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INTERNATIONAL ORGANIZATION)
OF MASTERS, MATES & PILOTS,)
AFL-CIO; INLANDBOATMEN'S UNION OF)
THE PACIFIC, ALASKA REGION 1,)
INTERNATIONAL LONGSHORE AND)
WAREHOUSE UNION; and)
MARINE ENGINEERS' BENEFICIAL)
ASSOCIATION, AFL-CIO,)
Complainants,)
vs.)
STATE OF ALASKA,)
Respondent.)
_____)
CASE NO. 15-1672-ULP

DECISION AND ORDER NO. 311

By agreement of the parties, we decided this unfair labor practice charge on the basis of the written record, including pleadings, exhibits filed, sworn affidavits, and briefing of the parties. Hearing Examiner Mark Torgerson presided. The record for this case closed on January 25, 2017, after we completed final deliberations.

Digest: The unfair labor practice charge 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, is denied and dismissed. The unions failed to prove that the State of Alaska committed a violation by bad faith bargaining. The parties did not reach impasse until August 30, 2015, the date we set for impasse if the parties could not reach agreement by then.

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; Benthe Mertl-Posthumous, Labor Relations Analyst, for Respondent State of Alaska.

Board Panel: Jean Ward, 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) filed an unfair labor practice charge against the State of Alaska (State). The unions allege that the State committed an unfair labor practice by surface bargaining, failing to provide relevant information, and prematurely declaring impasse, multiple times, before the August 30, 2015, deadline set in Decision and Order No. 303.

The State denies the charges. It contends that it bargained in good faith, as required, and did not implement its last, best offer until after the deadline set in Decision and Order No. 303.

Issues

1. Did the bargaining by the State of Alaska constitute surface bargaining in violation of AS 23.40.110(a)(5) and AS 23.40.110(a)(1)?
2. Did the State unreasonably refuse to release wholesale price or profit margin information and therefore violate AS 23.40.110(a)(5) and (a)(1)?
3. Did the State commit an unfair labor practice by declaring impasse in advance of the August 30, 2015, deadline set by this agency in *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.*), *Decision and Order No. 303 (February 27, 2015)*¹?

Procedural Background and Case History

This case stems from a dispute over the providing of access to food and beverages for employees working on the fast vehicle ferries operated by the State. In the original dispute, the unions filed an unfair labor practice against the State, contending that the State unilaterally stopped a nine-year, open practice of allowing access to the food courts and the consumption of free food and beverages aboard the fast ferries F/V Chenega and F/V Fairweather, without negotiating the change. The State contended it never sanctioned free consumption of food or beverage during this nine-year period.

We concluded that under the facts of that case, access to food and beverages while working on the fast vehicle ferries was a mandatory subject of bargaining. Further, we concluded that the State committed an unfair labor practice violation when it stopped providing free food and beverage service

¹ We incorporate by reference the findings of fact from Decision and Order No. 303.

without negotiating to impasse. We ordered the State to provide each employee up to \$7.94 in food and beverage, for each shift they worked, from the date of the issuance of Decision and Order No. 303. We also ordered the parties to negotiate “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.” (Decision and Order No. 303 at 27, Order No. 3).

Subsequently, the parties could not agree on whether the \$7.94 amount for food and beverage was at the retail or wholesale amount. The unions filed a motion for clarification. In *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. 13-1637ULP (*Consol.*) (15-1688-OTH) (Decision and Order No. 304) (October 1, 2015), we concluded that the \$7.94 was at the retail amount for food and beverage. (Decision and Order No. 304 at 7, Conclusion of Law No. 4).

On October 13, 2015, the unions filed an unfair labor practice charge against the state, contending that the State prematurely declared impasse, committed surface bargaining, and refused to provide relevant information. The State denies it committed any wrongdoing.

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. The AMHS also utilizes fast vehicle ferries (FVF), which are day boats.

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

4. MEBA is the exclusive collective bargaining agent for the licensed engineering officers who work on boats in the AMHS.

5. 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

6. The unions and the State (the parties) became involved in a dispute over the providing of meals for employees working aboard the fast vehicle ferries M/V Chenega and M/V Fairweather. This dispute boiled over after simmering for years. The unions claimed the State had agreed to provide free meals on the fast vehicle ferries, just as they do on the mainline vessels. The State maintained it never agreed to provide free meals and beverages for employees on the fast vehicle ferries.

7. We held a four-day hearing and concluded that the State committed an unfair labor practice violation when it stopped a past practice of providing food and beverage access on the fast ferries without negotiating to impasse.

8. We ordered the State to pay employees an amount not to exceed \$7.94 in food and beverage for each shift employees worked, “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.” (Decision and Order No. 303 at 27, Order No. 3).³

9. We issued Decision and Order No. 303 on February 27, 2015. We ordered the parties to commence negotiations on the food and beverage issue within 30 days. On March 8, 2015, the unions requested a meeting to start negotiations.

10. The parties’ first negotiating session was on April 2, 2015. At this session, the parties took positions that got them into the dispute that resulted in Decision and Order No. 303: the unions proposed that the State provide free food and beverages for fast ferry employees, and the State proposed that the employees pay full price. In addition, Ben Goldrich, representative for MEBA, requested that the State provide a retail markup for items sold at the food court. (Exhibit 5).

11. The parties met for a second bargaining session on May 1, 2017. (Exhibits 6 and 9). The State moved from its original offer of no free food to a proposal of a 25% discount off the retail price of food and beverage. The unions rejected the State’s offer and “proposed a 100% discount rate as well as a system of having ‘acceptable free food’ and ‘unacceptable free food’, where some food items are on the ‘yes-you-can-take-for-free’ list and some are not allowable for free.” (Exhibit 9, page 2) (punctuation in original). The State rejected the proposal as too complex to track. (Complainant’s Hearing Memorandum at 7).⁴

² See Exhibits 1, 2, and 3 for the most recent collective bargaining agreements.

³ After the State failed to comply with Order No. 3 in Decision and Order No. 303 for three months (finding of fact 8, above), the unions filed a grievance on June 4, 2015.

⁴ Wright’s June 29 email detailed the reasons for rejection. See Finding of Fact No. 14.

12. During the May 1 session, there was also discussion about retail markup, or profit. Benthe Mertl-Posthumus, the State's spokesperson, estimated that the markup is 44 percent, although it varies. (Exhibit 6). Deputy Commissioner Michael Neussl for the State estimated that profit margin is about 30 percent.

13. The parties next met on June 11.⁵ (Exhibit 7; Exhibit C; Exhibit J-1). The State again proposed a 25 percent discount off retail price. The unions rejected the proposal and verbally countered with an offer that the State set a budget for food consumption for each member. (January 14, 2017 Affidavit of Shannon Adamson at 2, received by ALRA on January 20, 2017). The unions also suggested employees pay a discounted rate for certain high price items, and they challenged the State's proposal that crew members pay retail prices for food. The State rejected the proposals. (*Id.*).

14. On June 29, 2015, Emily Wright, Labor Relations Manager for the Division of Personnel and Labor Relations, emailed the unions that the State now proposed, in draft letters of agreement (LOA), that fast ferry employees receive a 50 percent discount off the retail price of food.⁶ In her email, she attached another email, previously written by Labor Relations Analyst Benthe Mertl Posthumus, that summarized negotiations to date and explained the State's new offer. (Exhibit C-2). First, Posthumus summarized the parties' proposals to date. She noted that the unions rejected the State's most recent proposal of a 25 percent discount off retail price of food and drink. She also noted that the State rejected the unions' proposal of a 100 percent discount on "acceptable free food" but no discount on "unacceptable free food." She explained that the "complications and administrative burden of being the 'food policy police' . . . is not something the State is willing to start doing." She said the State wanted "one simple rule that applies across the board . . . in a simple administrative manner." Accordingly, the State had, upon further consideration, decided to offer a 50 percent discount off the retail price of food and drink. She noted that the State already "discussed and rejected the notion of providing the discount of whole sale prices and explained our reasons" in the recent negotiations. "The union believed that we would be making money off of our employees at a 25% discount and after considering this notion we are willing to offer a 50% discount. As discussed, this is the discount available to similarly situated day boat employees." (Exhibit C-2, punctuation in original).

15. Wright's June 29 email (with the included Posthumus email) described the 50% discount "as last and best proposal" by the State. (Exhibit No. 9 at 3). The email added: "As this is our last and best proposal, and absent an agreement, the State plans to implement our current policy of no free food/beverages on the fast ferries, as we intended to enforce in May, 2013. Absent an agreement, the State plans to implement the no free food/beverage policy on July 6, 2015.

⁵ This meeting had been postponed, at the unions' request, from an earlier date. (Exhibit E-2).

⁶ Wright attached a draft email by Labor Relations Analyst Benthe Mertl-Posthumus that contained the offer and the language quoted regarding last best offer. Wright said she was "covering" for Mertl-Posthumus "while she is out." (Exhibit C-1).

16. Joshua Stephenson, Regional Representative for the Inlandboatmen's Union of the Pacific (IBU), responded to Wright's email on June 29. He wrote: "Thank you for the LOA we will review it. Are you able to clarify Benthe's statement [] 'Absent an agreement, the State plans to implement the no free food/beverage policy on July 6, 2015. . .' It is my understanding that the parties have until August 31, 2015 to come to an agreement, until that time or until an agreement is met, the State is to allow employees \$7.94 worth of food daily." (Exhibit C-1) (punctuation in original).

17. Later on June 29, in a follow-up email, Wright changed the implementation date for the 'no free food and beverage' policy from July 6 to July 20, 2015. Wright added that she was "happy" to discuss the proposed letters of agreement with the union representatives. (Exhibit 5; Exhibit 9 at 1). In her email to Stephenson, Wright stated in pertinent part:

In re-reading the ALRA decision, if we have not reached an agreement by August 30th, impasse is automatically declared. However, there is nothing that precludes either party from declaring impasse prior to that date. Our position is that we have met several times and this is the best offer we can make, we believe we are at impasse given the positions presented at the last meeting.

However, I know you were not at the meeting in June – so if you want to chat about our offer and why we made it, just let me know what time works best and I will give you a buzz.

My hope is that this last LOA with a 50% discount offer will be acceptable to you and your members. One reason I really like it is that is simple, easy to administer, and is similar to what is done in Washington. Too often we overcomplicate things . . . Again, happy to chat. Just tell me what works for you.

(Exhibit C-1).

18. On June 30, 2015, Stephenson emailed Wright and requested a "current retail price list for FVF [fast vehicle ferry] food court items . . ." (Exhibit F-4). That same day, Shanna Burns, Human Resource Consultant for the State Department of Administration, forwarded Stephenson's request to Hakan Sebcioglu, Ship Services Manager at the State Department of Transportation and Public Facilities. (Exhibit F-3). The price list was compiled and forwarded to Stephenson on July 14, 2015. (Exhibit F-2).

19. On July 15, 2015, Stephenson emailed Wright that since "the state has maintained its position on not making any profit from food sold to employees . . . [M]ay we please be sent the wholesale price of food and beverages sold aboard the FVFs and the mark up percentage." (Exhibit F-1).

20. Wright responded to Stephenson on July 15 that she would discuss his request with the marine highway staff employees, but the "retail was easier to pull together as this is what is entered in to the POS [point of sale] system. Wholesale items will fluctuate in prices from purchase to purchase, from month to month, and from year to year." Wright also expressed disagreement with Stephenson's and the unions' contention that the State was trying to make a profit on the employees.

“We have responded that we are seeking to offer a reasonable, straightforward policy; and we have maintained that no free food or free beverages is our baseline. I will let you know what we can do as to your request.” (Exhibit B-1).

21. On July 15, 2015, Wright also sent Stephenson an email accepting his email request to provide a 50 percent discount for employees deadheading on fast vehicle ferries, and providing access to free coffee. Wright added: Finally, I would reiterate that this is our last best offer and we urge you to consider agreement. Otherwise, we believe we are at impasse.” (Exhibit 7).

22. On July 21, 2015, Wright responded to Stephenson’s request regarding wholesale prices, after consulting with AMHS staff members. “At this time we cannot give you a list like we gave you for resale costs. While we have the resale prices keyed in to the POS system, wholesale prices are not traced the same way. Wholesale prices vary from purchase to purchase based on a variety of factors (distributor price, supply and demand, amount purchases, etc.). There is no set “wholesale” price for items that we can provide. Further, certain items do not have a set wholesale price – the example I was given is a cheeseburger. At any given time there are variations in the cost of the meat, cheese, vegetables, condiments, and bun – each individual piece of the cheeseburger would have an individual price – there is no wholesale price for a cheeseburger per se.” (Exhibit F-1). Wright also noted that the State had accepted the unions’ proposal that deadheading crew would get the 50 percent discount and the State would again provide the crew free coffee. (See also Exhibit 7). She inquired about a letter of agreement.

23. There is no evidence that the State implemented any last, best offer on July 20, 2015, (See Exhibit 9 at 1).

24. On July 27, 2015, Wright sent a letter to the three unions’ representatives outlining negotiations to that point in time. The letter describes and summarizes the State’s June 2 offer of a 25% discount, the June 29 offer of a 50% discount, and then a July 15 offer of a 50% discount plus a like discount for employees “deadheading” on the fast vehicle ferries. This offer also included an agreement to provide free bulk coffee in the fast ferries day rooms and free coffee in the concession area. (Exhibit 11 at 1-2). Wright then alleged that the unions were not making any proposals, and the State believed the parties were at impasse. She concluded: “As we told you on July 15, this is our last best offer. . . . [W]e are at a point of looking to implement a benefit of a 50% discount for food and beverages . . . on or before August 3. If you do not concur regarding impasse, then it is imperative that you contact me before that time with a written proposal, demonstrating that we perhaps are not at impasse on the subject matter.” (Exhibit 11 at 2).

25. That same day (July 27), IBU Representative Stephenson sent Wright a proposed letter of agreement that he signed on behalf of his union only. (Exhibit 12). In it, IBU proposed a 75 percent discount off the retail price of food and beverages. (See also Exhibit 8).

26. On July 31, 2017, the three unions proposed a 75 percent discount rate off of food court retail prices. (Affidavit of Shannon Adamson at 3).

27. On August 17, 2015, Emily Wright emailed the State’s response to Shannon Adamson, Regional Representative for the Masters, Mates, and Pilots bargaining unit. In the

email, Wright expressed appreciation for the counter offer, and she indicated that the State reviewed and considered the union's 75 percent discount proposal but decided to reject it. (Exhibit 9). Wright reiterated that the 50 percent discount was in line with a discount the Washington State ferry system provides its employees. (See, e.g., Exhibit D). Second, she noted that a 75 percent discount could have tax consequences for employees. Finally, she asserted that there is a statutory prohibition in applying the discount to alcoholic beverages. She concluded by reiterating the State's belief that the 50 percent discount was a fair and reasonable offer. (Exhibit 9).

28. On August 27, 2015, the unions again repeated their request, made at the April 2 bargaining session, and in subsequent emails, that the State provide retail markup, or profit margin information on food and beverages on the fast vehicle ferries.

29. The State submitted the sworn affidavit of Hakan Sebcioglu, Ship Services Manager of the Alaska Marine Highway System. He oversees onboard services and amenities that include the food service for passengers and crew. He said that he prepared a report for Deputy Commissioner Michael Neussl that provided information on markup percentage. He cautioned: "This customized report merely reflects the difference between wholesale and sale price at the cash register for items sold on the FVF It does not include other significant cost factors such as labor, waste, shipment, etc. Small fluctuations of the wholesale price are ignored and not reflected into the sales price as it is a laborious and time consuming process. Instead, we focus on the average margin to keep our sales prices competitive even though most of these small fluctuations will show an increase in the wholesale price. It is not, in any way, a proof of our food service returning [a] profit."

30. The August 30, 2015 deadline for impasse, set in Decision and Order No. 303, passed without agreement of the parties.

31. On September 9, 2015, after the agency-imposed impasse deadline, the State provided the unions with raw cost data. (Exhibit A). In his sworn affidavit, Deputy Commissioner Michael Neussl stated that "the actual 'profit' on the sale on food items is not conclusive as we do not track and factor in the cost of labor to provide the food, equipment to store and dispense it, food spoilage, and wasted food which is simply not sold during its shelf life." (Neussl affidavit at 3).

32. On September 25, 2015, Benthe Mertl-Posthumus sent an email to the union representatives stating that the State would "shortly" implement its last offer of a 50 percent discount for eligible employees, a 50 percent discount for employees on a deadhead pass, and free coffee for the crew. (Exhibit A at 1-2).

33. On October 13, 2015, the unions filed an unfair labor practice charge against the State, alleging the State declared impasse prematurely and in advance of the August 30, 2015 deadline set by this Agency, surface bargaining, and refusal to provide wholesale prices or profit margins in violation of AS 23.40.110(a)(5) and (a)(1).⁷

⁷ The unions amended their charge on October 23, 2015.

ANALYSIS

1. Did the bargaining by the State of Alaska in this dispute constitute surface bargaining in violation of AS 23.40.110(a)(5) and AS 23.40.110(a)(1)?

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).

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).

Moreover, “[c]onduct that violates AS 23.40.110(a)(5) can also interfere with rights protected under AS 23.40.110(a)(1). *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). 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).

In *Fairbanks Fire Fighters Ass’n, Local 1324, IAFF, vs. City of Fairbanks*, Decision and Order No. 256, at 9-10 (October 17, 2001), we stated that in the context of collective bargaining:

Good faith has been described as "an open mind and a sincere desire to reach an agreement" and "a sincere effort . . . to reach a common ground." I Patrick Hardin, *The Developing Labor Law*, at 608 (3d ed. 1992), quoting *NLRB v. Montgomery Ward & Co.*, 133 F.2d 676, 12 L.R.R.M.(BNA) 508 (9th Cir. 1943), and *General Elec. Co.*, 150 NLRB 192, 194, 57

L.R.R.M.(BNA) 1491 (1964), *enforced* 418 F.2d 736, 72 L.R.R.M.(BNA) 2530 (2d Cir. 1969), *cert. denied*, 397 U.S. 965, 73 L.R.R.M. (BNA) 2600 (1970). In *Hotel Roanoke*, 293 NLRB 182, 184 (1989), the Board stated: "In determining whether a party has bargained in bad faith, the Board looks to the totality of the circumstances in which the bargaining took place. *Port Plastics*, 279 NLRB 362, 282 (1986); *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984). The Board looks not only at the parties' behavior at the bargaining table, but also to conduct away from the table that may affect the negotiations. *Port Plastics*, 279 NLRB at 382."

In determining whether a violation occurred, we will review both parties' conduct at and away from the negotiating table, not just the conduct of the State. In *Southwest Region School District v. Southwest Region Education Association, NEA Alaska* (Decision and Order No. 257 at 16 (2001) (*citing* I Patrick Hardin, *The Developing Labor Law*, page 634-35 (3d ed. 1992)), we stated:

The duty to bargain is a bilateral one, however, so that where both parties have been equally dilatory, or where the union has broken off negotiations and made no further request for bargaining, or has failed to request the employer to bargain, the Board has refused to find bad faith on the part of the dilatory employer.⁸

The unions contend that the State engaged in surface bargaining in violation of AS 23.40.110(a)(5) and (a)(1). The State denies this contention.

When deciding whether an employer has engaged in surface bargaining, we examine the "totality of the employer's conduct, both at an away from the bargaining table." *People Care, Inc.*, 327 N.L.R.B. 144 (1999), *citing to Overnite Transportation Co.*, 296 N.L.R.B. 669, 671 (1989). Surface bargaining is addressed in I Patrick Hardin, *The Developing Labor Law*, 3d ed. (1992) at 616:

When examination of the "totality" of a party's conduct during bargaining discloses that the forms of negotiation have been employed to conceal a purpose to frustrate or avoid mutual agreement, the party is said to have engaged in "surface bargaining." Any single factor, standing alone, is usually insufficient to support such a conclusion, but its "persuasiveness grows as the number of issues increases."

Although an employer may be willing to meet at length and confer with the union, the Board will find a refusal to bargain in good faith if it concludes the employer is merely going through the "motions of bargaining."

Under the "totality" of the conduct standard, we find that the unions failed to prove by a preponderance of the evidence that the State engaged in surface bargaining. The unions did not

⁸ Case citations from Hardin omitted. See also *International Brotherhood of Electrical Workers Local Union 1547, AFL-CIO vs. City of Seldovia*, Decision and Order No. 208 (September 23, 1996).

develop this issue or provide evidence supporting an argument that the State was ‘merely going through the motions.’” To the contrary, the evidence and documents indicate the State moved substantially from its original position on providing food and beverages to fast ferry employees. During the negotiating period we set, the State moved from a position of providing no free food or beverage, to giving employees a 50 percent discount. Although the State’s delay in getting started with negotiations was concerning, it was not the type of delay that constitutes surface bargaining.⁹ Therefore, under the totality of the conduct, we deny and dismiss the unions’ claim of surface bargaining.

2. Did the State unreasonably refuse to release wholesale price or profit margin information and therefore violate AS 23.40.110(a)(5) and (a)(1)?

The unions contend that the State committed an unfair labor practice violation by refusing to provide wholesale price and profit margin information as requested during negotiations. The unions argue that “[g]ood faith bargaining requires the exchange of information where relevant to the matter at hand. Obviously, the issue at hand was the cost of the meals for the crews aboard the fast ferries.” (Unions’ Hearing Memorandum at 17). The State, on the other hand, contends that cost information fluctuates, and the raw cost data it provided on September 9, 2015 does not take into consideration other cost factors such as labor costs, waste, and shipping costs.

The State provided what it reasonably could regarding cost. The State has a good point that the raw cost of food will fluctuate, and the real cost of food must take into consideration multiple factors, including but not limited to labor costs, waste, and shipping costs. We find that the State made a good faith effort to provide the information requested by the unions. In that sense, it did not refuse to provide the information. The unions’ request that we find the state violated AS 23.40.110(a)(5) and (a)(1), by refusing to provide information, is denied and dismissed.

3. Did the State commit an unfair labor practice by declaring impasse in advance of the August 30, 2015, deadline set by this agency in *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.*), *Decision and Order No. 303 (February 27, 2015)*?

The unions contend that the State committed an unfair labor practice violation by declaring impasse prematurely on June 29, 2015, prior to the August 30, 2015, deadline we set in Decision and Order No. 303. They argue that in a June 29, 2015 email, Emily Wright “proposed a ‘last best and final offer’ of 50% off of the retail prices [of food and beverages].”

⁹ See, e.g., *Irvington Motors*, 147 N.L.R.B. 565 (BNA), 56 L.R.R.M. 1257, *enforced per curiam*, 343 F.2d 759, 58 L.R.R.M. 2816 (CA 3 1965), *cited in* I Patrick Hardin, *The Developing Labor Law* at 618: “[T]he employer was held to have violated the Act by engaging in surface bargaining where its offer merely reiterated existing practices and its first written counterproposal was not submitted until 3 1/2 months after it had been requested.”

“[A] premature declaration of impasse, by itself, does not necessarily constitute an unfair labor practice. It constitutes some evidence of bad faith bargaining.” *Southwest Region School District v. Southwest Region Education Association, NEA-Alaska*, Decision and Order No. 257 at 21 (December 19, 2001). Even assuming we would find that the State declared impasse prematurely, we would conclude that any lapse in negotiations due to the declaration was relatively brief in the context of the entire negotiating process between the unions and the State.

There never was any actual impasse until August 30, 2015, the deadline date we set for impasse in the event the parties did not reach agreement on the food and beverage issue. Although the State expressed its belief that the parties were at impasse, it did not implement its last best offer until after the August 30 board-ordered deadline. From its June 29 ‘belief’ that the parties were at impasse until August 30, the State continued to discuss the food and beverage issue, to provide information to the unions, and to exhibit a willingness to move from its original position in bargaining. The State changed its offer from no free food or beverage, to a 25 percent discount, then to a 50 percent discount. It did not move further from its 50 percent discount offer but did add eligibility for the discount to deadheaders, and also free bulk coffee.

In a June 29 email to Joshua Stephenson, Emily Wright did indicate that it was the State’s belief that the parties were at impasse “given the positions presented at the last meeting.” Further, her earlier email indicates that “absent an agreement,” the State planned to implement its ‘no free food and beverage’ policy on July 6, 2015. However, in the subsequent email exchanges with Joshua Stephenson from IBU on June 29, Wright changed the implementation date to July 20, 2015. More importantly, she indicated a willingness to “chat” with Stephenson about the State’s position, given that he had missed the last negotiating session. This and other evidence indicates the State was willing to continue bargaining despite its impasse statements.

We deemed a five-month period more than adequate time for the parties to fully explore and negotiate the single issue of the subject we found mandatory for bargaining – fast ferry employees’ access to food and beverages while working their shift. The State moved substantially from its original position during this period. It met the unions’ original offer halfway.¹⁰ Viewing the totality of the State’s conduct, we cannot conclude that it violated the duty to bargain in good faith.

We had hoped that with five months to utilize, the parties would reach agreement on this simple, single issue. Unfortunately, they could not get there.

¹⁰ The unions showed less movement. The exhibits showing meal allowances for employees of the Washington state ferry system seem reasonable and simple to administer.

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 claim by a preponderance of the evidence. 8 AAC 97.340 and 350(f).

4. The unions failed to prove each of the elements of their claim that the State committed unfair labor practice violations, including surface bargaining, providing relevant information, and declaring impasse prematurely.

ORDER

1. The unfair labor practice complaint 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, is denied and dismissed in accordance with this decision.

2. 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

Jean Ward, Vice Chair

Matthew R. 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; Inlandboatmen's Union of the Pacific, Alaska Region 1, International Longshore and Warehouse Union; and Marine Engineers Beneficial Association, AFL-CIO vs. State of Alaska*, Case No. 15-1672-ULP, dated and filed in the office of the Alaska Labor Relations Agency in Anchorage, Alaska, this 25th day of April 2017.

Margaret Yadlosky
Human Resource Consultant

This is to certify that on the ____ day of April, 2017, a true and correct copy of the foregoing was mailed, postage prepaid to:
Rhonda Fenrich, MM&P, MEBA, & IBU
Benthe Mertl-Posthumus, State of Alaska

Signature