons, and hotel/restaurant employees working in the galleys on AMHS ferries (boats). These employees are unlicensed. (Darryl Tseu testimony).

5. MEBA is the exclusive collective bargaining agent for the licensed engineering officers who work on boats in the AMHS. (Ben Goldrich testimony).

6. MM&P, IBU, and MEBA (the unions) each have collective bargaining agreements with the State of Alaska (State). For several decades, each union has negotiated numerous three-year agreements with the State.²

7. Crew members on the mainline vessels live and work on the vessels for the length of the assignment, sometimes for several days. (Bressette testimony). There are cabins available, and the ships have food galleys. (Nancy Sutch testimony). Crew members have always been allowed to consume food and nonalcoholic beverages for free on the mainline ships. They do not get per diem during their work shift, but they are allowed to consume food for no cost, even though the collective bargaining agreements are silent on this free consumption.

8. The crew mess on the mainline ships is approximately 40 feet long and 15 feet wide. Crew members may order food from the messman (a server). Food is made to order and includes spaghetti, steaks, halibut burgers, a salad bar, and breakfast with eggs. (Captain Sam Daniels testimony).

9. The AMHS eventually decided to add two fast vehicle ferries (FVF's) to its fleet of ships. These vessels and their operation differ in many respects from mainline vessels. FVF's are high speed catamarans. Driving them is "pretty intense." (Captain Wayne Carnes testimony). While the mainliners' service speed is 16 knots, the fast ferries run at 32 knots. (Carnes testimony, and Exhibit C, at page 1). The fast ferries are like driving a car at 100 miles per hour.³

10. The captain is in charge of everything on the FVF, and the chief mate is second in command. (Bressette testimony). On the fast vehicle ferry, all the crew members driving the ship are on the bridge, or operating compartment. There is an engineering console where all engineering equipment is started and stopped. There are two forward chairs and a lookout, with two navigators. It is similar to a jet aircraft view in the cockpit. (Carnes testimony).

11. The Coast Guard licensing required to operate FVF's is different and in addition to that required to operate mainline vessels. Obtaining licensing to operate FVF's requires additional schooling and training. (Bressette and George Poor testimony). Crew members were required to get high-speed craft training before the State could begin revenue service. (Sutch testimony). Extra licensing is also required for deck officers, and those who operate and navigate the ships, including the captain, chief mate, second mate, third mate, and pilot. (Bressette testimony).

² See, for example, the Supplemental Agreement between the State of Alaska and the Inlandboatmen's Union of the Pacific executed on August 7, 1980. (Exhibit A). The agreements particularly relevant for these cases are those agreements negotiated from 2004 to 2014.

³ George Poor testified: "It's a high intensity environment working on these vessels. You're on task all day long."

12. The M/V Fairweather was the FVF added in 2004, and its home port was Juneau. The M/V Chenega came the following year and its home port was Cordova. The AMHS decided where the two FVF's would be home-ported. (Sutch testimony). These two vessels do not operate year-round. (Benthe Mertl-Posthumus testimony).

13. After the State decided to add FVF's to its fleet, the AMHS subcontracted with a group of Canadians experienced with operating fast ferries. (Carnes and Captain John Falvey testimony). Training took place over a two-month period in 2004. There was both classroom and ship training. (Carnes testimony).

14. Employees represented by the unions who work on the traditional mainliner boats get free meals, but the collective bargaining agreements between the unions and the State do not address this fact. The taking of food and drink items is neither permitted nor prohibited by the collective bargaining agreements. (Joint Exhibits 2 and 4, and Exhibits 1-3).

15. The unions and the State have negotiated a number of collective bargaining agreements related to the FVF's, beginning in 2004. The parties negotiated the collective bargaining agreement for the M/V Fairweather from approximately February 2004 to May 2004, and the State and the unions reached tentative agreements in early May 2004.⁴ The three unions negotiated together in bargaining with the State. The members of the State's bargaining team included Spokesperson Nancy Sutch, Art Chance, John Torgerson, and Dianne Kiessel. (Sutch testimony).

16. Nancy Sutch is currently deputy director of the Division of Personnel and Labor Relations within the Department of Administration. In addition to her 2004 participation, she was on the State's bargaining team in the 2007 and 2011 collective bargaining negotiations with MEBA.

17. Sutch testified that all through bargaining, the State took the position that the M/V Fairweather was a day boat, and the State was not providing meals. As day boats, the vessels leave in the morning and come back to the dock at night. They do not have the same crew facilities as the mainline vessels have, as the day boats don't have cabins and galleys.

18. Since there is no galley, there is a food court, with more pre-packaged food, soup, and beverages available. During training, before the vessels carried revenue passengers, crew members prepared soup to see how long it would take to heat it before it could be served, for example. (Sutch testimony).

19. Sutch testified that employees on the day boats were expected to feed themselves by bringing their own food for lunches. When Sutch learned that food was being served to the crew members, she asked Mike Wilson, the port steward at the time, why crew members were being served food when the State had taken the position that no food would be provided to crew members on day boats. Sutch claims that Wilson said they were trying out soups and things to see how the

⁴ See, e.g., Exhibit 16 – tentative agreement between the State and IBU.

food items worked, and rather than throwing the soup away, they gave it to the crew members to eat.

20. On May 26, 2004, Art Chance, then Director of Labor Relations for the State Department of Administration, wrote a letter to Darryl Tseu, Regional Director of the Inlandboatmen's Union of the Pacific (IBU). Chance's letter provides: "Please consider this as notification that although the Alaska Marine Highway System (AMHS) is currently providing meals to the crew of the M/V Fairweather, there is no contractual requirement to do so." (Joint Exhibit I). Chance copied the letter to Captain John Falvey, general manager of the AMHS, the senior port captains, senior port engineers, and the port steward.

21. Formerly, Sutch was a labor relations analyst in the labor relations section. She testified that she authored the May 26, 2004, letter for Chance. When asked why the letter was written, she testified that it was written before the M/V Fairweather entered into revenue service, and after the labor relations section became aware that employees were eating meals on the M/V Fairweather.

22. The letter from Chance does not mention soup or that providing the food was only for the time before the M/V Fairweather entered into revenue service carrying passengers. It states, "Please consider this as notification that although the Alaska Marine Highway System (AMHS) is currently providing meals to the crew of the M/V Fairweather, there is no contractual requirement to do so." (Joint Exhibit I).

23. The Chance letter was not rescinded. However, over nine years later, on July 24, 2013, Captain Anthony Karvelas sent an e-mail to the captains of the M/V Fairweather and the M/V Chenega, which was copied to multiple individuals in the State and the three union representatives. The e-mail said in part that, "At this time there is no written policy or bargained agreement allowing crewmembers the entitlement of food or drinks aboard the FVF's. All crewmembers are required to bring these items with them to work or purchase the items through the point of sale system." (Exhibit 11). This e-mail provided written notice to the employees on the two FVF's that the employees were not to take food or drinks while on board the FVF's unless the employees paid for the items.

24. There has never been an order from the labor relations staff to coach and counsel employees on the food policy on the FVF's. (Mertl-Posthumus testimony).

25. Ferry union negotiators, captains, and other employees have different perceptions than those of some State witnesses of discussions about meals and providing meals on the M/V Fairweather and the M/V Chenega.

26. Darryl Tseu works for Southeast Stevedoring as a Longshoreman in Juneau. Previously, he was Regional Director for IBU from 1999 through 2009. He was responsible for the day-to-day operation of the IBU office in Juneau.

27. Tseu was chief spokesperson for IBU when the unions bargained the 2004 "all union" agreement regarding the FVF's. It was the first time the unions sat together in negotiations with the State. "We pretty much played equal roles on all the issues." (Tseu testimony).

28. Tseu said there were discussions regarding the consumption of meals while on the FVF's. "Well yeah, it would start off as something that was going to be a concern, being that it was the first time we . . . it was the first opportunity to take a look at [a day boat operation], new for the union as well as for the employer." (Tseu testimony).

29. In response to a question about whether the State made a formal proposal saying that the crew on board the FVF's would not be able to consume free meals like the crews on the mainline vessels, Tseu responded:

I recall saying that being that they were day boat operations . . . and I looked at it as being part of the negotiating process. When you come with two different parties, you're going to have divergent views, and eventually through the negotiating process you come up with some kind of compromise. So when the State came out and said 'we're not gonna provide meals,' we all knew that that was just another position that we would end up working through and see where we would end up.

(Tseu testimony).

30. Tseu testified that the parties discussed the meal issue over and over, and as they approached a deadline where they knew they had to start operating, the meal issue became less and less of an issue. It was "kind of agreed that although they would not put it in writing, it would be acceptable for the crew to get something to eat." He added that "it was never stated otherwise that you couldn't." At the end of the day, Tseu testified, the State indicated that it was acceptable for the crews to consume food for free. (Tseu testimony).

31. Tseu said that there is nothing in the IBU Master agreement that says crews on the mainline vessels can consume food for free, but they have been allowed to do so since the inception of the ferry system. There is nothing different, regarding providing meals, in the contract language for FVF's. (Tseu testimony).

32. Tseu also negotiated the supplemental agreement for IBU in 2005. He does not recall discussions at the bargaining table, but he had phone discussions with Mike Wilson, passenger service inspector in charge of the operation of all food, gift shops, and anything on that side of the operation. "And he pretty much said, Darryl, we don't really care about the food. As long as it does not get too excessive, it's not going to be a problem, and we'll just leave it at that." (Tseu testimony).

33. Ben Goldrich, MEBA's representative, participated in the 2004 negotiations for the M/V Fairweather. He has represented MEBA since 2002. He negotiates collective bargaining

agreements, handles grievance resolution, and works on day-to-day contract administration. He testified that there were extensive discussions about all aspects of the FVF operations because the FVF's were new to all the parties. Meals were discussed. Goldrich testified that the parties discussed a variety of avenues to deal with the meal issue, but "what we elected to do is what we have in front of us today, and that is –crew members are allowed to eat out of the galley, and that's it." (Goldrich testimony).

34. Captain Ron Bressette represents MM&P's licensed deck officers who work on the AMHS. Bressette has worked for the AMHS for 34 years.

35. Bressette participated in negotiations with the State in 2008 and 2011. He testified that meals on day boats were never discussed in either of these negotiations. In the recent 2014 discussions, the union made a proposal on meals, but the State's representative said the State was going to wait for the outcome of the unfair labor practice charge.

36. To Bressette, a meal means a regular meal like one would have at home, or the types of things served to the crew in the crew messes. An occasional bagel dog or sandwich is not a meal. (Bressette testimony).

37. After Karvelas sent the 2013 e-mail about no free food, Bressette e-mailed Karvelas and proposed the parties come up with a solution. Karvelas refused. Karvelas did not think his e-mail about no free food represented a change, whereas Bressette felt it changed an existing practice that had been in effect since the FVF's started running. Karvelas told Bressette that they may have to agree to disagree about the issue. In his e-mail to Bressette, Karvelas had attached a copy of Falvey's memo about taking food in the support building at Cordova. Bressette believes that Falvey's memo pertained only to the storage facility in Cordova. (Bressette testimony). Captain Falvey confirmed in testimony that his memo only addressed issues occurring at the storage facility, and his memo did not address consumption of food by crews while on the FVF's. (Falvey testimony).

38. In response to Karvelas' statement that the food issue had been fully bargained and was covered in Rule 11, Bressette believes that Rule 11 has nothing to do with the consumption of meals by a permanent bid holder while on a day boat, or on the conventional vessels. According to Bressette, the Rule 11 language in the supplemental agreement almost mirrors the Rule 11 language in the master agreement. The State has never used Rule 11 to say that those on conventional vessels cannot consume the food, nor has it said that those on day boats are in travel status, and therefore Rule 11 applies. If Rule 11 applied, Bressette believes the State would owe the bargaining unit members per diem. (Bressette testimony). Rule 11 for MM&P provides,

11.01 When the Deck Officer is in work status away from home and quarters are not furnished, the Deck officer shall be entitled to a quarters allowance of ninety-five (\$95.00) per day between May 16 and September 15 and eighty-five dollars (\$85.00) per day between September 16 and May 15.

In the event that quarters are not available at the contracted quarters allowance rate

the Deck Officer shall be reimbursed for necessary receipted expenses for quarters. 11.02 Deck Officer is in work status away from home and meals are not furnished, the Deck officer shall be entitled to a meal allowance in accordance with the State Administrative Manual.

(Exhibit 1, page 8) (State's and MM&P's Master Agreement, July 1, 2011 to June 30, 2014).

39. In a May 20, 2013, e-mail to Karvelas, the master of the M/V Fairweather, Michael Schlechter responded to Karvelas' e-mail to "Captains." The Karvelas e-mail had said in part, "I wish to gather information concerning your understanding of any considerations given to the crew aboard the FVF's for food or drinks. More specifically what benefits do you believe were afforded to the crew and who or what gave you the understanding that the benefit was allowed. The purpose of my inquiry is not to pursue disciplinary matters, but to gather facts concerning any allowances offered aboard the vessels. (Exhibit 10). Schlechter's response was that,

I have been working on the Fairweather since the initial training nine years ago. In the labor negotiations regarding the Fairweather, at that time, it was asked that per diem be paid to the crew, as there was no meal service onboard for the crew. The understanding from these negotiations was that per diem was not going to be paid and that the crew was welcome to get food from the food court instead. Captain Falvey implied this during labor meetings held with the crew during the start-up of the Fairweather.

This is the understanding that the crew of the Fairweather has been under for the last nine years, it has all been done in the open and with no under the table mentality regarding food from the food court.

(Exhibit 10).

40. Kerry Crocker is a passenger service worker in charge (PSWIC) on board the M/V Fairweather. He participated in negotiations in 2004, on behalf of IBU, as chairman on IBU's bargaining team. He testified that the State did not put forth proposals prohibiting crew members from consuming food items on board the FVF's.

41. Crocker purchases all of the food and keeps track of the sales. His work responsibilities combine the job of the purser and chief steward. He inventories the food once a week and orders it from the Ketchikan office. He checks the cash register, and documents what food is consumed on the vessel. There is a fixed number for consumption by the crew members. (Crocker testimony).

42. The practice on board the M/V Fairweather has been for the crew members to consume almost anything they wanted. He and the port steward had frequent discussions about how to mitigate what the State did not want the employees to be able to consume, such as candy and canned sodas that were not offered to employees on other vessels. However, they could consume

anything else. The port steward, Mike Wilson, came on the vessel in the morning five days a week, and Crocker spoke with him almost daily. (Crocker testimony).

43. Wilson clearly knew that the crew members were consuming food and beverages at no cost to the crew members. Crocker and Wilson discussed how to prevent the crew members from eating items that were not appropriate. (Crocker testimony).

44. The crew break room was stocked with snacks, including coffee, hot water, muffins, creamer, granola bars, and fruit, at the request of the captain or chief engineer. Every AMHS manager who was in the break room could see that the items were stocked in the break room. Various managers used the break room, and consumed coffee without paying. Audits were conducted throughout the year. After being told in 2013 that employees were not allowed to consume food and beverages, the snacks were taken out of the break room. (Crocker testimony).

45. Crocker did not estimate the actual cost of food for the crew. There was never an accurate count, just a fixed number of \$945.00 was used. This amount does not go into what he deposits at the end of the week. None of the vessels track specifically what the crews consume. The \$945.00 is an average taken from the mainline vessels. The documents submitted are not signed. Crocker submits them weekly. Previously, they were sent to Juneau, but as of last year, they are sent to Ketchikan. (Crocker testimony).

46. Crocker believes the set number of \$945.00 is probably a little low compared to the amount of free food that was consumed by employees. He noted that the crew members brought their own food a lot, because people can't eat the pre-packaged food every day without making themselves sick. (Crocker testimony).

47. The two FVF's have a small hotel-type refrigerator, approximately 2 feet high and 2 feet wide for 10 crew members to store their food. This is inadequate for ten employees. After the employees were told they could no longer have coffee, they purchased a Keurig for the break room. (Crocker testimony).

48. Some food is discarded. It may be a handful of hot dogs, a quart or two of soup, and maybe one or two sandwiches a day. (Crocker testimony).

49. Captain Sam Daniels worked with the AMHS from 2002 to May 5, 2014. He was a master on the M/V Chenega, and he has served as a crew member on both FVF's. He understood that food and beverages were free to employees unless the employee was receiving per diem. If an employee was receiving per diem, it would be a conflict for the employee to also take free food or beverages. Employees used discretion in what they were taking and didn't take a bunch of food if members of the public wanted it. (Daniels testimony).

50. Daniels has worked on AMHS mainline vessels as well. On these vessels, he was allowed to consume food and beverages. He was not aware of any specific policy that allowed the consumption. (Daniels testimony).

51. While Daniels was the master of the M/V Chenega, he was aware of food disappearing from the Cordova storage facility, and they were trying to deal with it internally. (Daniels testimony).

52. Daniels worked vacation relief on the mainlines and the M/V Chenega. He was paid per diem only when he was assigned somewhere other than his home port. He had concerns about the home port and per diem issue. He was trying to resolve a disparity of pay issue with the Cordova situation. Basically, all of the crew members working on the M/V Chenega are imported. They are away from their families and support system. The area is remote from where they live. They do not receive per diem and lodging. All expenses are from the employees' pockets. There is a lot of heartache over the situation. He discussed the situation with Karvelas, who denied any relief. Daniels rescinded his bid, and then asked for per diem, which was denied. He then asked the union to file a grievance for failure to provide per diem. He was never told by Karvelas that he should not be eating meals on the M/V Chenega, or that crew members should not be eating meals. (Daniels testimony).

53. Many of the pre-packaged sandwiches, injected with nitrogen, ended up in the trash, as few of them were sold. The night crew made sandwiches from things purchased at a local grocery store, and these sandwiches were provided to the crew members, as well as being sold to the public. (Daniels testimony).

54. Captain Wayne Carnes has been a captain on the M/V Fairweather B crew since the inception of the high speed vehicle ferry. The typical shift is 12 hours continuous, with the night crew working 5:30 p.m. to 5:30 a.m. The night crew restocks and refuels the vessel. After the training was completed, Carnes remembers the vessel was tied up in Auke Bay, and that Falvey was there with some of the training crew. He recalls a crew member asking Falvey what was going to happen with meals on the ship, and whether the State was going to provide meals on the ship or give the employees per diem. Carnes said that Falvey responded in an animated manner, saying "Absolutely not! There is no way you guys are gonna get per diem, ever." The next question that was asked was what the employees are going to do for food. Falvey responded, "Well, eat out of the food court. Knock yourselves out. Whatever you want out of the food court, crew can eat whatever they want out of there." Consequently, that was what the crew did, except for alcoholic beverages and Rock Star, which was deemed a high value item. One employee ate solely out of the food court, but others brought their own food and supplemented it with things from the food court. Carnes brought his own food, but got a salad from the vessel. (Carnes testimony).

55. Falvey does not recall such a conversation with Carnes and others about being able to take food because they weren't going to get per diem. He acknowledged that it would have been over 10 years ago and he said, "and uh, I'm not sayin' I didn't say that, but I can't recall saying that. I honestly don't remember that. . . .And if I did, I'd be the first one to admit it, and I don't, but I'm not sayin' I didn't say that. Maybe I did, but I don't recall, I don't recall saying that, honestly. (Falvey testimony).

56. Carnes is familiar with a form that is very similar to the form in Exhibit 13 that is filled out on the Fairweather, which details food costs on the ship. It includes a line item for the cost of crew meals, and the amount entered is \$945.00. It is part of the PSWIC's weekly report, sent to the port steward in Ketchikan. Until two years ago, the port steward was Mike Wilson, who was the shoreside AMHS management representative. Carnes knows that the AMHS was aware the crew members were consuming meals because of Falvey's statement, and his conversations with Mike Wilson about sandwiches. He said he discussed with Wilson that the crew ate sandwiches. Food is ordered weekly shoreside through the Ketchikan office. The PSWIC orders the food, the vendor delivers it, and the night crew stocks it on the ship from the warehouse. (Carnes testimony).

57. The night crew consists of two licensed engineers for ship maintenance, a safety officer who inspects the vessel and keeps it secure in its berth, an unlicensed person who assists the engineers, and two employees who clean and stock the ship. They receive and prepare the food, in addition to cleaning bathrooms, vacuuming, and washing the windows. (Carnes testimony).

58. The parties have drawn differing conclusions as to the meaning of Chance's May 26, 2004, letter. Tseu, to whom Chance wrote the letter, interpreted the letter as meaning: "We know you are eating, and that's no problem for us." Tseu believed the letter did not mean that employees were not to eat meals. He felt it meant what it said: the State was providing meals but it had no contractual requirement to do so. Tseu noted that the letter was written after bargaining on the initial fast ferry contract had concluded. (Tseu testimony).

59. MEBA's Goldrich testified that Chance's letter appeared to recognize a historic practice of providing meals for ferry boat employees. He said meals are not directly addressed in the contracts, but it is the "standard practice on board all vessels, except the M/V Lituya, that where meals are available to the public, they are available to the crew." (Goldrich testimony).

60. The State changed the historic practice of providing free food and beverages on the FVF's in 2013 prior to and without negotiating with the unions. (Goldrich testimony).

61. In Rule 32.02 of the MEBA collective bargaining agreement, there is a provision providing that when a crew member is traveling on a pass, the crew member will pay for meals. This shows Goldrich that if the State intends to require an employee to pay for meals, it can draft language to require it. (Goldrich testimony).

62. Consumption of meals during the regular shifts by crews on the FVF's was not discussed in the 2008 or 2011 collective bargaining negotiations.

63. The collective bargaining agreements address per diem but do not address whether employees on board the FVF's are allowed to take food and drink for free from the food court. The parties agree that crew members have always been allowed to consume food for free on the mainline vessels. This is so despite the fact that the agreements do not specifically authorize consumption of free food on those vessels. The agreements are silent.

64. There is conflicting testimony on whether the State provided meals to crew trainees during the training period. Captain Wayne Carnes has captained the M/V Fairweather since its inception in 2004. He has worked in the AMHS since 1987. Carnes testified that during training, the State provided food, such as Subway sandwiches.

65. George Poor works at AMHS as chief engineer on the M/V Fairweather. He has worked 12 and 1/2 years for AMHS, and has been on the M/V Fairweather since April, 2004. He was the first chief engineer on the M/V Fairweather. Poor testified that on some training days the AMHS provided sandwiches, but on other days, employees brought their own food.

66. Prior to 2013, the crew members on the M/V Fairweather were allowed to consume food on the vessel without cost, if the food was available to members of the public. Poor was told this was agreed to at the bargaining table. As a compromise, since per diem wasn't going to be paid, crew members could eat whatever was available. On board the vessel, the captain and PSWIC said they could eat what was put out, but they could not drink the bottled water. (Poor testimony).

67. Poor believes that portside management knew the M/V Fairweather crew members were consuming free food and beverages because he worked in an office with the general manager, the operations manager, and the marine engineering manager, who was his immediate supervisor. The marine engineering manager reported to the general manager. Poor was in regular communication with them, and it was his duty to enforce the policy of what could be consumed on the vessel. No policy prohibited the crew members from eating food from the food court. (Poor testimony).

68. The five percent wage differential for working on the FVF was a technology bonus because of the additional knowledge required to work on the FVF's. It was not because the State now says the crew members cannot consume free food or beverages. (Poor testimony).

69. Various State witnesses testified about the consumption of free food by crew members on the FVF's.

70. Captain John Falvey is currently general manager of the AMHS. He was initially hired by the State in March of 2003 to work on the business model for the fast ferries because he had prior fast ferry experience.⁵ Falvey has been the general manager since May 2004. In this position, he is responsible for all aspects of the entire AMHS operation, including the FVF's.

71. Falvey was asked about whether the State provided food for trainees on the FVF's. He said, "I don't recall that we did. Once again, it was a long time ago." (Falvey testimony). He later confirmed that it was his recollection that the State did not provide any food to the crews during training, but he said that the port steward would have provided food if it was provided. (Falvey testimony).

⁵ He was one of the first captains in the United States to get type-rated.

72. According to Falvey, training probably went on until the end of May, 2004, "or thereabouts." (Falvey testimony).

73. Falvey provided more information about State's Exhibit I, a memo he wrote to the masters of the FVF Chenega on June 24, 2011. The memo was written in response to notification by some of the captains on the M/V Chenega that some crew members were physically living in the Cordova maintenance facility, cooking in it, taking power from the building to power the RV's they were sleeping in, and that food was missing from the food storage area. That is why his memo to the captains of the A and B crew said that these activities needed to stop, and he expected them to police it as captains. Falvey said that the memo did not address food taken once it was transferred to the vessel. He also said that as far as he was concerned, employees could not take the food once it was transferred to the ship, but the memo did not address that. He acknowledged that crew members do not like to live in Cordova because it is expensive to live there. (Falvey testimony).

74. Falvey was asked if he had any concerns about employees taking food off the M/V Chenega, when there were rumors of the taking of food from the warehouse in Cordova, where food and other items are stored. He said,

Well I think for years there was some thought that uh, that uh, you know, a cup of coffee or a muffin may be taken out of the snack bar here and there. I think what uh started to uh to happen is after this got written here, things started to bubble up to the surface and maybe it was more than an occasional snack taken out of the galley on the ship underway, and I think that's what got everything, you know, rollin' along, as to, well, maybe it's more food being taken than we thought. You know, I won't sit here and say I didn't think food was being taken out of there, but I didn't think it was being taken to any large degree.

He added:

What I said was, I can't sit here and say that I was not fully under anticipation that crew was not taking food from the galley, over the years, but I uh, I didn't assume that it was in any large amount, and once this memo hit, I just started lookin' and watchin' a little closer, it was revealed that maybe more food was being snacked out of there than we had anticipated, or that I had anticipated. That probably sums it up.

(Falvey testimony).

75. In reviewing prior e-mails, Falvey discovered one he sent to Captain Larry Sackett, who was one of the first captains to begin training for the FVF's. Falvey was still a port captain at that time. The e-mail to Sackett shows that Falvey contacted someone in personnel in the State building in Juneau, and that person said "that we were not allowed uh to disperse food though the contracts." (Falvey testimony). He thinks the date was April 23, 2004. Chance's

memo to Tseu was issued after Falvey's contact with someone in personnel. (Falvey testimony).

76. Falvey has never seen one of the port steward reports in his job as general manager. He believes the requirement to fill out such a document would come from the passenger services department. Falvey does not have reason to doubt Crocker's testimony about being directed by the port steward to fill in a value for the crew meals using the same formula that is used for crew meals on the mainline vessels. (Falvey testimony).

77. Falvey confirmed that there might be some taking of incidental food and beverages on the FVF's. He has been on those vessels, and in the crew break room. He remembers seeing coffee pots, but does not exactly recall seeing muffins, nuts, and fruit there. He said it is possible that these items were there, but he doesn't recall seeing that. He is unaware of any area employees are provided to store the food they bring on board, or to heat it. (Falvey testimony).

78. Falvey also testified that, "I don't know if there was a whole lot of thought given into how much food was being consumed over the years. I think this really kind of started with the memo regarding the Chenega maintenance facility building and food being missing, and that's when things kind of started bumping to the surface, and I don't think there was a whole lot of thought really given to food over the years, on the fast ferries, . . . I mean as far as anybody being disciplined, you understand what I'm saying there? Because I don't think there was much thought, or knowledge of this wasn't anything more than a can of coke or a cup of coffee, once in a while. That's all I have." (Falvey testimony).

79. In response to a question from a board member, who summarized Falvey's testimony as, "Well, it sounds as if your testimony is that nobody is really paying attention, that the captains weren't paying attention because it was just a cup of coffee or it was a bagel occasionally, and the state wasn't paying attention because it was a placeholder figure that wasn't a real figure. Is that what you're telling us?" Falvey responded, "I think that's fairly accurate." (Falvey testimony).

80. Falvey was unable to answer why, if they were trying to figure out how their food is billed, the state would put any value in for crew meals if there was an edict saying the crew will not consume anything, not a cup of coffee, not a muffin, not a bagel dog.

81. Benthe Mertl-Posthumus, a State labor relations analyst since 2002, has been assigned to IBU matters since 2004, and to MEBA & MM&P matters since 2011. She bargained all three of the current maritime agreements for the State. She disagrees with the testimony that the State allegedly said it would not discuss the meal issue because it was waiting for resolution of the unfair labor practice charges. She said, "We gave notice to all three unions that uh we would discontinue the practice July 1 unless it was bargained into the agreement. We never said we wouldn't bargain it." The State did not put forth a proposal that said no free meals on the FVF's. She feels the contract is clear, and she said at the bargaining table that the State thinks the contract means no free food. (Mertl-Posthumus testimony).

82. Mertl-Posthumus testified that there was difficulty filling bids for deck officer positions due to the expense to employees of providing their own food and lodging in Cordova. She obtained some of her information about employees' concerns from John Stormont, a captain who rescinded his bid to work on the M/V Chenega. Since the State did not provide food or lodging, employees were required to have two homes to accept work on the M/V Chenega. (Mertl-Posthumus testimony).

83. Mertl-Posthumus was aware of warehouse and inventory issues with the M/V Chenega. They started with the port steward information sheets and the vending machine problem. Mertl-Posthumus spoke with Captain Karvelas. She tried to work out the math on the port steward information sheets and observed some problems because it looked like the crew members were eating the food. She was surprised about that, but had difficulty determining where the numbers came from. She concluded the sheets were not correct. There were ten crew members, and \$945 was the amount always listed. She also looked at inventory numbers, but the numbers did not add up.

84. Mertl-Posthumus asked Denise Pooler to explain where the numbers came from. Pooler said the amount of \$94.50 was an estimate of what the cost was per crew member on the mainline vessels. None of the forms were adjusted to comply with the reality of what was occurring. Mertl-Posthumus asked Pooler for more information about the forms. Pooler was not familiar with the reports at first, and after several days of looking into it she concluded that no one uses the forms. The employees were not told to change the forms. (Mertl-Posthumus testimony).

85. When asked about Falvey's memorandum to the crew members on the M/V Chenega in 2011, regarding the warehouse, Mertl-Posthumus said it was a reminder to employees that State property was not theirs for the taking: they could not use it, live in it, or have parties in it. She believes that Karvelas specifically told employees not to take meals off the vessels without paying for them. (Mertl-Posthumus testimony).

86. Mertl-Posthumus confirmed that Karvelas stopped crew members from taking meals off the vessels without paying for them, and he stopped the problem with the vending machine. (Mertl-Posthumus testimony).

87. Mertl-Posthumus testified that it was very clear when the M/V LeConte became a day boat that the IBU bargaining unit members were not supposed to consume meals, but she acknowledged there was not a policy that said "don't consume the meals," and that the contracts do not specifically say, "don't consume the meals." However, the contract does have a provision about providing meals in Rule 11.2 . When asked about the meaning of this rule, she said that the unions and the State don't agree upon its meaning. (Mertl-Posthumus testimony).

88. Mertl-Posthumus said she wouldn't consider a muffin or a cup of coffee a meal, and if it were only those items, there probably wouldn't be a need for a hearing. However, problems with meals started to happen, inventories were missing from vending machines, and things were

getting out of control. The State looked into the situation and said, “Whoa, this is never what we agreed to.” It should have been understood by the employees on the day boats that they wouldn’t be getting anything other than muffins or coffee or a light snack. (Mertl-Posthumus testimony).

89. Mertl-Posthumus said the problems began with the M/V Chenega and what was being taken out of the warehouse. Later, with the Karvelas e-mails to the captains, the State made an effort to find out what the crews on both FVF’s were eating, they were asked what is the practice, and what do you believe you were allowed to do. She saw the response from Captain Mitchell, but did not talk to him about it. Instead, she talked to Denise Pooler and Karvelas about the forms. Mike Wilson had already retired, so she did not speak with him. (Mertl-Posthumus testimony).

90. Mertl-Posthumus said there was a problem with someone eating biscuits and gravy on the vessel. These food items were ordered on the One Card, which is the State’s credit card, so that was a big problem. It wasn’t going through the inventory, and the food ordered was not for sale to the public. When the State found out about it, it corrected it. The year 2012 was not a good one for the M/V Chenega. She did not send any information to employees on the M/V Fairweather about the no-food rule after the problem was discovered on the M/V Chenega. (Mertl-Posthumus testimony).

91. Mertl-Posthumus does not believe employees were willfully violating the food rules. She does not have direct communications with the employees, so the communication was with the vessel masters only. Regarding any information that may have been given to employees new to the FVF’s, she thinks it would be up to the dispatcher to communicate with those employees, but enforcement should happen on the vessels by either the captains or the PSWICS. A lot of AMHS’s temporary employees are dispatched from the Seattle hall. (Mertl-Posthumus testimony).

92. Another State representative acknowledged some food consumption by FVF crew members. In an e-mail exchange between Sutch and Tseu, in response to crew members requesting reimbursement for meals on the M/V LeConte, Sutch said in part, “Like the Fairweather, while not contractually obligated to provide meals, we know that sometimes crew eat from the galley. We are not policing that.” (Exhibit F, at 1-2). When asked about knowledge she had as a labor relations person in 2006, after the collective bargaining agreement had been negotiated, that people were eating meals on the vessels, Sutch replied, “People do things, yes.” When questioned further about how she had personal knowledge that people were eating meals on the vessels, she asked if the questions pertained to the e-mails with Darryl (Tseu). She responded that was because people were putting in claims for per diem. She also said that she didn’t remember how it came to their knowledge. (Sutch testimony).

93. According to Mertl-Posthumus, the M/V LeConte was a day boat at the time some grievances were filed. It operated under the same principles as the M/V Chenega and the M/V Fairweather, except for specific language that said, “we would first try to feed you on the vessel.” The M/V LeConte was more of a mainliner that shifted to a day boat. It had full quarters and a galley. The State provides food to avoid paying per diem. (Mertl-Posthumus testimony).

94. Sutch does not believe that AMHS General Manager Falvey would have operational authority to convey to crew members that they could eat from the galley [food court] because Falvey does not bargain the collective bargaining agreements. She believes only people who have been delegated to bargain for the State can determine the terms and conditions of employment for the bargaining unit members. (Sutch testimony).

95. Regarding the memo Falvey sent about the support building in Cordova, Sutch did not have conversations with Falvey before he wrote the memo. She acknowledged that Falvey “probably did come at it from a facilities bent but that doesn’t mean that the stored food suddenly becomes not the State’s property when it’s not in that building.” (Sutch testimony). The State was aware people were living in the support building in Cordova and it had a picture of sleeping bags. There were things that were problematic because Cordova is so far removed. Sutch confirmed that the State had not sent information to the unions about not consuming meals on the vessels, but explained it by saying there are lots of things crew members shouldn’t do but the state does not send out monthly notices. “I mean, we just don’t do that sort of thing unless it comes up.” (Sutch testimony).

96. Sutch confirmed that the State had difficulty filling positions manned by IBU and MEBA bargaining unit members in December 2011 because they rescinded their bids over lodging and per diem issues. People were upset because there were IBU and MEBA bargaining unit members who were regularly working the vessels, but not as a permanent bid, and they were receiving full lodging and per diem. Dennis Gum was an individual who rescinded his bid. (Sutch testimony).

97. In response to a question about how much food Sutch thought the crew members were consuming aboard the FVF’s, she replied that she had “no idea.” (Sutch testimony). In response to being asked if she’d be surprised to hear it exceeded \$950 a week, she said she would be surprised. When asked if there was any coaching, counseling, or discipline documented about crew members consuming food on the FVF’s, she indicated that she believed Falvey’s memo was an attempt to address that. However, she wouldn’t know about everything from at least February 2010. (Sutch testimony).

98. Between the start of the M/V Fairweather’s revenue service on June 8, 2004, the start of service of the M/V Chenega in 2005, and April or May of 2013, employees represented by the unions took and consumed foodstuffs and beverages from the snack bars for free. There are varying opinions about how much food and beverage was involved. The State’s documents show a consistent allowance for crew meals.

99. Each week, the passenger services worker in charge, or PSWIC, filled out a form and submitted it to the AMHS’s main office in Ketchikan. (Exhibit 13). Carnes is familiar with the form, which is filled out by the PSWIC and sent to the port steward in Ketchikan each week. For many years, the port steward was Mike Wilson. Subsection G of the form indicates a cost for crew meals of \$945.00.

100. Denise Pooler is the passenger services inspector. She has worked in this capacity since 2004. She assists the pursers in obtaining the supplies they need, provides training for them, and reviews all weekly reports for discrepancies.

101. She works with Kerry Crocker, who is a PSWIC on the M/V Fairweather. He submits financial reports, and a weekly report on inventory that says what they started with, what was used, and the ending balance. The financial report tells the revenue received from snacks, vending machine, alcohol, and the gift shop. The information comes from the new “point of sale” (POS) system installed in 2012. (Pooler testimony).

102. Pooler said that the form that is page 2 of Union Exhibit 12 (TripCash Report; Port Steward Information), is not a representation of how the AMHS deals with or handles the inventory for the costs of finances for vessel food. She said they don’t use the form for anything. The document is generated by other information put into a spreadsheet folder, but the document that is called “Port Steward Information” isn’t used for any planning, ordering, or similar activity. The form came from the mainline vessels, but it isn’t used there anymore. It is generated by a workbook, but they don’t use the workbook because it is not accurate. That’s why they began using the POS system. Although the form is still being generated, it isn’t necessary or used any more. However, employees have not been instructed to stop using the form, and the document is placed in a file. (Pooler testimony).

103. Previously, managing food costs and inventory was done by Cardex, but “in the past we haven’t really done a really good job at that, and we recognize that, and this is why we now have the POS, the point of sale program to track our revenue, and we are currently putting in a new inventory management program, called menuing. There is nothing on the point of sale report that has any costs for crew meals.” (Pooler testimony).

104. The PSWIC’s cannot order any food that is listed on the order form. Since the FVF’s don’t have cooking facilities, they cannot order fresh meats and fish, for example. The PSWIC’s do not enforce the no food rule.

105. Pooler went to Cordova for a couple of days in July 2012 to ride the M/V Chenega and to inspect the vessel. She recorded that while she was there, a very nice stir fry was fixed for lunch for the crew, and the next day it was grilled cheese sandwiches and salad. An electric skillet was used to cook the stir fry. She did not tell the PSWIC that the “no food” rule was being violated, nor did she initiate any disciplinary action. She did report it to her supervisor, Mike Wilson. Wilson sent an e-mail, which she saw, to one or both vessels’ PWSIC’s saying that meals were not to be served to the crew. However, there was no follow up to make sure the crews followed this order. (Pooler testimony).⁶

106. Pooler said there have been difficulties with the “no food” rule since she’s been there- for a long time. To her knowledge, it is being enforced currently, but she isn’t there to verify

⁶ Wilson's e-mail is not in the record.

enforcement. Inventory control is improving under the new POS .

107. Exhibit 12, page 7, is a trip cash report used for revenue tracking. If crew members were not paying for their meals, it wouldn't be included in a revenue tracking form. Crew meal values on the mainline vessels are not tracked on this form. To the best of Pooler's knowledge, the value of crew meals is not tracked anywhere, but she is not involved in budgeting. She has knowledge of how the number of \$13.50 per day per crew member on the conventional ferries and the FVF's was determined. Her supervisor was asked to provide a number "now," so he came up with that number over 10 years ago. (Pooler testimony).

108. In response to a question about how the PSWIC's she supervised could be providing food for the crews for so long, because they were the ones who were ordering it and putting it out, Pooler responded by saying, "Well, I am not saying that we did not know. I'm saying that it was not, they're not supposed to. But I am not saying that I did not know, obviously. I was up there and I saw that they were, and I reported it to my supervisor." (Pooler testimony).

109. From Pooler's perspective, the thing that brought the food issue to a head was that they started getting more accurate numbers after putting the POS on the ship regarding what had been sold versus what had been ordered. Too much was being ordered for what was being sold. It showed the inventory numbers were way off, and that items were being ordered that were not for sale to the passengers. When crew members were questioned about it, they said it was for breakfast for the crew. They were asked why there was breakfast for the crew when they had been reminded over the years that there weren't supposed to be any meals for the crew. (Pooler testimony).

110. After the July 24, 2013, e-mail from Karvelas that said crew members had to start paying for food and beverages through the point of sale system, Chris Mitchell, master of the M/V Chenega, sent an e-mail to Karvelas on July 25, 2013, along with a copy of a TripCash Report for the week ending July 21, 2013. Mitchell said the report shows the cost of crew meals to be \$1616.50 for 17 crew members. (Exhibit 12, page 2). These forms are provided to the PSWIC's onboard to keep track of food expenses. Mitchell said that represents \$13.50 per day, even though the crew members do not eat that much each day. He points out that the State recognizes the crew members eat the food. Mitchell further states problems with the State's decision to rescind the ability of the employees to eat free food on the vessels: (1) there isn't a single permanent crew member of the night shift, leading to maintenance problems, (2) most employees are living in hotels or cars, and cannot cook food in either place, (3) an inability to store food due to lack of refrigeration, and (4) the cashier in the food court does not work past 9 p.m. and most restaurants close at 9 p.m., making it hard for night crew members to obtain food. (Exhibit 12, p. 1).

111. Various AMHS state employees in supervisory or management capacities and at least two employees from the Department of Administration were aware that food and beverage items were being consumed by employees on the FVF's over the years from 2004 until 2013, although their perceptions of how much was being consumed varies.

112. After Karvelas advised FVF crew members in writing in 2013 of the State's policy

that food and beverages purchased by the State were not to be consumed by the crew members unless they were purchased by the employees, the employees experienced changes to their terms and conditions of employment.

113. No evidence was submitted showing the State notified the unions of the change affecting the FVF's crew members' ability to consume free food and beverages prior to announcing the change. There was no evidence that the State asked to bargain this change before implementing it.

ANALYSIS

1. Is access to food and beverages in the food court on the Alaska Marine Highway System's fast vehicle ferries a mandatory subject of bargaining? If so, did the State commit an unfair labor practice by unilaterally changing a practice of allowing access to the food courts and consumption of free food and beverages on the M/V Fairweather and M/V Chenega, without notice to or bargaining with the three affected unions?

The stated purpose of the Public Employment Relations Act (PERA) is to give public employees “the right to share in the decision-making process affecting wages and working conditions.” AS 23.40.070. PERA requires “public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours and other terms and conditions of employment.” AS 23.40.070(2). However, AS 23.40.250(9) excludes from mandatory subjects of bargaining those “general policies describing the function and purposes of a public employer.” Additionally, AS 23.40.250(9) defines “‘terms and conditions of employment’ [as] the hours of employment, the compensation and fringe benefits, and the employer’s personnel policies affecting the working conditions” of employees.

When a public employer refuses to negotiate a mandatory subject of bargaining, it commits an unfair labor practice; “[a] public employer or an agent of a public employer may not refuse to bargain collectively in good faith with an organization which is the exclusive representative of employees in the appropriate unit....” AS 23.40.110(a)(5). Additionally, “[a] public employer or an agent of a public employer may not interfere with, restrain, or coerce an employee in the exercise of the employee’s rights....” AS 23.40.110(a)(1). “Prior to impasse, and absent necessity, a compelling business justification, or contractual provisions to the contrary, the State violates AS 23.40.110(a)(5) and (a)(1) by implementing a unilateral change to a mandatory subject of bargaining....” *Alaska State Employees Association, AFSCME Local 52, AFL-CIO vs. State of Alaska, Department of Administration, Division of Personnel/EEO*, Decision and Order No. 246 at 1 (December 16, 1999).

The Alaska Supreme Court provided a general balancing test for determining whether an issue of public education was negotiable in collective bargaining between a teacher’s union and the local government under AS 14.20.550 – 14.20.610 (mediation and negotiation in public

education employment). *Kenai Peninsula Borough School District v. Kenai Peninsula Education Association*, 572 P.2d 416 (Alaska 1977), (*Kenai I*). In *Kenai I*, the Supreme Court noted that “a matter is more susceptible to bargaining the more it deals with the economic interests of employees and the less it concerns professional goals and methods.” (*Id.* at 422).

In a later case, the Alaska Supreme Court applied this balancing test to a different issue: a dispute over Classification and Pay plans. *Alaska Public Employees Association v. State*, 831 P.2d 1245 (Alaska 1992). The Court noted, “[w]e now adapt the *Kenai I* balancing test... between mandatory and permissive subjects of bargaining in cases such as this one, where the government employer’s constitutional, statutory, or public policy prerogatives significantly overlap the public employees’ collective bargaining prerogatives.” (*Id.* at 1251). The Court held that “a matter is more susceptible to categorization as a mandatory subject of bargaining the more it deals with the economic interests of employees and the less it concerns the employer’s general policies.” (*Id.* at 1251). Finally, the Court concluded that the “contrast between the state’s strong, specific, express mandate to act and the employees’ more diffuse, general, limited entitlement to bargain is important in our balance of the competing interests[.]” (*Id.* at 1252).

We first address whether access to the food courts while working on board the fast vehicle ferries is a mandatory subject of bargaining. We find, on balance, that an employee’s access to food and drink during the employee’s work day is a substantial and important interest.

The State contends that fast vehicle ferry crew members are like any other employees who drive to work in the morning, then drive back to their homes after work. We find that the facts show that working on the fast vehicle ferries on Alaska waters during a work day is not quite the same as working in an office in an Alaskan community, and driving back and forth to work. While employees working in offices usually have food alternatives such as a grocery store or restaurant or even going home at lunch, fast vehicle ferry employees are stuck on a high speed boat, on Alaskan waters for twelve hours, with the food court the only access available if they neglect to bring their own food. Moreover, for the employees in a small community who work on the night shift cleaning, repairing, and stocking the M/V *Chenega*, there was testimony that the restaurants and grocery stores close after 9 p. m., so alternate eating facilities are not available for members of the night crew who are not on the waters some distance from Cordova. Evidence showed further that the ten employees on the day shift (A shift) must cram their food into a small refrigerator approximately 2 feet by 2 feet, where prior to the State’s 2013 notice, a number of employees consumed free food and beverages from the food court.

We conclude that access to the food court and food services on board the fast vehicle ferries is a condition of employment and a mandatory subject of bargaining. The State committed a violation by failing to negotiate before it notified the employees represented by the unions that they must pay for food and drink purchases aboard the fast ferries.

The State contends that since Rule 11 of the unions’ collective bargaining agreements does not specifically allow for the free consumption of food by fast vehicle ferry employees, the Rule means that employees are prohibited from consuming meals for free. The unions see the

opposite side of the coin: since Rule 11 does not prohibit free meal consumption on board the ferries, the consumption is allowed. Further, the unions argue, the free food policy is reflected by the historic practice of the State allowing free consumption of food and drinks on board the mainline vessels. By omission from the fast ferry collective bargaining agreements (like the master agreements for mainline vessels), then, free consumption is allowed.

Although free food and beverage consumption has clearly been allowed and agreed to on the mainline vessels despite the absence of a contract provision permitting it, a fact that the parties do not dispute, we must determine whether access to the food courts was allowed on the fast vehicle ferries and whether it developed into a practice.⁷ Therefore, the next question is whether there was a past practice of the State providing crew access to the food courts aboard the fast vehicle ferries. We find that through the Alaska Marine Highway's neglect over the better part of a decade to manage the situation, access to the food courts developed into a practice and became bargainable under *Kenai I*.

The unions maintain that there was a practice that developed from the time the fast ferries came online in 2004 and 2005, and this practice continued without interruption until 2013 when the State stopped it unilaterally with the Karvelas e-mail. This practice, uninterrupted from the start of fast vehicle ferry service in 2004 until the spring of 2013, allowed the fast vehicle ferry workers access to free food and beverages (with certain exclusions) while working during their shifts. The unions contend that this practice was open, notorious, and it occurred from 2004 when the first fast vehicle ferry came on line, until the spring of 2013 when the State stopped the practice unilaterally and without negotiation. The unions point to the May 26, 2004, letter from Art Chance to Darryl Tseu, and the July 20, 2006, email from Nancy Sutch to Tseu, as supporting their contention that the parties had a tacit agreement, outside the written contracts, to allow consumption of food and beverages by crew members on the fast vehicle ferries. Moreover, testimony by various State witnesses, such as Pooler and Falvey, supports the unions' contentions that the AMHS was aware food and beverage items were being consumed by crew members on the fast vehicle ferries. Multiple union witnesses testified to the open practice of being able to consume free food and beverages (with some exceptions for Rock Star, candy bars, etc.) from the food courts and employee break rooms.

The State contends that no past practice developed between the parties. It argues that the Chance and Sutch documents do not support a finding of a past practice. It contends that when the Chance document referred to "meals," it only meant "soup." And in the 2006 Sutch document to Tseu, the State contends that it was only acknowledging that taking food is forbidden and it cannot police that policy as a practical matter.

The unions further contend that Captain Falvey authorized the consumption of free food near the end of training in 2004 when he adamantly said crews on the fast vehicle ferries would not get per diem but they could eat from the food court. Captain Falvey could not recall

⁷ We emphasize that the unions did not prove any entitlement to full meal service, like that provided on the mainline vessels.

authorizing this, but he acknowledged in other questioning that "for years there was some thought that . . . a cup of coffee or a muffin may be taken out of the snack bar here and there." In addition, he said: "I won't sit here and say I didn't think food was being taken out of there, but I didn't think it was being taken to any large degree."

We find that the Chance and Sutch letters, when construed by their plain meaning, are an acknowledgement that the State knew about consumption of food from the food courts. Captain Falvey's testimony, as well as that of Pooler and Sutch, is further support for the unions' contention that the State knew and acquiesced in the consumption of some food from the food courts. This evidence, added to the years of silence on this issue between 2006 and 2013, supports a finding that a practice of allowing food court access and consumption had developed.

The next question is to what extent was free food consumption allowed from the food courts. The unions contend that the State is required to provide a "meal." Two union employees gave their definition of a meal. Captain Bressette described a meal as like something a person would eat at home, like a full breakfast, or what is provided on the mainline boats. Ben Goldrich described a "meal" aboard the fast vehicle ferries as more akin to consuming a snack, salad, cup of soup, a sandwich. "But they are rarely sitting down to what I consider a meal."

Based on the evidence in the record, we find the food on board fast ferries consisted of muffins, coffee, and light snacks, like a sandwich, salad, or granola bar. Regarding the amount consumed, the preponderance of the evidence showed that the State estimated a \$945 per week charge on board each fast vehicle ferry. This amount was based on a history of food consumption on the mainline vessels. Therefore, we base calculations for food court access and consumption on this amount. Dividing \$945 per week by the 17 crew members on the day and night shifts amounts to \$55.58 per week per employee, and \$7.94 per day per employee. The employer shall pay this amount in accordance with the order below.

We find that the State violated AS 23.40.110(a)(5) when it unilaterally changed a mandatory subject of bargaining, the access to the food court and consumption of food and beverages for free. In two of the unfair labor practice charges, case numbers 13-1635-ULP and 13-1636-ULP, the MM&P and IBU alleged that these employer's actions also violated AS 23.40.110(a)(1). Alaska Statute 23.40.110(a)(1) prohibits a public employer or an agent of a public employer from interfering with, restraining, or coercing an employee in the exercise of those rights guaranteed in AS 23.40.080. Those rights are to "self-organize and form, join, or assist an organization to bargain collectively through representatives of their own choosing, and engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection."

Violations of AS 23.40.110(a)(1) can be either derivative or independent violations. According to John E. Higgins, Jr., the National Labor Relations Board has determined that an employer violation of any of the four subdivisions of Section 8, other than subdivision one, also violates subdivision one. Other violations can infringe only on Section 8(a)(1) and are

considered independent violations of Section 8(a)(1). See I John E. Higgins, Jr., *The Developing Labor Law*, at 88 (6th ed. 2012).

Section 8(a)(1) of the National Labor Relations Act is similar to AS 23.40.110(a)(1). Under 8 AAC 97.240(b), “[r]elevant decisions of the National Labor Relations Board will be given great weight in determining what constitutes an unfair labor practice under AS 23.40.110 and AS 42.40.760.” The Agency has found in previous cases that a violation of AS 23.40.110(a)(5) also violates AS 23.40.110(a)(1). *Alaska Community Colleges’ Federation of Teachers, Local 2404, AFT, AFL-CIO (Re: Loveland, Narangs) v. University of Alaska*, Decision & Order No. 204, at 10-11 (Aug. 20, 1996). Similarly, we find in these cases that a derivative violation of AS 23.40.110(a)(1) occurred when the employer violated AS 23.40.110(a)(5).

2. Did the State retaliate against the MM&P by stopping access to the food court on the M/V Fairweather in response MM&P’s filing an unfair labor practice related to the M/V Chenega?

In this case, the MM&P contend that the State unilaterally ceased providing free meals on the M/V Fairweather in retaliation for its having filed an unfair labor practice complaint about cessation of free meals on the M/V Chenega.⁸ Proof of removal of a benefit in retaliation for filing an unfair labor practice would be a prima facie showing of a violation of AS 23.40.110(a)(1), and it could support an independent violation of AS 23.40.110(a)(1). The burden would then shift to the employer to set forth a legitimate and substantial business reason for suspending the benefit. See *Alaska State Employees Association vs. State of Alaska*, Decision and Order No. 195 at 7 (September 26, 1995) (citations omitted).

Discontinuing access to free food at the food court on the M/V Fairweather followed the filing of the unfair labor practice about discontinuing free food on the M/V Chenega. Thus, there appears to be a causal connection between the M/V Chenega complaint and the State’s action. However, we must next determine the State’s motivation for this latter action.

The unions presented no direct evidence of motive. However, circumstantial evidence can be sufficient to prove motive, and the timing of the State’s action is circumstantial evidence of motive. *Alaska State Employees Ass’n/AFSCME Local 52, AFL-CIO (Johnson) v. State of Alaska*, Decision & Order No. 193 at 14 (September 26, 1995). In reviewing the evidence in this case, we find that the State sent the crew members notice that they must pay for food and beverages from the food court on the M/V Fairweather because the State was trying to be consistent with its notice of the same regarding the M/V Chenega. Although there is circumstantial evidence, the timing of the State’s action by itself does not prove retaliation. We conclude that the State’s action was not

⁸ MM&P filed the initial complaint on retaliation. See Case No. 13-1635-ULP, filed on July 31, 2013.

retaliatory. We therefore find that the unions failed to carry their burden and deny and dismiss their claim of retaliation under AS 23.40.110(a)(1).

CONCLUSIONS OF LAW

1. The International Organization of Masters Mates and Pilots, AFL-CIO (MM&P), the Marine Engineers' Beneficial Association, AFL-CIO (MEBA), and the Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union (IBU) are organizations under AS 23.40.250(5). The State's Alaska Marine Highway System is a public employer under AS 23.40.250(7).

2. This agency has jurisdiction to determine whether a violation was committed under AS 23.40.110.

3. As complainants, MM&P, MEBA, and IBU have the burden to prove each element of their claims by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

4. MM&P, MEBA, and IBU did not establish a claim to full meal service on board the fast vehicle ferries. However, they proved each of the elements of their claims, for limited access to some food and beverages at no cost in the food court on the fast vehicle ferries M/V Chenega and M/V Fairweather, by a preponderance of the evidence.

5. Providing limited access to food and beverages in the food court at no cost to the employee on the fast vehicle ferries is a mandatory subject of bargaining. The State did not notify the unions or bargain with them before issuing instructions to crew members on the fast vehicle ferries in 2013 that they could not consume food and beverages unless the employees paid for the items through the State's point of sale system. Therefore, the State violated AS 23.40.110(a)(5) by failing to bargain in good faith before issuing the 2013 instructions to the employees on the fast vehicle ferries, and it also violated AS 23.40.110(a)(1) based on this conduct.

6. MM&P did not prove that the State retaliated against it for filing the unfair labor practice charge in case number 13-1633-ULP, concerning the M/V Chenega, when it stopped allowing access to free food and beverages on the M/V Fairweather. Accordingly, the charge of retaliation under AS 23.40.110(a)(1) is denied and dismissed in case number 13-1635-ULP.

ORDER

1. The unfair labor practice complaints by the International Organization of Masters, Mates and Pilots, AFL-CIO, Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union, and Marine Engineers' Beneficial Association, AFL-CIO, are granted in accordance with this decision, regarding access to the food court.

2. The State of Alaska and the unions are ordered to initiate good faith bargaining in good faith within thirty days of this decision about employee access to the food court and the consumption of food and beverages by employees on the fast vehicle ferries, the M/V Chenega and the M/V Fairweather.

3. The State of Alaska is ordered, as of the date of this decision, to provide employees who are not receiving per diem on the M/V Chenega and the M/V Fairweather an amount not to exceed \$7.94 in food and beverage for each shift the employee works, until such time as the parties have, through negotiations, reached an agreement concerning the terms and conditions of employment for employees' access to the food courts on the fast vehicle ferries. The parties shall be at impasse if they have not reached agreement by August 30, 2015.

4. The International Organization of Masters, Mates and Pilots, AFL-CIO's claim of retaliation in case number 13-1635-ULP is denied and dismissed.

5. The State of Alaska is ordered to 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, personally serve each employee affected. 8 AAC 97.460.

ALASKA LABOR RELATIONS AGENCY

Lynne Curry, Vice Chair

Matthew McSorley, Board Member

Tyler Andrews, 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 mailing or distribution of this decision.

CERTIFICATION

I hereby certify that the foregoing is a full, true and correct copy of the Decision and Order in the matter of *International Organization of Masters, Mates & Pilots, AFL-CIO vs. State of Alaska*, Case Nos. 13-1633-ULP, 13-1635-ULP; *Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union vs. State of Alaska*, Case No. 13-1636-ULP; *Marine Engineers' Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 13-1637-ULP (*Consol.*) dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 27th day of February 2015.

Margie Yadlosky
Human Resource Consultant I

This is to certify that on the ____ day of February, 2015, a true and correct copy of the foregoing was faxed and mailed, postage prepaid to:

Rhonda Fenrich, MM&P, MEBA, & IBU
Kent Durand, State of Alaska

Signature