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A. ISSUES BEFORE THE COURT

1. Whether the Superior Court properly dismissed plaintiff's complaint for lack of subject matter jurisdiction where the issues in the complaint have been found to be within the statutory jurisdiction of the Public Employment Relation Commission ("PERC") and have been ruled upon by PERC and, further, where plaintiff failed to timely exhaust administrative remedies

2. Whether Respondent Port of Tacoma ("Port"), which prevailed both in the PERC proceeding in which Appellant ILWU Local 23 ("Local 23") participated and before the Superior Court, is entitled to its attorneys fees and costs in this appeal, pursuant to RAP 18.9

B. COUNTER STATEMENT OF FACTS

1. Parties

a. Defendant/Respondent, Port of Tacoma. The Port is a municipal corporation existing pursuant to the laws of the State of Washington (RCW, Title 53). It owns and operates public marine facilities in Pierce County. It provides various services to its customers, including planning for transfer of freight containers departing or arriving by railroads serving its facilities. The Port is subject to PERC's statutory jurisdiction in matters relating to unions' claiming status as representative

of Port employees. RCW 53.18.015 and 41.56.050-.080; *see also* RCW 41.58.005.

b. **Plaintiff/Appellant, International Longshore and Warehouse Union, Local 23.** ILWU Local 23 currently represents private-sector longshore workers, including longshore Marine Clerks. (PERC’s Findings of Fact, Conclusions of Law and Order, CP-19-34, hereinafter the “Order,” at p. 9; Appendix “A” hereto,). When it needs longshore workers, the Port can ask that members of Local 23 be dispatched to it “through a hiring hall process jointly run by Local 23 and the [Pacific Maritime Association (“PMA”)]. . . The Port does not pay their salaries, nor does it control any aspect of their employment relationship.” (*Id.*). Local 23 formerly also represented a division of public employees of the Port, called the “Port Workers Division” of Local 23. In March 2006, the Port Workers Division was chartered as a separate local union, Respondent International Longshore and Warehouse Union, Local 22. (*Id.*).

c. **Defendant/Respondent, International Longshore and Warehouse Union, Local 22.** ILWU Local 22 represents a bargaining unit of Port employees, including employees who perform railcar coordination and planning duties that are the focus of this proceeding. The “Port Workers Division,” represented by Local 22 “have

always been hired directly by the Port, and they are considered to be public employees, whose wages and other benefits are set only by the Port of Tacoma.” (*Id.*). Local 22 and the Port are parties to a collective bargaining agreement covering Port employees, including employees classified as “Rail Car Coordinators” (hereinafter, “RCCs”). (Order, pp. 7-9, CP 25-27).

2. **Local 23 Claims That its Members Should Perform the Work of Railcar Planning by the Port.**

The issue in dispute, as evidenced in the PERC Order, is which union, Local 22 or Local 23, has the right to represent workers performing railcar planning at the Port’s North Intermodal Yard. (Order, p. 2, CP 20). This work is performed by Port employees classified as RCCs and currently represented by Local 22. Local 23 claims that the work should be performed under terms of the coastwise collective bargaining agreement covering “Clerks and Related Classifications” entered into between members of the Pacific Maritime Association (“PMA”) and longshore locals of the ILWU along the West Coast, including Local 23 (“the PMA Contract”). (Order, p. 11, CP 29). Local 23 sought to perfect its claim under arbitration provisions in the PMA Contract.

3. **Proceedings before the Public Employment Relations Commission.**

Because the claim of Local 23 involved the assignment of work of Port employees, on February 27, 2008, the Port submitted to the PERC the issue of which union should be assigned representation of that work. (Order, p. 1, CP 19). The Port's petition to PERC was filed before arbitration of Local 23's claim under the PMA Contract. At the PMA arbitration – to which Local 22 was not a party – the Port asked the arbitrator to hold the hearing in abeyance pending the outcome of the PERC proceeding. (CP 2). In his Interim Award, issued March 31, 2008, the arbitrator rejected the Port's request and, acting pursuant to the terms of the PMA Contract, ordered that the work of rail car planning “be assigned immediately by the Port of Tacoma to ILWU Local 23 Marine Clerks.” (CP 6).

On April 15, 2008, PERC held its hearing on the Port's petition. Both Locals 22 and 23, and the Port, presented testimony, introduced evidence and submitted post-hearing briefs. Local 23 argued that PERC did not have jurisdiction “because the underlying dispute involved work assignments rather than a question concerning representation,” to use PERC's characterization of Local 23's argument. (Order, p. 2, CP 20). Local 23 asserted “that it retains jurisdiction over the work” of railcar planning by the Port. (*Id.*) Local 22 opposed Local 23's claim.

Subsequent to the hearing and filing of post-hearing briefs, PERC's Executive Director issued the Order, specifically rejecting Local 23's claim that its members should perform the work of rail car planning at the Port. (Order, pp. 14-15, CP 32-33). No party appealed the Executive Director's Order, and it is now the final ruling by PERC on the issues presented. WAC 391-25-660. (Order, p. 16, CP 34).

In its unappealed Order, PERC's Finding of Fact No. 6 was that:

International Longshore and Warehouse Union, Local 23 does not have any factual claim on the work being performed by railcar coordinators in the bargaining unit represented by International Longshore and Warehouse Union, Local 22.

(Order, p. 15, CP 33, emphasis added.) With respect to the issue of PERC's jurisdiction in light of the private PMA arbitration filed by Local 23, the Order stated, in part:

Local 23's attempt to resolve the dispute through grievance arbitration has no bearing on the instant matter. Apart from the fact that Local 22 did not participate in the arbitration hearing, the issue is not appropriate for resolution through a contractual grievance procedure. The issue involves competing claims for the same work, and the Commission must assert its jurisdiction to resolve the dispute through representation case procedures. * * *

(Order, p. 13, CP 31, emphasis added). PERC concluded that it "has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC." It then ruled that "[t]he position of railcar coordinator is appropriately within [] the existing bargaining unit of Port of Tacoma employees represented by [ILWU], Local 22, and the railcar coordinator

position must retain the duties it has historically performed.” (Order, p. 15, CP 33). PERC specifically rejected the arbitration award Local 23 now wants the court to enforce, stating that its “**determination is not affected by the grievance arbitration award issued by Arbitrator Randy Vekich.**” *Id.* (emphasis added).

Though it could have appealed all or any portion of the Order to the full PERC Commission, with a statutory right to appeal the final PERC decision to court if it wished, Local 23 filed no appeal of any portion of the Order.

4. Proceedings before the Superior Court.

After the time for appealing PERC Executive Director’s Order had expired, and the Order had thus become the final order of PERC, Local 23 filed the present action in Pierce County Superior Court. (CP 1-3). In its “Complaint to Enforce and Confirm Arbitration Award,” Local 23 sought -- and seeks here -- enforcement of the arbitration award it had introduced as an exhibit in the PERC hearing and that PERC rejected in its Order. The Complaint neither referenced the PERC proceeding or Order, nor did it identify Local 22 as an interested party.

The Port moved the Superior Court to dismiss Local 23’s complaint because PERC, and not the courts, has jurisdiction to resolve the fundamental issue of Local 23’s right to have its members perform rail

car planning duties for the Port, and PERC has ruled that Local 23 “does not have any factual claim” to that work. (CP 15). The Superior Court granted the Port’s motion to dismiss Local 23’s suit. (CP 74). Local 23 now appeals the order of dismissal to this court.

C. ARGUMENT

1. PERC Has Subject Matter Jurisdiction over this Dispute.

a. The Legislature assigned to PERC primary jurisdiction over public employee representation issues.

Pursuant to RCW Chapters 53.18 and 41.56, PERC has jurisdiction over the Port and unions claiming status as representatives of Port employees. RCW 53.18.015 and 41.56.050-.080; *see also* RCW 41.58.005 (stating the legislature’s intent to transfer to PERC jurisdiction over issues of representation of public employees). The statutory language states that PERC’s jurisdiction over representation issues at the Port is exclusive: **“Controversies as to the choice of employee organization within a port shall be submitted to the public employment relations commission.”** RCW 53.18.030 (emphasis added). Washington law clearly assigns to PERC the jurisdiction of resolving competing claims by unions regarding work assignments of public employees, as stated in the well-established precedent cited in PERC’s Order. (Order, pp. 3-6, CP 21-24). The issue in this lawsuit and underlying the arbitration award is precisely that -- a

controversy as to which union appropriately represents the employees performing the Port's railcar planning work.

b. **PERC does not defer to arbitration awards when making decisions about a union's jurisdictional claims regarding work assignments.**

Local 23 argues that the courts are to give deference to an arbitrator's decision, because "where a collective bargaining agreement establishes a grievance and arbitration procedure for redress of employee grievances, that employee must seek redress under those procedures before resorting to judicial remedies." Brief of Appellant, p. 6. While this is true in matters involving employee grievances, it does not apply to circumstances, such as ours, where there are conflicting jurisdictional claims of two unions.¹

PERC precedent supports its determination that competing claims by two unions should be resolved by PERC, and not by private arbitration that excludes one of the interested parties (or by judicial enforcement of

¹ Local 23 asserts that "the Port agreed to include an arbitration provision in the PCCCD contract, [so] it agreed to abide by the arbitration process to resolve disputes arising from the collective bargaining agreement." Brief of Appellant, p. 9. The Port is not a signatory to the PCCCD. Rather, the Port, in 1990 signed a one-page agreement to apply terms of the PMA contract when it hires longshore workers. A copy of that document was Exhibit 1 at the PERC hearing. Though it is not in the record currently before the Court, because Local 23 did not appeal PERC's Order, the Order does summarize terms of the one-page agreement. (Order, p. 9, CP 27).

such arbitration). For example, in *Seattle School District*, Decision 5220 (PECB 1995), PERC was faced with competing claims by two unions -- similar to the competing claims between Local 23 and Local 22 for the work of Port rail car planning. One of the unions in *Seattle School District*, Local 609, filed for arbitration on its claim under terms of its collective bargaining agreement -- just as Local 23 did here. PERC rejected the claim that the issue should be resolved in such arbitration, stating:

The Commission has exercised a firm hand in the resolution of disputes concerning the scope of bargaining units, and in the allocation of positions where two or more bargaining units have colorable claim to the work of those positions.

* * *

Local 609 urges the Commission to let an arbitrator resolve whether the backhoe work belongs to the custodian/grounds bargaining unit, based on the language of the contract(s). The fundamental problem with that approach is that, even if the dispute appears to involve an 'assignment of work', it also involves the scope of [an] appropriate bargaining unit under RCW 41.56.060.

Parties may agree on unit matters, but such agreements are not binding on the Commission. **Arbitrators only draw their authority from the agreements of parties, so the Commission does not defer 'unit' matters to arbitrators, and is not bound to consider or accept decisions issued by arbitrators on such matters.**

Id., slip op. at 11 (emphasis added; citations omitted).

In *Port of Seattle*, Decision 6181 (PORT 1998), PERC was faced with a claim by ILWU Local 9 that it should represent employees

classified as “harbor specialists.” In rejecting Local 9’s argument that the issue should be resolved through arbitration, PERC wrote:

Throughout its history, including long before the Legislature dovetailed Chapters 53.18 and 41.56 RCW by enactment of RCW 53.18.015 in 1983, the Commission has exercised a firm hand in the resolution of disputes concerning the scope of bargaining units and the allocation of positions to bargaining units. This policy is particularly apt in the context of statutes which do not protect or authorize any strikes.

Id., slip op. at 11. PERC then continued:

Local 9 nevertheless argues that the Commission should allow an arbitrator to resolve, based upon the language of its collective bargaining agreement with the employer, whether the cleaning work performed by the harbor specialists is work that belongs to the bargaining unit it represents. The fundamental problem with that argument is that, even if the dispute involves some ‘assignment of work’ issue, it also involves the scope of appropriate bargaining units under RCW 41.56.060.

Arbitrators only draw their authority from the agreements of parties. **In this case, there is no evidence that the employer and both of the competing unions have agreed to submit any work jurisdiction disputes to arbitration**, so as to invoke the second sentence of the un-numbered second paragraph of RCW 53.18.030.
* * * *

Under its deferral to arbitration policy reviewed and restated in City of Yakima, Decision 3564-A (PECB, 1991), **the Commission does not defer ‘unit’ matters to arbitrators or give weight to decision issued by arbitrators on such matters.**

Id., slip op. at 14-15 (emphasis added). Thus, well-established precedent shows that cases precisely like the one now before the Court are within PERC’s jurisdiction.

In responding to the Port's motion in Superior Court, Local 23 did not focus on the specific order of the arbitration award it wants enforced -- that the Port "immediately assign" to Local 23 members work currently performed by Port employees represented by Local 22 (CP 34) -- but focused on the supplemental arbitration award, which requires Port to *pay* Local 23 members until it assigns them work as ordered by the first arbitration award, even though they will not be performing the work. (CP 47).² Effectively, Local 23 sought the same "time-in-lieu" payments for certain longshore work as its sister union, Local 32, had sought and was denied in *ILWU Local 32 v. PMA*, 773 F.2d 1012 (9th Cir. 1985), a case cited by the Port to the Superior Court (CP 14) and not distinguished by Local 23 in its Response. (CP 51-55).

In *ILWU Local 32*, the Ninth Circuit dismissed a suit by the local union to enforce an arbitration award that purported to hold the union was entitled to "time-in-lieu" payments for certain longshore work. The arbitration award was contrary to a ruling by the National Labor Relations

² Though Local 23's complaint does not attach the arbitration award it wants enforced, there are two awards by the PMA arbitrator, the second being supplemental to the first. (CP 38; CP 45). The first award requires that the work at issue "shall be assigned immediately by the Port of Tacoma to ILWU Local 23 Marine Clerks." (CP 43). The second award, supplemental to the first, orders that the Port pay Local 23 an amount equivalent to daily pay from April 18, 2008 until it implements the first award. (CP 47).

Board. The Ninth Circuit affirmed dismissal of the union's suit, ruling that the arbitrator did not have the authority to make an award inconsistent with the determination of the administrative agency having jurisdiction to determine competing union claims for work jurisdiction.³ 773 F.2d at 1016-19. The court then further held that it did not have power to enforce a private arbitration award that conflicted with an NLRB decision made within the NLRB's jurisdiction:

The power of the federal courts to enforce the terms of private agreements is at all times exercised subject to the restrictions and limitations of the public policy of the United States as manifested in ... federal statutes.... Where the enforcement of private agreements would be violative of that policy, it is the obligation of courts to refrain from such exertions of judicial power.

Id. at 1020-21.

In yet another similar case involving the ILWU, where the union sought "time-in-lieu" payments for work it asserted its members were entitled to perform but had been assigned to workers represented by another union in accord with the ruling of the NLRB, the U. S. Court of

³ The National Labor Relations Board, an agency of the federal government, has jurisdiction over labor relations of employers and unions in the private sector. 29 U.S.C. § 152(2). The Washington State Legislature has conferred on PERC similar jurisdiction over labor relations of most public sector employers and unions in Washington, including the Port. RCW Chapters 53.18 and 41.56. "Once the NLRB decides a work assignment dispute, its determination takes precedence over a contrary arbitrator's award. [cases cited]. This is true regardless of which action was initiated first. [case citation]." *Auto Workers Local 1519 v. Rockwill International Corp.*, 619 F.2d 580, 583-84 (1980).

Appeals for the District of Columbia stated that if the ILWU were allowed to assert such claims, the “very purpose” of the NLRB ruling that resolved the jurisdictional dispute between the two unions “would be totally frustrated.” *International Longshoremen’s and Warehousemen’s Union v. NLRB*, 884 F.2d 1407, 1414 (D.C. Cir. 1989). The court held that the union’s pursuit of a grievance for “time-in-lieu” payments was coercive action, “because, whatever the union’s motivation and no matter how persuasive its contractual case, a union cannot force an employer to choose between [the NLRB determination] and a squarely contract claim. That, like the jurisdictional dispute itself, would place the employer between ‘the devil and the deep blue.’” *Id.* (citations omitted).

Local 23 here seeks exactly the result rejected by the federal circuit courts in *ILWU Local 32* and *International Longshoremen’s and Warehousemen’s Union, supra*. Though Local 23 has, at least before the Superior Court, claimed not to be challenging the PERC decision that the work at issue should be performed by members of the Local 22 bargaining unit, it wants the Port to be required to pay Local 23 members an amount of money that they would have received had they been hired to perform the work until the Port assigns them that work, despite the fact that PERC has ruled Local 23 has no right to the work. Whether it seeks enforcement of the initial arbitration ruling that the railcar planning work is to be

“immediately assigned” to Local 23 members, or it just wants an order requiring the Port to pay Local 23 members an equivalent amount of money until they are assigned the work, effectively Local 23 wants to proceed just as though PERC never ruled on the issue of which union has a right to have its members perform the work. Similar to the issue in *ILWU Local 32 v. PMA*, here Local 23 seeks to enforce an arbitration award that is contrary to a decision by an administrative agency (PERC) with jurisdiction over the underlying issue of representation. The Superior Court correctly dismissed Local 23’s Complaint for lack of subject matter jurisdiction.

2. **Dismissal of Plaintiff’s Complaint under Rule 12(b)(1) Is Appropriate in this Case because this Court Lacks Subject Matter Jurisdiction.**

Pursuant to Civil Rule 12(b)(1), a superior court has authority to dismiss a lawsuit for lack of subject matter jurisdiction. Whether the court has subject matter jurisdiction is a question of law. *In re Estate of Peterson*, 102 Wn. App. 456, 462, 9 P.3d 845 (2000). The party asserting jurisdiction (here, Local 23) has the burden of proving its existence. *2 Moore’s Federal Practice 3d* § 12.30[5], at 12-47; *see Pickett v. Holland Am. Line-Westours, Inc.*, 145 Wn.2d 178, 188, 35 P.3d 351 (2001) (stating that, where a Washington civil rule is identical to its federal counterpart, authority interpreting the federal rule is highly persuasive).

In considering a motion to dismiss for subject matter jurisdiction, the court may consider and weigh extrinsic evidence. 2 *Moore's Federal Practice 3d* § 12.30[4], at 12-46; see *Pickett*, 145 Wn.2d at 188. Further, a court must take judicial notice of information not subject to reasonable dispute, specifically including state administrative agency decisions. ER 201(a), (d); see also *U.S. v. Ritchie*, 342 F.3d 903, 909 (9th Cir. 2003) (“Courts may take judicial notice of some public records, including the ‘records and reports of administrative bodies.’”).

PERC’s clear jurisdiction over competing representation claims required the Superior Court to properly dismiss Local 23’s lawsuit, which sought to enforce an arbitration award that directly contradicts PERC’s Order. The PERC ruling holds that Local 22, not Local 23, is the proper representative of workers performing railcar planning for the Port. The arbitration award that Local 23 seeks to enforce ruled that its members should be assigned to perform work PERC ruled is properly assigned to Port employees represented by Local 22. Enforcement of the arbitration award would effectively circumvent the state law and public policy that places these issues within PERC’s jurisdiction. Because this issue is within PERC’s statutory jurisdiction, the Superior Court correctly determined it did subject matter jurisdiction and correctly dismissed Local 23’s complaint.

3. Local 23 Cites Inapposite Cases.

Local 23 cites a litany of cases relating to court enforcement of collective bargaining agreements and arbitration decisions. Unlike the facts in those cases, in our case the fundamental issue was not one of enforcing a single collective bargaining agreement. The fundamental issue is which bargaining unit -- the Port employees represented by Local 22 and working under terms of the Port's agreement with Local 22, or longshore workers represented by Local 23 and working under terms of the PMA Contract (which the Port had agreed to honor for limited purposes) -- was to perform the work.

Local 23 cites *W. R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983) for the propositions that a reviewing court is "bound to enforce the award and is not entitled to review the merits of the contract dispute;" that the court can't "second-guess the arbitrator's authority or decision;" and that a company can not evade responsibility under a collective bargaining agreement by virtue of a conflicting obligation under another agreement. (Brief of Appellant, pp. 9, 14 and 16). The facts and issue in our case are manifestly different than the facts and issue in *W. R. Grace*, and there has been a ruling on our issue by the duly-authorized governmental administrative agency. In *W. R. Grace*, the Court stated "[i]t is beyond question that obedience to judicial

orders is an important public policy.” 461 U.S. 766, 76 L. Ed. 2d 307, 103 S. Ct. 2183. That same concept should apply to the PERC Order. Obedience to the Order “is an important policy,” and the Order ruled that Local 23 has no “factual claim on the work being performed by railcar coordinators in the bargaining unit represented by Local 22.”

4. **The Port is Entitled to an Award of its Attorneys Fees and Costs for Responding to a Frivolous Appeal.**

“RAP 18.9 allows the appellate court to award compensatory damages when a party files a frivolous appeal. An appeal is frivolous when there are no debatable issues over which reasonable minds could differ, and there is so little merit that the chance of reversal is slim. [citations omitted].” *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). In *Cramer v. Seattle School District*, 52 Wn. App. 531, 762 P.2d 356, 540 (1988), the court considered the prior course of litigation when it granted an award of attorneys fees to the successful respondent. Determining the appeal to be frivolous, the court stated an analysis that is most appropriate in our case:

This case presents essentially the same claims and issues on which the [plaintiffs] were defeated in two prior cases. Nevertheless, the [plaintiffs] have persisted in appealing this case even though they present no debatable issues and their position is so devoid of merit that there is no possibility of reversal.

In our case, Local 23 presented to PERC its claim that its members should be assigned to perform the railcar planning duties at the Port.

Local 23 fully participated in the PERC proceeding. Unlike the PMA arbitration, Local 22 was also a party and was able to advance its claim to representing employees performing Port railcar planning duties. PERC ruled against Local 23, specifically ruling that Local 23 has “no factual claim” to the work of Port railcar planning. PERC rejected the arbitration award Local 23 now wants enforced. Local 23 did not appeal the PERC Order, though it had that legal right. Then, in a complaint that made no reference whatsoever to the Order and did not name Local 22 as a formal or even interested party, Local 23 filed the present action in Pierce County, seeking enforcement of the arbitration award that is directly in conflict with the Order. After full briefing of Local 23’s claim and oral argument, the Superior Court dismissed the action on the basis that PERC has jurisdiction to determine which union should be assigned the work of railcar planning at the Port, and PERC ruled that Local 23 “does not have any factual claim on the work.” Now, on appeal of the Superior Court’s order, Local 23 makes no effort to distinguish cases -- cited below -- establishing PERC’s authority to make the rulings contained in the Order. In essence, Local 23 continues its quest to obtain a decision effectively rejecting the unappealed, and thus final, PERC Order, by asking this court to enforce an arbitration award that would require the Port to “immediately assign” its railcar planning work to members of Local 23.

Its pursuit of its claim is frivolous, particularly in view of its failure to have appealed any portion of PERC's Order.

D. CONCLUSION.

The Superior Court's dismissal of Local 23's Complaint should be affirmed. In accordance with RAP 18.9, Respondent Port should be awarded damages in the amount of its attorneys fees and costs incurred in responding to Local 23's appeal of the Superior Court order.

RESPECTFULLY SUBMITTED this 8th day of January, 2009.

LANE POWELL PC

By 

J. Markham Marshall

WSBA No. 1242

Attorneys for Defendant-Respondent Port of Tacoma

CERTIFICATE OF SERVICE

I hereby certify that on January 8, 2009, I caused to be served a copy of the foregoing **BRIEF OF RESPONDENT PORT OF TACOMA** on the following person(s) in the manner indicated below at the following address(es):

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- by **Facsimile Transmission**
- by **First Class Mail**
- by **Hand Delivery**
- by **Overnight Delivery**

Adrienne Zuckeberg
Adrienne Zuckeberg

Attachment "A"

STATE OF WASHINGTON

BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the petition of:)
PORT OF TACOMA) CASE 21556-E-08-3338
Involving certain employees) DECISION 10093 - PORT
represented for purposes of)
collective bargaining by:)
INTERNATIONAL LONGSHORE AND) FINDINGS OF FACT,
WAREHOUSE UNION, LOCAL 22) CONCLUSIONS OF LAW,
AND ORDER

Lane Powell PC, by J. Markham Marshall and Karin E. Valaas, Attorneys at Law, for the employer.

Don Clocksin Law Offices, by Don Clocksin, Attorney at Law, for International Longshore and Warehouse Union, Local 22.

Gordon, Thomas, Honeywell, Malanca, Peterson and Daheim, by Lynn Ellsworth, Attorney at Law, for International Longshore and Warehouse Union, Local 23.

On February 27, 2008, the Port of Tacoma (employer or Port) filed a petition concerning the bargaining unit status of employees classified as "railcar coordinators." The railcar coordinators are part of a bargaining unit of Port employees represented by International Longshore and Warehouse Union, Local 22 (Local 22). International Longshore and Warehouse Union, Local 23 (Local 23) represents private sector longshore and warehouse personnel working in Port of Tacoma facilities and claims jurisdiction of the work performed by the railcar coordinators.

Representation Coordinator Sally Iverson held an investigation conference on March 21, 2008. Two issues remained in dispute at

the close of the conference: (1) Local 23 asserts that the Commission does not have jurisdiction in this matter because the underlying dispute involved work assignments rather than a question concerning representation. The employer and Local 22 argue that a question concerning representation exists. (2) Prior to the investigation conference, Local 23 disclaimed interest in all employees represented by Local 22, but maintains that it retains jurisdiction over the work performed by the railcar coordinators. The employer and Local 22 dispute Local 23's work jurisdiction claim.

A hearing was conducted on April 15, 2008, before Hearing Officer Kenneth J. Latsch. The parties submitted post-hearing briefs that were considered.

ISSUES

The issues to be decided by the Executive Director are: (1) whether the Commission has jurisdiction to hear the dispute, and (2) assuming that the Commission has jurisdiction, what is the appropriate bargaining unit placement of the railcar coordinators?

Based upon the record, the applicable statutes, rules and case precedent, the Executive Director rules that the Commission has jurisdiction to hear this matter and that Local 23's effort to resolve the dispute through grievance arbitration does not affect the Commission's authority to decide bargaining unit determination issues. The Executive Director further rules that the railcar coordinators perform work that shares a community of interest with the bargaining unit of public employees represented by Local 22.

APPLICABLE LEGAL PRINCIPLESJurisdiction

The Public Employment Relations Commission has broad jurisdiction to decide union representation disputes involving public employees. Before a detailed analysis of the instant case can be made, it is necessary to deal with the manner in which the dispute has been presented for determination. The employer filed this case as a representation petition, claiming that a question concerning representation exists between Local 22 and Local 23 as to the appropriate bargaining unit status of railcar coordinators. In fact, the issue presented deals with the appropriate allocation of positions between established bargaining units.

Such issues are typically resolved through the filing of a unit clarification petition, pursuant to Chapter 391-35 WAC. However, it would not serve any purpose to have the employer re-file its petition as a unit clarification, because the same issue would be presented for determination. Accordingly, the case will be decided on the basis of whether or not railcar coordinators, and their work, should be part of Local 22's bargaining unit.

There are limits to the Commission's jurisdiction, and, as noted in *Broadway Center for the Performing Arts*, Decision 8169 (PECB, 2003), the Commission does not have jurisdiction over private sector employees or employers.

Chapter 53.18 RCW allows the Port of Tacoma, as a municipal corporation, to bargain collectively with its employees. Of particular interest to this case, RCW 53.18.015 provides:

Port districts and their employees shall be covered by the provisions of chapter 41.56 RCW except as provided otherwise in this chapter.

Chapter 53.18 RCW contains very little guidance involving the allocation of positions to a particular bargaining unit placement. RCW 53.18.030 specifies that port employees are to be given "maximum freedom" in selecting a bargaining representative, but does not include any criteria to be considered if a work jurisdiction dispute arises. Since Chapter 53.18 RCW does not conflict with the provisions of Chapter 41.56 RCW, case precedent related to the allocation of positions developed under Chapter 41.56 applies to disputes arising under Chapter 53.18 RCW.

While Chapter 41.56 RCW was modeled after the federal National Labor Relations Act (NLRA) that governs private sector employers and employees, there are several important distinctions between the federal and the state legislation. Of particular interest to this matter, Chapter 41.56 RCW does not contain any language similar to Section 10(K) of the NLRA that directs adjudication of a jurisdictional dispute underlying an unfair labor practice allegation charged under Section 8(b)(4)(d) of the Act. Thus, this Commission must address jurisdictional disputes through unit clarification or representation cases. In WAC 391-35-020(1)(b), the Commission adopted a rule that recognized the serious nature of jurisdictional disputes, and allowed such cases to be filed as they occur, rather than prescribing a set filing period, such as during the pendency of ongoing negotiations.

The Commission has long defended its authority to determine bargaining units, even where parties to a representation dispute have already submitted the issue to a contractual grievance procedure. In *Seattle School District*, Decision 5220 (PECB, 1995),

the Commission addressed a jurisdictional dispute similar to that presented in this case. In that case one of the competing unions filed to arbitrate its work jurisdiction claim under terms of an existing collective bargaining agreement. The Commission rejected the union's argument that the dispute should be "deferred" to arbitration stating:

The Commission has exercised a firm hand in the resolution of disputes concerning the scope of bargaining units, and in the allocation of positions where two or more bargaining units have colorable claim to the work of those positions.

Parties may agree on unit matters, but such agreements are not binding on the Commission. *City of Richland*, 29 Wn.App 599 (Division III, 1981). Arbitrators only draw their authority from the agreements of parties, so the Commission does not defer "unit" matters to arbitrators, and is not bound to consider or accept decisions issued by arbitrators on such matters.

The Commission reached a similar result in *Port of Seattle*, Decision 6181 (PORT, 1998), where a work jurisdiction dispute had already been submitted to grievance arbitration before the bargaining unit issue was presented to the agency:

[The union] nevertheless argues that the Commission should allow an arbitrator to resolve, based upon the language of its collective bargaining agreement with the employer, whether the cleaning work performed by the harbor specialists is work that belongs to the bargaining unit it represents. The fundamental problem with that argument is that, even if the dispute involves some 'assignment of work' issue, it also involves the scope of appropriate bargaining units under RCW 41.56.060.

Arbitrators only draw their authority from the agreements of the parties. In this case, there is no evidence that the employer and both of the competing unions have agreed to submit any work jurisdiction disputes to arbitration, so as to invoke the second sentence of the un-numbered second paragraph of RCW 53.18.030.

The Commission will not delegate its bargaining unit determination authority to grievance arbitrators.

Community of interest

The Commission makes bargaining unit placement determinations on a case-by-case basis. The purpose of unit determination is to group together employees who have sufficient similarities to indicate that they will be able to bargain collectively with their employer. Once bargaining units are established, it is possible to identify bargaining unit work. In *City of Tacoma*, Decision 6601 (PECB, 1999), the Commission described bargaining unit work as:

[W]ork that has historically been performed by bargaining unit employees. Once an employer assigns unit employees to perform a certain body of work, that work attaches to the unit and becomes bargaining unit work.

ANALYSIS

Bargaining Unit History

The Port of Tacoma operates a number of facilities designed for the loading and unloading of ocean-going vessels, and for the transportation of materials to and from Port property. For a number of years dating at least from the 1970's, the employer had a collective bargaining relationship with International Longshore and Warehouse Union, Local 23. Local 23 actually represented two distinct groups of employees working in Port facilities: private sector employees working under terms of a collective bargaining agreement with the Pacific Maritime Association (PMA), referred to as the "Longshore Division," and public employees employed by the Port in particular work classifications, referred to as the "Port Workers Division."

The PMA agreement covers stevedoring and warehousing work performed for private sector shipping companies that ship freight into and from the Port's facilities. The PMA contract also serves as the model for the terms and conditions found in the collective bargaining agreements reached between the Port and Local 23 for the Port's public employees.

The Port and Local 23 entered into a successor collective bargaining agreement from April 1, 2005, through March 31, 2008, that described the public sector bargaining unit as:

The Port of Tacoma, hereinafter referred to as the Employer, recognizes ILWU Local 23, hereinafter called the Union, as the exclusive bargaining agent for all employees employed in the classifications set forth in Appendices A, B, and C, excluding managerial employees, administrative employees, confidential employees, professional employees, security employees and supervisors as defined in the Labor-Management Relations Act, as amended.

The appendices listed the following job classifications to be included in the Port Workers Division bargaining unit which became Local 22:

Appendix A - Office Employees

Accounts Payable Clerk
Accounts Receivable Clerk
Payroll Clerk
Lead Billing Clerk
Billing Clerk
Purchasing Clerk
Clerk
Safety and Claims Assistant
Receptionist and Switchboard
Freight Coordinator
Railcar Coordinator
Data Entry Clerk
Construction Inspector

Appendix B - Equipment Maintenance

Lead Foreman
Foreman
Leadperson
Electronic Technician
Journey Level
Lead
Dispatcher/Storekeeper
Dispatch/Storekeeper
Specialist
Maintenance Assistant
Apprentice

Appendix C - Building Maintenance

Lead Foreman
Foreman
Leadperson
Journey Level
Lead Facilities Technician/Sweeper
Buildings and Grounds II
Buildings and Grounds I
Dispatcher/Storekeeper
Specialist
Sweeper
Facilities Technician
Maintenance Assistant
Apprentice

There are approximately 95 employees working in the classifications listed above. The employees work in three general Port facilities: the Port's main office building, the Port's maintenance facility, and the North Intermodal Tower. The North Intermodal Yard is the Port's main shipping facility, where freight is transferred from ships to freight trains.

In 2005, a number of the Port's employees asked Local 23 to allow them to have a separate local for their negotiations with the Port. Local 23 did not oppose their request, and Local 23 officials contacted the Port, asking for its commitment to recognize a new local as bargaining representative for the Port Workers Division

employees. Port officials agreed to recognize the new local in a letter to Local 23 on January 31, 2006. International Longshore and Warehouse Union, Local 22 was chartered by the International Union in March 2006, and the Port entered into collective bargaining negotiations for a first contract shortly thereafter. Local 23 continued to represent private sector employees under terms of the PMA agreement, including employees in the classification of "marine clerk."

The Disputed Position and its Work

The railcar coordinator position has always been part of the Port Workers Division that became Local 22, as listed in the above appendices. The Port Workers Division employees have always been hired directly by the Port, and they are considered to be public employees, whose wages and other benefits are set only by the Port of Tacoma. Port employees are also covered by the Public Employee Retirement System (PERS) for their retirement benefits.

This contrasts with Local 23 members who are private sector employees paid under terms of the PMA contract. While Local 23 members work in Port of Tacoma facilities, they gain employment through a hiring hall process jointly run by Local 23 and the PMA, and they are dispatched directly to their positions from the hiring hall. The Port does not pay their salaries, nor does it control any aspect of their employment relationship. In certain limited situations, the Port may ask Local 23 to provide it a particular person to fill a specific job assignment. In such cases, the Port reimburses the PMA for the work of the Local 23 employee.

The railcar coordinator is responsible for lining up train cars to accept containers being off-loaded from ocean-going vessels. The railcar coordinators perform their work in the North Intermodal Tower, and report to Operations Superintendent Agnes Smith. Ms.

Smith, in turn, reports to Senior Director of Inland Transportation Jean Beckett. At the time of hearing, there were four railcar coordinators, the same number that existed when the disputed positions were part of the Port Workers Division represented by Local 23.

The coordinators must plan which containers need to be loaded on which rail cars, and then must plan the sequence of the freight cars on each train leaving Port facilities. For example, freight bound for a particular location must be placed together, and the sequence of delivery must be considered as the freight cars are lined up.

Before 2004, the railcar coordinators performed their work by writing out plans that would be changed many times until the freight was finally sorted into the appropriate order. This work involved the use of small paper squares that were constantly moved on a table, with each square representing a different container to be loaded on different freight cars. In 2004, the Port initiated a computer program (called "Spinnaker") to streamline the planning process so the railcar coordinators could use a computer to plan the sequencing of freight trains, thus saving time and making the entire process less labor-intensive.

Thus, while the Spinnaker system streamlined their work, the railcar coordinators still do the same work they did in the past. The railcar coordinators still have primary responsibility for planning the sequence and loading patterns for freight trains leaving the Port's facilities. The work at issue has always been done by Port employees and the same individuals performed this work before and after the creation of Local 22 as a bargaining representative.

Once the railcar coordinators finish their work, the plan is forwarded to a marine clerk who is responsible for implementing the loading scheme. The marine clerk, who is a member of Local 23's bargaining unit, works with equipment operators to make sure that the freight containers are loaded in the appropriate sequence. The marine clerks have discretion to make certain limited changes in the plan to accommodate weight and/or height restrictions on a particular railcar, but the clerks do not have authority to modify the general loading order set forth in the railcar coordinator's plan.

Shortly after Local 22 received its charter, Local 23 notified the Port that it was concerned about work assignments given to the railcar coordinators. Local 23 maintained that the Port improperly removed work that should be assigned to the marine clerks under terms of the PMA contract. Local 23 advanced its concerns about the work issue to an arbitration proceeding which was conducted on March 3, 2008. Arbitrator Randy Vekich ruled that the Port improperly gave the rail car planning work to the railcar coordinators, and that the work really belonged to marine clerks represented by Local 23. Local 22 did not participate in the arbitration proceeding.

Discussion

Local 23 characterizes the instant matter as a work jurisdiction dispute that cannot be resolved by the Commission because the Commission does not have jurisdiction over the private sector employees in Local 23's bargaining unit. Local 23's argument relies on a conclusion that the instant dispute involves only work that is supposed to be performed by private sector employees who are beyond the Commission's jurisdiction. Such a result is not forthcoming.

Local 23 ignores the fact that this dispute actually involves employees who are responsible for performing the disputed work, and there is a real and immediate impact of any jurisdictional decision on employees in the private and public sectors. The Commission is responsible for the formation and modification of collective bargaining units in the public sector.

The Commission has been asked to determine whether the existing bargaining unit configuration is appropriate, in light of Local 23's attempt to have certain work removed to another bargaining unit. Local 23 filed a disclaimer over the railcar coordinator positions, but did not disclaim the work performed by the coordinators. In fact, Local 23 argues that the coordinators' work must be transferred to marine clerks.

It is clear that marine clerks are private sector employees who are not subject to the Commission's jurisdiction. Similarly, it is clear that the railcar coordinators are public employees who are subject to Commission jurisdiction. Even before the employer acquiesced to Local 23's request to recognize Local 22 as the representative of a separate bargaining unit of Port employees, the railcar coordinators were part of the Port Workers Division of Local 23, and their collective bargaining relationship was with the Port of Tacoma as a public entity.

The introduction of the Spinnaker computer program in 2004 has not changed the underlying collective bargaining relationships. Although the railcar coordinators may have new ways of doing their work, this change occurred in 2004, two years prior to the formation of Local 22, and their basic functions have not changed. They are still responsible for the assembly of freight trains that haul cargo from the Port's premises. Local 23's assertions that its marine clerk employees should now be doing the work is simply not

supported by the record or by the agreement that railcar coordinators who have historically performed the work, are among the agreed-upon classifications put under Local 22's jurisdiction in 2006. The railcar coordinators plan the work and marine clerks implement the plans. While it is important that these two classifications work together, they each perform unique and identifiable duties. Given these facts, there is no reason to tamper with the existing collective bargaining units or the work performed by incumbent employees.

Local 23's attempt to resolve the dispute through grievance arbitration has no bearing on the instant matter. Apart from the fact that Local 22 did not participate in the arbitration hearing, the issue is not appropriate for resolution through a contractual grievance procedure. The issue involves competing claims for the same work, and the Commission must assert its jurisdiction to resolve the dispute through representation case procedures. The railcar coordinators should retain the existing work they have historically performed and must remain part of the bargaining unit represented by Local 22.

The last question to be addressed is how to resolve the petition, as filed. It has been determined that the railcar coordinators have always performed the work of creating the plan for railcar shipment of cargo containers. That work should remain with the railcar coordinators, and those employees are properly in the bargaining unit of public employees represented by Local 22. Accordingly, there is no question concerning representation present in Local 22's bargaining unit. The employer's petition must be dismissed, but the dismissal is done in recognition of the existing bargaining

unit structure and the work being performed by railcar coordinators as part of Local 22's bargaining unit.¹

FINDINGS OF FACT

1. The Port of Tacoma is a port district within the meaning of RCW 53.18.010 and is a public employer within the meaning of RCW 41.56.030(1).
2. International Longshore and Warehouse Union, Local 22 is a bargaining representative within the meaning of RCW 41.56.030(3).
3. International Longshore and Warehouse Union, Local 23 represents a bargaining unit of private sector employees working at Port of Tacoma facilities, and is not a bargaining representative within the meaning of RCW 41.56.030(3).
4. The position of railcar coordinator is part of a bargaining unit of Port of Tacoma employees represented by Local 22.
5. Duties performed by the railcar coordinators have remained essentially the same even with the introduction of computer programs designed to make their work faster and more efficient.

¹ In its post-hearing brief, the employer asked the Commission to rule that the position of "freight coordinator" also be considered in these proceedings, and argued that the freight coordinator must be part of Local 22's bargaining unit. Examination of the record reveals that evidence was not presented regarding the freight coordinator position, and that the hearing was confined to the position of railcar coordinator. Accordingly, no ruling shall be made concerning the position of freight coordinator.

6. International Longshore and Warehouse Union, Local 23 does not have any factual claim on the work being performed by railcar coordinators in the bargaining unit represented by International Longshore and Warehouse Union, Local 22.

CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction in this matter under Chapter 41.56 RCW and Chapter 391-25 WAC.
2. The Public Employment Relations Commission's determination is not affected by the grievance arbitration award issued by Arbitrator Randy Vekich.
3. The position of railcar coordinator is appropriately within to the existing bargaining unit of Port of Tacoma employees represented by International Longshore and Warehouse Union, Local 22, and the railcar coordinator position must retain the duties it has historically performed.
4. There is no question concerning representation in the bargaining unit of Port of Tacoma employees represented by International Longshore and Warehouse Union, Local 22, since Local 22 already represents the railcar coordinators, and their work remains in Local 22's unit.

ORDER

International Longshore and Warehouse Union, Local 22 appropriately represents the classification of railcar coordinator in the existing bargaining unit of employees of the Port of Tacoma. The railcar coordinator duties are appropriately allocated to the coordinator position within Local 22's bargaining unit. The Port

of Tacoma's petition seeking resolution of a question concerning representation is hereby DISMISSED.

Issued at Olympia, Washington, this 6th day of June, 2008.

PUBLIC EMPLOYMENT RELATIONS COMMISSION



CATHLEEN CALLAHAN, Executive Director

This order may be appealed by filing timely objections with the Commission under WAC 391-25-660.