

ORDER NO. 93-4

ENTERED

BEFORE THE
OREGON BOARD OF MARITIME PILOTS

BP 1
(Columbia/Willamette River)

In the Matter of Revised Tariffs for the Columbia) ORDER
and Willamette River Pilotage Ground.)

DISPOSITION: SETTLEMENT AGREEMENT PARTIALLY ADOPTED

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Summary

In this order, the Board partially adopts the rates in settlement agreements between the Portland Steamship Operators Association (PSOA) and the two pilot groups on the Columbia/Willamette River ground: the Columbia River Pilots (COLRIP) and Lewis & Clark Pilotage, Inc. (Lewis & Clark). The Board adopts the following provisions:

- An immediate 25 percent increase in all tariff items; and
- An automatic adjustment clause to reflect increases in the cost of living.

The Board rejects provisions which would have required the Board to implicitly approve a fare-box pension system. This includes rejection of provisions which would automatically adjust rates to reflect changes in the number of retirees drawing benefits under COLRIP's pension plans.

Participation

COLRIP, Lewis & Clark, the PSOA, the Port of Portland, and the Port of Kalama participated as parties to this portion of the case.¹

Introduction

The COLRIP Rate Filing

The Request

On July 24, 1992, COLRIP filed a petition requesting:

- An increase in target net income to \$148,251 per year to give the pilots the same purchasing power they had after the Board's 1984 rate order.
- An additional increase in total revenues sufficient to fund five additional pilots. (That would enable the pilots to schedule one day off for each day on duty.)
- Either full funding for a funded pension system or a return to a pure fare-box system.

¹ The full service list for all portions of the case is Appendix A.

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Annual automatic adjustments to all tariff items to offset the effects of future inflation.

Lewis & Clark Intervention

Lewis & Clark's Filing. On July 21, 1992, Lewis & Clark filed a notice of intention to intervene in the Columbia River Bar Pilots rate proceeding.² It filed a petition to intervene in the COLRIP proceeding on August 17, 1992. In the petition, Lewis & Clark suggested that the Board should resolve the pension issue by establishing a unified fare-box system for all pilot groups on the Columbia/Willamette River ground similar to the system for the San Francisco Bay ground.

Opposition. On September 4, 1992, COLRIP filed an argument in opposition to Lewis & Clark's petition. COLRIP opposed broadening the issues to include development of a new pension system.

Resolution. The issue became moot when COLRIP, Lewis & Clark, and the PSOA reached a settlement agreement. The agreement does not include development of a new pension system.

The Lewis & Clark Rate Filing

The Request

On August 20, 1992, the Lewis & Clark pilots filed a petition requesting:

- A 46.64 percent rate increase to give the Lewis & Clark pilots approximately the same target net income as the COLRIP pilots.
- Conversion to a unified fare-box pension system for the two pilot groups similar to the system for the San Francisco Bay area.
- Annual automatic adjustments to all tariff items to offset the effects of future inflation.

² The Columbia River Bar Pilots filed a rate petition on June 22, 1992, and the Board served it on potentially interested parties on June 24, 1992. This created a deadline of July 24, 1992, for pilot groups to file rate petitions. COLRIP did not file before the deadline, so the Bar pilot petition was the only one existing at the time Lewis & Clark filed its notice.

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COLRIP Opposition

COLRIP's Argument. On September 4, 1992, COLRIP filed an argument in opposition to Lewis & Clark's rate petition. COLRIP urged the Board to reject the Lewis & Clark filing on the grounds that it:

- was not timely; and
- requests relief (a unified pension system) which is not appropriate in a rate case.

Applicable Law. When one pilot group files a rate petition, other pilot groups desiring a rate change must file petitions within 30 days. OAR 856-30-101(3)(a).

Resolution. Lewis & Clark should have filed its rate petition by July 24, 1992.³ It did not meet the deadline, so the Board cannot consider its rate petition in this proceeding. The failure to meet the deadline does not make a difference, as a practical matter, because Lewis & Clark has participated as a party to this portion of the case and the resulting rates will apply to both pilot groups.

Consolidation

For hearing, the Board consolidated the Columbia/Willamette River rate petition with rate petitions for Oregon's other pilotage grounds. The Board is issuing this order for the Columbia/Willamette River ground, another order for the Columbia River Bar ground, and a third order for the Coos Bay ground and the Yaquina Bay ground.

Settlement Agreements

The PSOA has executed 5 year settlement agreements with COLRIP and Lewis & Clark. (The COLRIP agreement is Appendix B.) The agreements provide for:

- An immediate 25 percent increase in all tariff items.
- Annual cost of living adjustments for all tariff items starting September 1, 1994, for increases in the Portland-Vancouver Consumer Price Index for All Urban Consumers as published by the U.S. Department of Labor's Bureau of Labor Statistics for the 12-month period ending June 30 of the subject year. A decrease in the index would result in no change.

³ July 24 was 30 days after the Board served notice of the Columbia River Bar Pilots filing.

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Restoration of the pure fare-box pension system with a separate annual automatic adjustment mechanism to cover changes in pension expenses arising from changes in the number of retirees drawing benefits. That adjustment also would commence on September 1, 1994.

Of the other parties, the Port of Portland acquiesces to the agreement and the Port of Kalama opposes it. The Port of Kalama advocates full funding for the pension system.

Issues

The Hearings Officer adopted the following issue list for this portion of the case:

- "A" Whether retirement benefits for COLRIP pilots under an unfunded "fare-box" plan require present ship owners to pay part of the compensation for past services.
- "B" If so, whether the Board can factor past compensation into present rates.
- "C" If the Board has discretion to allow an unfunded plan, whether the Board, as a matter of policy, should require COLRIP to adopt a fully funded pension plan instead of the unfunded plan.
- "D" If the Board decides to allow an unfunded plan, whether the Board has authority to adopt an automatic rate adjustment mechanism.
- "E" If the Board has authority to adopt an automatic rate adjustment mechanism, whether it is a good idea.

Hearing

Karl Craine, a Hearings Officer for the Public Utility Commission, opened the hearing on September 18, 1992, and then called a recess to give the parties a fuller opportunity to develop the record. The parties conducted discovery, prepared written testimony, and had an opportunity for cross examination at hearings on November 20, 1992, and November 23, 1992. The parties then filed briefs, the Hearings Officer circulated a preliminary recommendation, and the parties filed comments on the preliminary recommendation.

Proposed Order

The Hearings Officer issued a proposed order on February 15, 1993; COLRIP, the PSOA, the Port of Kalama, and the Port of Portland filed comments or exceptions; and

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the Board heard replies at its March 16, 1993, regular meeting. At that meeting, the Board (with the exception of Captain Pollitt who recused himself) adopted the terms of this order.

Findings of Fact

The findings of fact in this order reflect the preponderance of the evidence from the consolidated record.

Ratemaking

Statutory Requirements

ORS 776.115(3) establishes the general goal of providing efficient and competent pilotage service on all pilotage grounds.

ORS 776.115(6)(a) authorizes and directs the Board to set "reasonable and just" rates.

ORS 776.115(6)(b) directs the Board to look at the following factors in setting rates:

- (A) The length and net tonnage of the vessels to be piloted.
- (B) The difficulty and inconvenience of the particular service and the skill required to render it.
- (C) The supply of and demand for pilotage services.
- (D) The public interest in maintaining efficient, economical and reliable pilotage service.
- (E) Other factors relevant to the determination of reasonable and just rates.

ORS 776.115(9) requires the Board to establish rates for a period of at least two years. The rates may include an automatic adjustment clause as long as the adjustment only reflects changing economic conditions. New rates must become effective for all pilotage grounds on the same day.

Ratemaking Formula

Ratemaking is a two step process in which the Board determines a reasonable total revenue level and then sets rates for specific tariff items to produce the appropriate

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amount of total revenues. The Board determines the total revenue figure by determining the appropriate:

- Target net income level for a pilot on the ground;
- Number of pilots; and
- Expenses of providing the service.

The target net income, times the number of pilots, plus the operating expenses equals the target total revenues. The actual total revenues will depend on the volume of traffic, so the Board's next task is to estimate future volumes. The Board's last task is to divide the total revenues by the volume of traffic to determine the rate for each tariff item.

Evidentiary Requirements

OAR 856-30-000(1) addresses the target net income level, the number of pilots, and the volume of traffic components of the ratemaking formula. It requires the Board to consider:

- (a) The amount of activity, including number of vessels, number of pilot assignments, size of vessels by net tonnage and length, and draft;
- (b) Any change in the amount of activity since the last rate order;
- (c) The public interest in prompt and efficient service;
- (d) The professional skills and experience required of a pilot and the difficulty and inconvenience of providing the service, including time necessary to perform the service;
- (e) Evidence of compensation for comparable maritime professions, including other pilotage associations;
- (f) -Total gross and net income for the pilots' group since the last rate order, or as directed by the Board, including sources of income by tariff category; and
- (g) Individual amounts paid to pilots since the last rate order, or as directed by the Board, which may be shown as both gross and adjusted gross income, as reported for tax purposes.

OAR 856-30-000(2) addresses the expense component of the formula. It requires the Board to consider evidence of expenses from the pilots' records as verified by an independent audit.

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Target Income Level
Number of Pilots
Volume of Traffic

Findings of Fact

Vessels. Vessels on the Columbia and Willamette Rivers range in length from less than 100 feet to over 1,000 feet with typical lengths between 550 and 700 feet. They average about 21,000 gross registered tons with an average draft of about 27 feet. An increasing percentage of the vessels approach the 40 foot maximum draft for the channel.

Difficulty. The ground extends from the lowermost dock or wharf at the Port of Astoria to the head of navigation on the Columbia River, the Willamette River, and their tributaries. The head of navigation on the Columbia River system is Lewiston, Idaho, and the head on the Willamette is upriver from Oregon City, Oregon. As a practical matter, ships travel only as far as Vancouver, Washington, and Portland, Oregon. Further travel on the Columbia system (tug/barge combinations) requires pilotage services only occasionally.

For the area where the pilots concentrate their efforts, the channel is long, winding, narrow, and shallow in relation to the size of the ships and the volume of traffic. (For example, a trip from Astoria to the LDC grain terminal in Portland covers 85 nautical miles with over 80 course changes through a 40 foot deep channel only 600 feet wide.) The ground is subject to adverse weather including high winds and fog.

There are several ports on the ground, so the time a pilot spends on the bridge depends on the destination. The time also varies with a variety of other factors, including the ship's specifications and loading condition, the weather, the amount of traffic on the river, and river conditions. Average times on the bridge for typical destinations are:

PORT	HOURS
Longview	4.5
Kalama	5.5
Vancouver	7.0
Portland (Terminals 5 & 6)	6.5
Portland (Terminal 4)	7.0
Portland (Terminals 1 & 2)	7.5
Portland Ship Repair Facility	7.5

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Bridge time, of course, is only a portion of the time a pilot must devote to each pilotage job.

Skill. Each COLRIP pilot holds a valid Master's license from the Coast Guard and served at least 730 days as Master aboard a towing vessel on the ground before becoming a pilot. The pilots' average towing experience before pilot training is 17.5 years with an average of 16.9 years on the ground. All COLRIP pilots met at least the minimum training standards in the Board's rules before receiving a pilot's license.

Supply. COLRIP consists of 41 full-time pilots and the group provides service to all ports 24 hours per day, seven days per week, and 365 days per year. COLRIP dispatches pilots in rotation so each performs about the same amount of work. Individual pilots work a schedule calling for 22 days on duty and the following 17 days off.

Two of COLRIP's most senior pilots left the association in 1989 to form the Lewis & Clark group. Lewis & Clark has a long term exclusive contract with ConAgra, Inc. *dba* Peavey Grain Company to pilot ships calling at ConAgra's grain export facility at the Port of Kalama.

Demand. Demand for pilotage services on the ground during the past three years has been:

YEAR	TRANSITS	GROSS TONS
1989	4,181	87,715,685
1990	3,915	82,173,544
1991	3,914	83,275,368

Income Comparisons

During 1989, 1990, and 1991, COLRIP's 41 members received the following income:

YEAR	TOTAL DISTRIBUTIONS	AVERAGE DISTRIBUTION
1989	\$4,911,219	\$119,786
1990	4,521,053	110,270
1991	3,961,483	96,621

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In comparison, the following sample of other pilot groups had the following target income at the beginning of 1992:

GROUP	INCOME
New Orleans, LA	\$175,000
Norfolk, VA	190,000
Philadelphia, PA	150,000
Houston, TX	150,000
Miami, FL	216,292
Port Everglades, FL	316,500
Canaveral, FL	198,350
Tampa, FL	212,654

A comparison with the annual salaries for IOMM&P⁴ ship masters (effective July 1, 1992) shows:

SHIP CLASS	SALARY
A4A	\$157,120
A3A	147,612
A2A	139,017
A1A	130,311

The IOMM&P figures do not include annual benefit packages which equal about 25 percent of the annual salary level. The IOMM&P ship masters also receive 30 day's vacation for each 30 days on duty.

Compensation. In 1984, the Board set a target net income figure of \$108,000 for all of Oregon's pilotage grounds and the PSOA desired to maintain income uniformity in the new rates. The PSOA agreed to a 20 percent rate increase, which theoretically would

⁴ IOMM&P is the International Organization of Masters Mates & Pilots.

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bring the target net income for each ground to \$129,312. The actual net income for each ground differed from the theoretical amount because of various adjustments.

The actual target net income for the Columbia/Willamette River ground is \$135,000. It reflects the pilots' desire to delay the first cost of living adjustment until September 1, 1994, in return for higher initial income.

The \$135,000 target income figure leaves the pilots with less real income than the Board found reasonable in its 1984 rate order. The agreement's cost of living adjustment will allow the pilots to maintain their real income level without filing frequent rate cases. The adjustment does not reduce income during periods of deflation, but that feature is not likely to result in real income higher than the Board found reasonable the last time the parties fully litigated the issue.

Resolution

The pilots are willing to accept significantly less net real income than the Board awarded in its 1984 order. That enables the Board to find, without going into great detail, that the settlement agreement is compatible with the public's interest in economical pilotage service. The Board views the pilots' willingness to accept the compensation level as a commitment to continue providing efficient and reliable service. As a result, the Board concludes that the \$135,000 target income figure is just and reasonable.

Pension Issues

Background

COLRIP pays retirement benefits under three unfunded retirement plans:

Plan I. COLRIP adopted this plan in 1950. It specified a fixed retirement benefit of \$50 per month with a lump sum payment of \$300 to widows at the time of the pilot's death.

Plan II. In 1967, COLRIP amended Plan I to additionally pay benefits ranging from 5 percent to 15 percent (depending on years of service) of an active pilot's net share.

Plan III. COLRIP adopted this plan in 1979. It initially entitled retired pilots to 1 percent of an active pilot's net share for each year of service.

The retirement plans were an issue in the pilots' 1986 rate case. During that case, the pilots executed a stipulation with the PSOA which increased the "target retirement benefit" from 1 percent to 1¼ percent of an active pilot's net share.

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The stipulation contemplated that COLRIP would apply the proceeds of the rate increase to a list of items with pension funding "to the extent possible" after funding the other items. The effect of the stipulation was to maintain active pilot income and payments to retirees while starting conversion to a funded system. The intent to pursue full conversion of the pension funding mechanism appears in the following statement:

- 5) The parties recognize that funding all pilots' pension requirements will exceed the agreed increase. While the current system of unfunded pensions is an expense, a funded system shall be established so that the current system may be phased out as rapidly as possible.

July 31, 1986, Stipulation at 2.

The full funding goal also appeared in the Board's final order. The Board expressly stated that:

The Board agrees with and adopts the policies specified in the settlement agreement, including the conclusion that a funded pension system should be established as rapidly as possible, and the conclusion that all benefits should be equalized throughout the Oregon pilotage grounds as far as is practicable, acknowledging the differences which exist among the grounds.

1986 Order at 2.

The pilots received a 10 percent rate increase with 75 percent of it covering:

- operating expenses;
- disability insurance;
- health and dental insurance;
- group life insurance;
- sick leave; and
- payment of unfunded pension benefits.

With the remaining 25 percent of the increase, the pilots established partial pension funding through a "buy-down" of benefits which active pilots would accrue under Plan III. The buy-down gives pilots more current income, which they may invest in individu-

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al retirement plans, in exchange for fewer "fare-box credits" under the unfunded plan. The result was:

1987. The 12 newest pilots participated in the buy-down with 9 of them receiving the equivalent of 0.62 credits in additional current income (reducing their fare-box credits from 1.25 to 0.63) and the remaining three receiving a lesser amount. Kalama 10 at 1.

1988. For the next year, 18 pilots participated in the buy-down with 12 of them receiving the equivalent of 0.70 credits and the remaining 6 receiving a lesser amount. Kalama 10 at 2.

1989. Since March 1, 1989, all of the pilots have participated in the buy-down with each receiving the equivalent of 0.225 credits. COLRIP 5-6 at 1; Kalama 11 at 7.

When the pilots filed revised rates this year, they asked the Board to either set rates at a level which would allow a full funding or abandon full funding as a goal. The pilots subsequently executed a stipulation with the PSOA which rejects full funding in favor of a return to the unfunded approach.

The issue is more complicated now than it was in 1986 because COLRIP no longer represents all of the Columbia River pilots. The two pilots who left the organization to form the Lewis & Clark group are not liable for pension benefits under COLRIP's three plans because COLRIP is responsible for paying the benefits and individual pilots are not.

The Lewis & Clark pilots continue to participate in COLRIP's Plan III under a three year interim agreement. The parties made a commitment in the agreement to working out a permanent unified plan during that period of time.

Current Proposal

On December 23, 1992, COLRIP proposed the following:

1. Adoption by the Board of all elements of the COLRIP/PSOA stipulations, which are based on continuation of the fare-box system.
2. Inclusion in the Board's final order the creation of a subcommittee made up solely of public members, not less than two in number, to guide and facilitate the Boards (*sic*) review of pension related events over the last 6-8 years, the examination of the fare-box program, and the review of possible alternatives such as a modified "San

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Francisco type" pension plan that would cover all river pilots.

3. Inclusion in the Board's final order of a requirement that COLRIP provide the subcommittee with all information that the subcommittee deems necessary, plus an updated actuary's report (at COLRIP's expense) which sets forth the cost of converting to a fully funded pension system.
4. Inclusion in the Board's final order the following series of deadlines:
 - a. Adoption of the new rates and adjustors in this proceeding not later than February 1, 1993.
 - b. Reports by the subcommittee every month thereafter.
 - c. Completion of all information gathered by the subcommittee and submission to the Board as a whole not later than October 1, 1993.
 - d. A determination by the Board of whether it wants to change the system not later than December 31, 1993.

If the Board determines that the COLRIP/PSOA stipulations represent the best solution, nothing more would be required. If, on the other hand, the Board determines that changes would be beneficial, the Board could reopen rate proceedings on its own motion as early as January, 1994, and complete them before the pension related adjustments take effect (on September 1, 1994).

Of the other parties, Lewis & Clark directly supports the proposal. The Port of Portland expressed support for the rate stability arising from the five year rate agreement and the concept of a cooperative investigation. The Port of Kalama opposes the proposal because it requires the Board to approve, at least for the time being, a return to a pure fare-box system. The PSOA opposes the proposal because it opposes Board involvement in pilot pensions.

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Federal Pension Law

As a preliminary matter, the parties argued whether the Employee Retirement Income Security Act of 1974⁵ (ERISA) requires a fully funded plan and the Hearings Officer issued the amended ruling in Appendix C.⁶ The Hearings Officer concluded that ERISA clearly does not apply because the pilots are independent contractors and, to the extent the plan covers COLRIP employees, it is an excess benefits plan. See Appendix C at 6-8. The Hearings Officer's analysis and conclusions are correct, so the Board adopts the ruling.

Issue A

The Issue

Do retirement benefits for COLRIP pilots under an unfunded "fare-box" plan require present ship owners to pay part of the compensation for past services?

Resolution

COLRIP first argues that present owners do not pay for past pilotage services because there is no direct link between the tariff and payments to retired pilots. (*ie.* COLRIP collects general revenues under the tariff and the pilots disburse the revenues at their discretion.) COLRIP Brief at 1-2. The lack of a dedicated fund does not matter. The key thing is that pension benefits are one of the expenses which the Board has considered in setting rates. That creates the link between rates and pension benefits.

Pension benefits may, as COLRIP argues, compensate pilots for both piloting ships and training future generations of pilots. COLRIP Brief at 2. But the compensation for training remains part of the compensation for past services rather than present ones. To the extent present ship owners pay rates which contemplate fare-box retirement payments, the ship owners pay part of the compensation for past services.

Issue B

The Issue

Can the Board factor past compensation into present rates?

⁵ 29 USC §§ 1001 *et. seq.* (as amended)

⁶ The Hearings Officer's initial ruling contained minor factual errors which the Hearings Officer corrected in the amended ruling.

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Applicable Law

ORS 776.115(6)(a) requires the Board to set "reasonable and just rates" for pilotage services. The Board seeks to set rates at a level which will allow the pilots to recover "appropriate" expenses. OAR 856-30-000(2).

Resolution

The real question here is whether it is appropriate for present ship owners to pay part of the compensation for past services. That depends on the circumstances, so it is a question of fact. The circumstances may show that a fare-box plan is the best way, or at least a good way, for the Board to accomplish its regulatory objectives. In that case, it would be appropriate. The possibility that the fare-box system might be appropriate prevents the Board from deciding, as a matter of law, that it must require a funded pension system.

Issue C

The Issue

Should the Board, as a matter of policy, require COLRIP to adopt a fully funded plan?

Findings of Fact

Note: In the following paragraphs, the Board restates part of findings which it adopted when it adopted the Hearings Officer's amended ERISA ruling.

In 1979, COLRIP adopted the Columbia River Pilots Association Plan III (Plan III) to replace the Columbia River Pilots Retirement Plan (Plan I) and its Supplemental Agreement (Plan II). Plans I and II remain in existence with two retired pilots (both over 80 years old) currently participating in Plan I and Plan II. One retired pilot's widow, whose benefits will expire in six months, also participates in Plan II. None of those pilots are eligible for benefits under Plan III.

Plan III is an unfunded "fare-box" plan which provides retired pilots with a retirement benefit equal to 1 percent of an Active Pilot's Net Share for each year of service through December 31, 1986, and 1¼ percent for each subsequent year of service.⁷ Active

⁷ See Plan III, § 3.2(a)(1). The plan is similar to a profit sharing plan because zero income for active pilots would result in zero pension benefits for the retired pilots.

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pilots receive payments under a 1989 amendment (the "target benefit plan") which reduces accruals under Plan III after December 31, 1986.⁸

COLRIP makes payments to active pilots under the target benefit amendment to Plan III, retired COLRIP employees under Plan III, and retired pilots under all three plans from COLRIP's general revenues. COLRIP administers the plan and makes payments once a month.

COLRIP, under its settlement with the PSOA, proposes an automatic rate adjustment mechanism (commencing in 1994) to fund pension obligation increases above the July 1992 level. COLRIP expects the obligation to increase from 5.7963 full-time equivalents in July 1992 at a rate of between 0.465 full-time equivalents (the average annual increase over the last five years) and 0.6 full-time equivalents per year. Under an assumption of an annual increase of 0.465 full-time equivalents, and an assumption of 4 percent growth in the Consumer Price Index, the Port of Kalama estimates that the adjustment would cause the rates to generate an additional cumulative total of approximately \$1,000,000 over the next five years. While rates would increase according to the formula, the proposal does not include a mechanism to ensure payment of benefits.

There are provisions which would allow the PSOA to renegotiate the agreement if it becomes unsatisfactory. The potential for benefit reductions gives retired pilots an interest in the outcome of the negotiations, but the agreement does not give retired pilots the right to participate in any negotiations or other tariff related proceedings.⁹ Retired pilots have a right to vote on any proposed reduction of benefits under COLRIP's Plan III. See Plan III, ¶4.1(B). They do not have a right to vote on an increase benefits under Plan III. See Plan III, ¶4.1(A).

Plan III is not subject to ERISA because the pilots are independent contractors rather than employees.

Note: In the following paragraphs, the Board makes new findings.

Plan III is not subject to the Financial Accounting Standards Board's Statement of Financial Accounting Standards No. 87 (Employers' Accounting for Pensions) because the pilots are members of an association rather than employees. COLRIP 6 at 2; COLRIP 10 at 1-3. If the plan was subject to FAS 87, COLRIP would have to recognize pension costs over

⁸ The pilots established the target benefit plan by ballot on March 1, 1989, but did not prepare a formal plan memorializing its provisions. The result is to distribute revenue to individual pilots to invest in individual retirement plans. This is the general approach which the Columbia River Bar Pilots used to convert their retirement program to a fully-funded plan.

⁹ The Board notes that retired pilots could petition to intervene in a Board proceeding and that the COLRIP/PSOA agreement cannot prevent the Board from allowing intervention.

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each pilot's period of service and, to the extent COLRIP did not fund the pension, COLRIP would have to carry the resulting liability on its balance sheet. Kalama 31 at 1.

It is hard to estimate COLRIP's "liability" to retirees under Plan III because COLRIP pays a percentage of the net share for the month rather than a fixed amount.¹⁰ COLRIP retained Milliman & Robertson, Inc. (Consulting Actuaries) to analyze the cost of converting to a fully-funded plan. COLRIP 5 at 7. Using assumptions in Milliman & Robertson's work sheets, and the \$135,000 income level from the COLRIP/PSOA agreement in this case, the Port of Kalama estimates liabilities to retired pilots of \$10 million and to active pilots \$8.4 million for a total of \$18.4 million. Kalama 0 (Heller) at 7-8; Kalama 19 through 21; Kalama 31. The Port of Kalama further estimates that the total liability will grow by approximately \$840,000 during 1993 and by similar amounts in subsequent years. Kalama 0 (Heller) at 12.

The Port of Kalama's consulting actuaries (Sedgwick James) expect cash flow requirements for obligations arising under the plan to "increase dramatically" in the future. Kalama 31 at 1. A competing analysis from Milliman & Robertson shows that the number of fare-box credits will increase gradually for a period of time and then remain relatively constant. COLRIP 9 at 2. In either case, an increase in pension expenses would directly increase rates because the COLRIP/PSOA stipulation contains an automatic adjustment clause (starting on September 1, 1994) to finance pension expenses above July 1992 levels. PSOA 3 at 4 *et. seq.* Without the automatic adjustment clause, COLRIP would expect to file rate increases of one to four percent every two years to keep up with increases in pension benefit expenses. COLRIP 5 at 11-12.

Rates eventually would be less under a funded plan because the fund's earnings help pay the benefits. Kalama 0 (Heller) at 13. However, the immediate effect would be a rate increase because the current generation of ship owners would continue to pay benefits to retirees under the existing plans at the same time they are contributing funds to a retirement plan for present pilots. The additional cost of an immediate conversion, according to COLRIP's estimate, would be over \$1.1 million during the first year. COLRIP 5 at 10; COLRIP 7 at 6. (That is about 1/2 of COLRIP's current annual expenses. COLRIP 7 at 6-7.) An immediate conversion also could have an adverse impact on the many pilots who have individual retirement plans. COLRIP 5 at 28; COLRIP 7 at 6.

Resolution

The Board has discretion to permit either type of plan. The Board concludes that it should focus on an individual pilot's target net income rather than approving, explicitly

¹⁰ While retirees receive a percentage of COLRIP's current income rather than a fixed amount, the payments arise from a contractual obligation rather than a discretionary decision to pay a particular percentage at a particular time. COLRIP views the current percentages as "a promise made that should be kept." COLRIP 7 at 7.

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or implicitly, any pilot group's pension plan. That will enable the Board to keep rates at a reasonable level while giving individual pilots flexibility in selecting the retirement plan which best meets their needs.

Financial Reporting Considerations. The Port of Kalama points out that FAS 87 requires employers to recognize pension liabilities at the time the employee performs the service. FAS 87 does not apply to the pilots because they are independent contractors operating through an association rather than employees. It additionally may not apply to COLRIP's plan because the pilots receive a portion of COLRIP's current income (in the form of a percentage of the active pilots' net share) rather than a specific dollar amount.¹¹

FAS 87's goal of matching expenses and revenues by recognizing liabilities at the time they arise may be appropriate for financial reporting. However, it is not important in the context of this case unless COLRIP's failure to carry an unfunded pension liability on its balance sheet has a significant adverse impact on the Board's ability to fulfill its regulatory responsibilities. The Board has more detailed information about COLRIP's future pension obligations than would appear on a financial statement, so it does not appear that any deficiencies in COLRIP's financial statements would have a significant impact on the Board's ability to make good regulatory decisions.

Federal Pension Policy Considerations. ERISA also does not apply to the pilots because they are independent contractors who operate through associations. As members of an association, the pilots have a direct voice in developing their pension benefits and can take the steps they feel necessary to inject sufficient certainty and stability into the system. As independent contractors with relatively high earnings, they also are in a better position than most employees to assume risks. They do not necessarily need the same level of protection as ERISA offers employees.

Regulatory Policy Considerations. The fare-box approach to funding pension benefits can raise regulatory concerns if it requires one generation of ship owners paying costs which a previous generation of ship owners should have paid. The problem clearly would arise in a new system because the first generation of ship owners escapes responsibility for paying retirement benefits. However, this is not a new system and the current generation of ship owners will transfer costs to future generations only if future pension costs are higher than the existing costs.

Even then, higher costs which merely compensate for inflation do not cause a problem because the real value of the money, in terms of its purchasing power, remains the

¹¹ The nature of the obligation—a promise to pay a percentage of future income rather than a fixed amount—makes it hard to accurately calculate a specific dollar amount to record as a liability on the balance sheet. The best way for COLRIP to comply with FAS 87, if it had to do so, probably would be for COLRIP to briefly describe the pension plan, and state the number of outstanding fare-box credits, in a note to its financial statements.

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same. An inflation adjustment is built into Plan III because, to the extent the active pilots' net share increases to keep pace with inflation, retirement benefits automatically increase.

A different situation arises when a change to the plan increases the *percentage* of the net share which retirees receive. That occurred in 1986 when the percentage increased from 1 percent to 1¼ percent. The 1986 change increased the real income which the existing active pilots could expect to receive after retirement, so the change had the potential to transfer costs from present ship owners to future ship owners.

As a practical matter, the change transferred very little cost to future ship owners because the buy-down program has brought the actual fare-box credit back down to 1.025 percent. That is very close to the 1.00 percent figure which the pilots had been accruing since 1979. The pilots will transfer the cost of the 1986 benefit increase to future generations of ship owners only if they discontinue the buy-down program *and* the Board raises future rates to cover the increase in COLRIP's pension expenses.

The Board has implicitly endorsed the fare-box plan in the past by allowing COLRIP to recover its pension benefit expenses through rates. The Board explicitly endorsed the ¼ percent benefit increase in its 1986 order, but with the understanding that COLRIP (and the other pilot groups) would pursue a rapid conversion to a fully-funded system. COLRIP now asks the Board to explicitly endorse settlement agreement provisions which would reverse the Board's 1986 order and transfer the cost of the 1986 benefit increase to future generations of ship owners.

At the same time, COLRIP and the PSOA, in response to the Port of Kalama, argue that the Board should not involve itself in pension issues. The Board agrees that it should not attempt to manage, or even regulate, a pension system for the pilots. The Board does not agree that it should simply accept the results of negotiations between a pilot group and the PSOA on pensions or any other issue.

The Board has a statutory duty to foster safe and efficient pilotage for the public in general and for both present and future generations. The present generation of pilots and ship owners have an incentive to favor the fare-box approach because the pilots can enjoy more current income, and the ship owners can enjoy lower rates, at the expense of future ship owners. It may be a good deal for the present generation, but it also may be harmful in the long run. This record does not permit the Board to resolve that issue, and a more exhaustive investigation merely would enable the Board to make a more educated guess about future traffic levels and other factors. It would not enable the Board to conclusively choose the best system.

The Board notes that it licenses individual pilots rather than pilot groups. While the pilots on each ground traditionally have formed a single association, that is no longer true on the Columbia/Willamette River ground. The existence of multiple associations

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makes it less appropriate for the Board to base rates on a single association's retirement benefit payments.

The payments are different than COLRIP's other "expenses" (such as fuel for the pilot boat) because they are not part of the cost of providing present services. COLRIP makes its payments because it has a contractual obligation to individual retirees arising from past pilotage services. COLRIP, in response to the Port of Kalama, calls the payments a distribution of present income. That is the most appropriate way to view the payments, so the Board will no longer treat fare-box pension benefit payments as a pilot association expense for ratemaking purposes.¹²

The Board, for this rate case, has adopted the rates in the settlement agreement but not the other terms or the methodology which the parties used to arrive at the rates. In future rate cases, the Board will set the target net income at a level which will provide individual pilots with a reasonable current income level and a reasonable additional amount to fund their retirements.¹³ Pilots participating in an association's fare-box plan may distribute part of their total income to existing retirees and others may use part to fund their retirement plans.

Conclusion. All pilots are independent contractors with relatively high incomes and ought to be able to provide for their own retirements. There is no need for the Board to mandate a retirement plan for them.

Issues D & E

The Issues

Does the Board have authority to adopt an automatic rate adjustment mechanism to reflect changes in pension costs? If so, it is a good idea?

Resolution

The Board will not base future rates on fare-box pension benefit payments, so these issues are moot.

¹² This policy will apply to all of Oregon's pilotage grounds.

¹³ The Board will use the following ratemaking formulas (see page 6):

Target Net Income = Reasonable Current Income + Reasonable Deferred Income

Group Expenses = Reasonable Cost of Providing Current Services (excluding any pension benefit expenses)

Total Revenues = (Target Net Income * Reasonable Number of Pilots) + Group Expenses

Rates = Total Revenues / Expected Traffic Volume

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Conclusions

1. The Board should approve the settlement agreement's immediate 25 percent increase in all tariff items.
2. The Board should approve the settlement agreement's automatic adjustment clause to reflect increases in the cost of living.
3. The Board should reject the automatic adjustment clause to reflect changes in the number of retirees drawing pensions.
4. The Board should reject COLRIP's proposal to conduct an investigation into the optimal pension system.

Costs

OAR 856-30-025(4) requires the Board to "determine the costs of the proceedings and assess such costs equitably among the parties involved as part of the final order." At its March 16, 1993, meeting the Board decided to allocate $\frac{1}{3}$ of joint costs to each of the grounds. The joint cost allocation for each ground, and costs directly related to a specific ground, shall be borne equally by the parties to that portion of the proceeding. The total cost will include the cost, if any, of reconsideration or an appeal. The result is:

Columbia River Bar. The pilots and the PSOA were the only parties interested in this part of the case. Each shall pay 50 percent of the total cost allocated to this part.

Columbia/Willamette River. COLRIP, Lewis & Clark, the PSOA, the Port of Kalama, and the Port of Portland were interested in this part of the case. Each shall pay 20 percent of the total cost allocated to this part.

Coos Bay/Yaquina Bay. The pilots, the PSOA, and Knutson were interested in this part of the case. The pilots shall pay 33.34 percent of the total cost allocated to this part and the others shall pay 33.33 percent.

ORDER

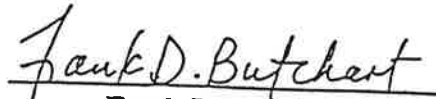
THE BOARD ORDERS that:

1. The revised tariffs in Appendix D shall become effective at 12:01 am on the effective date of this order.

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2. The cost of this proceeding shall be allocated pursuant to the terms of this order.

Made, entered, and effective at 12:01 a.m. on March 26, 1993


Frank D. Butchart
Chairman

Notice: You may appeal this order to the Oregon Court of Appeals. To do so, you must file a Petition for Judicial Review with the Court within 60 days from the date the Board served you with a copy of the order. Judicial review is pursuant to ORS 183.480.

August 13, 1992

AMENDED

SETTLEMENT AGREEMENT

Columbia River Pilots and
Portland Steamship Operators Association

1. The Columbia River Pilots (those pilots on the Columbia River and Willamette River grounds) filed a request for an increase in their tariff. The Portland Steamship Operators Association (PSOA) objects to the River Pilots' request. To compromise the dispute, the PSOA and the Columbia River Pilots agree to the following tariff adjustments. This compromise is based on the known and current circumstances of the Columbia River Pilots and the PSOA. This compromise is made for purposes of resolving the 1992 rate dispute and is not intended to and does not establish precedent or act as an admission by either party as concerns any other pilot ground, operating group or subsequent rate dispute. This Agreement is meant only as a concession between the parties for an increased tariff, and the parties will jointly seek approval of the Board of Maritime Pilots and implementation of this agreement through an order of the Board.

2. Upon approval by the Board of Maritime Pilots, the Oregon Pilotage Tariff for the Columbia and Willamette River pilotage ground will be increased by 25% for all tariff items.

3. On September 1, 1994, and on each succeeding September 1 until a new Rate Order supersedes the Order issued pursuant to this Agreement, the Oregon tariff for the Columbia and Willamette River pilotage grounds will be adjusted. The amount of this adjustment will be the amount of the Portland-Vancouver Consumer Price Index For All Urban Consumers as published by the U.S. Department of Labor, Bureau of Labor Statistics, for the preceding twelve months ending June 30 of the subject year. A negative Consumer Price Index for a given twelve month period or periods is to be considered no change.

4. In no event shall the Columbia River Pilots or the PSOA seek a Rate Order or other agreement modifying this Agreement before September 1, 1997, except as enumerated herein or mutually agreed upon in writing by both parties.

5. This Agreement may be extended, in whole or in part, for an additional five years beyond September 1, 1997, with the mutual consent of both parties. It is understood and agreed that the adjustment formula set forth in paragraph 12 can be sunsetted after the initial five years by mutual agreement of the parties.

6. This Agreement is made in good faith. This Agreement makes no provision for lost income should the rate review be extended by a contested rate hearing. If there is a delay in implementing this Agreement beyond November 1, 1992, both parties reserve the right to cancel their obligations under this Agreement and resume the rate proceeding initiated by the filing of the Columbia River Pilots' petition. In the event a contested rate hearing resumes, the PSOA reserves the right to file a response under the Board's rules, and the Columbia River Pilots consent to such filing.

response under the Board's rules, and the Columbia River Pilots consent to such filing.

7. Upon implementation of this Agreement, the new tariff should provide an initial minimum target net income of \$129,312.00 for Columbia River Pilots. For purposes of the preceding sentence, net income means the income to a pilot after deductions for operating expenses.

8. The basic principle of this Agreement is that the owners and operators of vessels will pay a lump sum for pilots' services according to the tariff and leave to the pilots all the responsibility and expenses of operating a pilot business. The parties acknowledge and agree that the pilots' services for owners and operations of vessels are offered and performed as independent contractors, and not as employees. The parties agree that all operating expenses of the pilots are to be paid from revenues generated by the tariff, and that those include, but are not limited to, operating expenses such as:

Equipment and maintenance, insurance including life, health, dental, liability and disability, out-of-pocket expenses, pensions or retirement benefits, training administration, and sick leave.

9. It is anticipated by the parties that through the efforts of the administrative or legislative branches of the State and/or federal governments, such as the recently passed Oregon Senate Bill 242, additional pilot training may be required. The cost of such training and how it should be paid for should be addressed within the context of those separate legislative or administrative proceedings.

10. Notwithstanding any other provision in this Agreement, this Agreement relieves the PSOA, the Columbia River Pilots, and any steamship owners or operators from any obligation, (to the extent that there is or ever was such an obligation) to fund or make payments to or on behalf of the new funded pension plan referred to in Paragraph 2.G. of the 1986 final order, or to make any contributions whatsoever to any other pension or retirement benefit plan or practice (including the Columbia River Pilots' fare-box pension practice) for the benefit of or on behalf of the pilots, their employees, or any other person who is or may be eligible to receive pension benefits from or through the pilots.

11. Columbia River Pilots desire to make an adjustment to the tariff so that it will have sufficient funds to be used for benefits to retirees, among the Columbia River Pilots' other expenses. PSOA has agreed to an increase, and, where applicable, a decrease, in the tariff, in order to enable the Columbia River Pilots to cover this and other anticipated increased operating costs of Columbia River Pilots. This paragraph and Paragraph 12 are expressly made subject to the provisions of Paragraph 10.

12. Based on what the Columbia River Pilots expect as increased operating expenses, on September 1, 1994, and on each succeeding September 1 until a Rate Order succeeds this Order, an additional adjustment to the tariff shall be made as described below.

- a. The tariff adjustment to be made on September 1, 1994, shall be made in the following manner:

- (1) The Base Total Share Equivalent Amount (BTSEA) paid to retirees on June 30, 1992 was 5.7963 shares.
- (2) As soon as practicable after July 1, 1994, the accountant for COLRIP will report to the designee of the PSOA the Total Share Equivalent Amount (TSEA) of retirees who are receiving retirement benefits from the Columbia River Pilots on June 30, 1994.
- (3) The difference between the BTSEA on July 1, 1992, and the TSEA on July 1, 1994 shall be multiplied by the Retirees Adjustment Figure (RAF) of \$135,000.00 adjusted by the CPI for the twelve months ending June 30, 1994.
- (4) The resulting figure in (3) would be the amount which would be necessary to be generated by a Tariff Adjustment (TA). All tariff items would be adjusted to generate this amount. This adjustment to the tariff shall be made in addition to, and the same time as, the CPI adjustment in paragraph three (3) above. In the form of a formula:
$$TA = (TSEA - BTSEA) \times (RAF \times (1 + \text{CPI Adjustment}))$$

WHERE:

TA = Total Amount of revenue needed to be generated due to a change in the number of retirees.

TSEA = Equivalent shares being paid to retirees
on June 30, 1994

BTSEA = Equivalent shares being paid to retirees
on June 30, 1992

RAF = \$135,000.00

CPI Adjustment = percentage change in Portland-
Vancouver CPI.

- b. An additional adjustment shall be made on September 1, 1995, and on September 1 of subsequent years until a Rate Order supersedes this Order. The adjustments shall be made in the above manner but along the following guidelines. Specifically, the difference between the TSEA and the BTSEA from the previous year, multiplied by the RAF (adjusted by the CPI from the previous year's RAF) shall equal the amount of revenue necessary to be generated by the next tariff adjustment. In years subsequent to the initial adjustment of 1994, the BTSEA shall be the TSEA from the previous year. The RAF shall also be adjusted annually by the CPI in years subsequent to the initial tariff adjustment. The same formula would then apply in the subsequent years.
- c. It is understood and agreed by the parties that an increase in the tariff is being agreed to based only on the fact that the total operating costs of the Columbia River Pilots are increasing. The parties are in no way guaranteeing any type of retirement benefits to retired

river pilots or their employees, or the creation or maintenance of any type of retirement benefit plan or practice. Neither party makes any warranty that benefits will be paid to retired pilots or their employees, or that there will be sufficient revenues in the future to fund such benefits. Should the cost of pension benefits be reduced in any given year, the calculation will produce a reduction in the tariff for the appropriate year. Also, it is understood and agreed that an increase in the CPI will lead to a higher base Retiree Adjustment Factor to which the difference in TSEA of retirees will be applied, and conversely, a reduction in the CPI will result in a reduction in the base RAF for purposes of this calculation.

13. Both parties acknowledge that this Agreement in no way obligates PSOA or steamship owners or operators to make any payments or contributions to Columbia River Pilots or its members or employees, or to any pension plan or practice, either directly or indirectly or in the interest of the Columbia River Pilots or any other person. The only obligation of the PSOA and the steamship owners and operators under this Agreement is to make the payments required by the applicable tariff for pilot services. The parties further acknowledge that this Agreement in no way obligates the PSOA or steamship owners or operators to make contributions to any welfare or pension benefit plan. Columbia River Pilots represents to PSOA that for retired pilots

it has only an unfunded retirement practice which is nonqualified under ERISA, and that for the purposes of this practice, its pilots, retired pilots, and employees are not and never were employees of PSOA or any steamship owner or operator, and that PSOA will be notified immediately if any serious consideration is given to changing the independent contractor status of Columbia River Pilots, adopting a multi-employer pension plan, converting to a funded pension plan, or converting its present retirement practice to a pension plan qualified under ERISA.

14. Both parties agree to study the concept of altering the rate structure to reduce the rate to high cube vessels such as car carriers and chip ships. It is understood this will not be a reduction in the total tariff amount. Any reduction in rate to high cube vessels will be offset with an increase in other areas. The parties agree to complete study and begin good faith discussions by September, 1993.

15. This Amended Agreement supersedes the previous stipulation between these parties.

IT IS SO AGREED,

ALASTAIR SMITH

Alastair Smith
President
PORTLAND STEAMSHIP OPERATORS'
ASSOCIATION, INC.
Dated: OCTOBER 19, 1992

CAPTAIN GLEN HURN

Chuck Tatchung
COLUMBIA RIVER PILOTS
Dated: 10-21-92

ISSUED FEBRUARY 9, 1993

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

BP 1

In the Matter of Revised Tariffs filed by the)
Columbia River Bar Pilots, the Columbia River) REVISÉD
Pilots, the Coos Bay/Yaquina Bay Pilots, and the) RULING
Lewis & Clark Pilots.)

Note: This revised ruling corrects minor factual errors in the November 6, 1992, ruling.

Introduction

Pension Plans

In 1979, COLRIP adopted the Columbia River Pilots Association Plan III (Plan III) to replace the Columbia River Pilots Retirement Plan (Plan I) and its Supplemental Agreement (Plan II). Plans I and II remain in existence with two retired pilots (both over 80 years old) currently participating in Plan I and Plan II. One retired pilot's widow, whose benefits will expire in six months, also participates in Plan II. None of those pilots are eligible for benefits under Plan III.

Plan III is an unfunded "farebox" plan which provides retired pilots with a retirement benefit equal to 1 percent of an Active Pilot's Net Share for each year of service through December 31, 1986, and 1¼ percent for each subsequent year of service.¹ Active pilots receive payments under a 1989 amendment (the "target benefit plan") which reduces accruals under Plan III after December 31, 1986.²

COLRIP's employees receive retirement benefits under an appendix to the plan. See Plan III Appendix A §1A.6. They also receive benefits under a fully funded pension program (a combination of a 1969 Profit Sharing Plan & Trust and a 1982 Money Purchase Pension Plan & Trust) which COLRIP maintains for them and which complies with ERISA.

¹ See Plan III, § 3.2(a)(1). The plan is similar to a profit sharing plan because zero income for active pilots would result in zero pension benefits for the retired pilots.

² The pilots established the target benefit plan by ballot on March 1, 1989, but did not prepare a formal plan memorializing its provisions. The result is to distribute revenue to individual pilots to invest in individual retirement plans. This is the general approach which the Columbia River Bar Pilots used to convert their retirement program to a fully funded plan.

COLRIP contributes 10 percent of each employee's gross income to the Money plan and 15 percent to the Profit Sharing plan. That totals the 25 percent maximum permissible contribution under IRC §415(c)(1)(B). The maximum contribution makes the funded program the employees' primary plan, so COLRIP merely provides supplemental benefits to its employees under Plan III.

COLRIP makes payments to active pilots under the target benefit amendment to Plan III, retired COLRIP employees under Plan III, and retired pilots under all three plans from COLRIP's general revenues. COLRIP administers the plan and makes payments once a month.

COLRIP, under its settlement with the PSOA, proposes an automatic rate adjustment mechanism (commencing in 1994) to fund pension obligation increases above the July 1992 level. COLRIP estimates that the obligation will increase from 5.7963 full-time equivalents in July 1992 at a rate of between 0.465 full-time equivalents (the average annual increase over the last five years) and 0.6 full-time equivalents per year. Under an assumption of an annual increase of 0.465 full-time equivalents, and an assumption of 4 percent growth in the Consumer Price Index, the Port of Kalama estimates that the adjustment would cause the rates to generate an additional cumulative total of approximately \$1,000,000 over the next five years. While rates would increase according to the formula, the proposal does not include a mechanism to ensure payment of benefits.

There are provisions which would allow the PSOA to renegotiate the agreement if it becomes unsatisfactory. The potential for benefit reductions gives retired pilots an interest in the outcome of any negotiations, but the agreement gives retired pilots no right to participate in negotiations or other tariff related proceedings. Retired pilots have a right to vote on any reduction of benefits due to them under COLRIP's Plan III. *See* Plan III, ¶4.1(B). They do not have a right to vote on an increase of benefits under Plan III. *See* Plan III, ¶4.1(A).

The Board's Past Practice

Historically, the Board has reviewed pilotage expenses, determined the appropriate income level, and set rates which would generate the appropriate total revenues. The Board has not become involved in management issues by requiring pilots to devote a specific amount of revenue to specific expenses.

That policy has applied to pension payments with the Board treating them as general operating expenses. However, the Board, in its 1986 rate order, addressed pension funding and directed the pilots to move toward a fully funded system "as rapidly as possible." The Board authorized rate increases for the Coos Bay, Yaquina Bay, and Columbia River Bar pilotage grounds which were sufficient to pay for full conversion of the pension programs for those grounds. The Board authorized a lesser increase for COLRIP and recognized that those pilots could not accomplish an immediate conversion.

COLRIP's Current Proposal

The transition to a fully funded pension system has left COLRIP with a mixture of funded and unfunded plans. COLRIP's 1992 rate petition requests either sufficient funding for full conversion to a funded system or a return to the unfunded "farebox" system. Its draft settlement with the PSOA contemplates a farebox system with an automatic adjustment clause. The automatic adjustment clause would increase rates to cover increased obligations under the third plan, but does not require COLRIP to actually increase benefits.

ERISA Issue

The Port of Kalama has asserted that the pilots' pension plan is subject to Employee Retirement Income Security Act of 1974³ (ERISA) and must be fully funded.

ERISA

ERISA is a comprehensive federal statute which sets a variety of standards for pension plans. With few exceptions, it applies to any plan established or maintained by an employer⁴ or an employee organization⁵ which (either by its express terms or as the result of surrounding circumstances) provides retirement income to employees or results in deferral of employee income beyond employment.⁶ An ERISA plan exists when:

- an "employer" gives
- an "employee"
- a promise of retirement income
- under a plan maintained by an employer or employee organization, unless
- ERISA exempts the arrangement.

³ 29 USC §§ 1001 *et. seq.* (as amended)

⁴ ERISA defines an employer as any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan. The term includes a group or association of employers acting for an employer in that capacity. ERISA § 3(5), 29 USC § 1002(5).

⁵ ERISA defines an "employee organization" as any organization of any kind in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning an employee benefit plan, or other matters incidental to employment relationships. ERISA § 3(4), 29 USC § 1002(4).

⁶ ERISA § 3(2)(A), 29 USC § 1002(2)(A).

ERISA defines an employee as "any individual employed by an employer."⁷ The circuitry of that definition, and the absence of clarification elsewhere in the act, has led the United States Supreme Court to apply traditional common law agency principles in construing the term. *Nationwide Insurance v. Darden*, 112 S.Ct. 1344, 1348 (1992). The Court's test for determining whether an individual is an employee focuses on "the hiring party's right to control the manner and means by which the product is accomplished."⁸ The Court listed the following factors to consider in determining whether an individual is an employee under the act:

- the skill required,
- the source of the instrumentalities and tools,
- the location of the work,
- the duration of the relationship between the parties,
- whether the hiring party has the right to assign additional projects to the hired party,
- the extent of the hired party's discretion over when and how long to work,
- the method of payment,
- the hired party's role in hiring and paying assistants,
- whether the work is part of the regular business of the hiring party,
- whether the hiring party is in business,
- the provision of employee benefits, and
- the tax treatment of the hired party.⁹

⁷ ERISA §3(6), 29 USC 1002(6).

⁸ 112 S.Ct. at 1348 citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752, 109 S.Ct. 2166, 2178-2179, 104 L.Ed2d 811 (1989).

⁹ 112 S.Ct. at 1348 citing *Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 751-752, 109 S.Ct. 2166, 2178-2179, 104 L.Ed2d 811 (1989).

The list is not exclusive and no single factor is decisive.¹⁰ The list refers to a "hiring party" but ERISA only covers pension plans which an "employer" establishes. That exempts plans offered by associations comprised of either employees¹¹ or employers.¹²

A plan for independent contractors is subject to ERISA if it covers even a single common law employee.¹³ However, there is an exemption for plans which offer employees only supplemental benefits and qualify under ERISA as "excess benefits" plans.¹⁴ ERISA states that the Department of Labor will determine whether employee benefits are separable from other benefits in a plan, but departmental approval is not a prerequisite for treating the employee benefit portion of a plan as a separate plan.

Resolution

Note: The applicability of ERISA is a federal question which only the United States Department of Labor or a federal court can ultimately resolve. However, in the absence of a federal ruling, and in the presence of a bearing on the rate issues before the Board, the Board must attempt to predict how the appropriate federal forum would rule on the issue. If the Board cannot predict the outcome with confidence, the Board must attempt to resolve the rate case in a way which accommodates the uncertainty.

Existence of a Plan

The pilots have documents which establish benefits, beneficiaries, the source of financing, and procedures for receiving benefits. That is sufficient to meet the threshold requirement of the existence of a plan. *See Donovan v. Dillingham*, 688 F.2d 1367, 1373 (11th Cir 1982).

Promise of Benefits

Plan III does not promise retired pilots any specific dollar amount of benefits. However, it does promise retirement income equal to a specific percentage of an active pilot's net share of the association's earnings. That probably is sufficient to meet the threshold requirement of a promise of retirement income.

¹⁰ 112 S.Ct. at 1348-1349 citing *NLRB v. United Insurance Co. of America*, 390 U.S. at 258, 88 S.Ct. at 991.

¹¹ *See, eg., Bell v. Employee Security Benefit Association*, 437 F.Supp. 382 (D. Kan. 1977)

¹² *See, eg., Insurance & Prepaid Benefits Trusts v. Marshall*, 90 F.R.D. 703 (C.D. Cal. 1981).

¹³ 29 CFR §2510.3-3(b).

¹⁴ ERISA §§3(36) and 4(b)(5), 29 USC 1002(36) and 1003(b)(5).

The promise in the plan is from COLRIP rather than the ship owners. While the ship owners have agreed to a tariff which contains an automatic adjustment mechanism to cover increases in pension costs, COLRIP has no obligation to devote those revenues (or any specific amount of revenue) to retirement benefits. The absence of an obligation to actually pay benefits prevents a finding that the ship owners, through the PSOA's execution of the settlement agreement, have promised retirement income.

Pilots as Employees

Of COLRIP

The state licenses individual pilots rather than COLRIP to provide pilotage services. COLRIP, as an association of pilots, does not employ them. COLRIP has not promised the pilots retirement income, and does not maintain plans for them, as an employer.

Of Ship Owners

Pilots are "servants" of the ships they pilot under Oregon law,¹⁵ but the Supreme Court's general common law factors take precedence over state common law or statutory definitions.¹⁶ While ship owners retain legal control of their ships, a review of the factors shows that pilots clearly are independent advisors rather than employees of the ship owners:

Skill. Pilotage requires a high level of skill and an individual must show competency and obtain a license from the state before providing the service. This is more consistent with independent contractor status than employee status.

Source of Tools. Pilotage requires radio communication and transportation to or from the ship. The ship has its own radio, but the pilots provide their radios, ground transportation, and pilot boats. This is more consistent with independent contractor status than employee status.

Location of the Work. Some of the work takes place on the ship while other work, such as determining river conditions, does not. To the extent work occurs on the ship, it does not detract from independent contractor status because many independent contractors perform services on the customer's premises.

¹⁵ See ORS 776.405 and ORS 776.520. The pilot's role, under Oregon statutes, is to advise the master of the vessel. The master remains in control and may stop the ship and await a new pilot rather than following the pilot's advice. Since the master remains in control of the ship, Oregon's statutes envision a mandatory, but still only advisory, role, they shift liability from the pilot to the ship owner.

¹⁶ See *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 46 (1987) quoting *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523 (1981).

Duration of the Relationship. Each trip takes only a few hours, with another pilot likely to handle the next one. The relatively short duration of the relationship is more consistent with independent contractor status than employee status.

Additional Projects. A ship owner/master cannot assign other tasks to the pilot. This is more consistent with independent contractor status than employee status.

When and How Long to Work. The pilot does not have much discretion regarding when or how long to work, but that does not detract from independent contractor status because customers frequently specify starting times for jobs when contractors perform them on the premises and the duration of the task is a function of the ship's origin/destination.

Method of Payment. Pilots publish fees for various services in a tariff and ship owners select, and pay the pilot association for, specific services. The pilots arrange their schedules and divide the association's profits internally. This is more consistent with independent contractor status than employee status.

Assistants. To the extent the pilots need assistants, they hire and pay them. This is more consistent with independent contractor status than employee status.

Relationship to Hiring Party's Work. Ship owners are in the business of moving ships from one point to another with movements over the pilotage grounds being part of the journey. The general business purpose does not detract from independent contractor status because the portion of the journey requires detailed knowledge of local conditions which is relevant to the ship owner's transportation business for only a short period of time. Since the ship owner must, by law, hire a pilot, the act of pilotage is not part of the ship owner's business.

Hiring Party in Business. Ship owners are in business, but that, by itself, does not detract from independent contractor status.

Provision of Employee Benefits. Ship owners do not provide employee benefits to pilots because they pay only the tariff rate. This is more consistent with independent contractor status than employee status.

Tax Treatment of Hired Party. Ship owners do not report pilotage expenses as wage expenses. This is more consistent with independent contractor status than employee status.

Pilots clearly are independent contractors rather than employees. That means that ship owners are not employers, COLRIP does not maintain the plans in the interest of an employer, and COLRIP does not maintain the plans as an employee organization.

Plan III's Coverage of COLRIP Employees

COLRIP contributes the maximum the IRS allows to its funded pension plans, so Plan III offers only supplemental benefits to COLRIP's employees. The maximum contribution to the funded plans clearly makes Plan III an "excess benefits" plan because the sole purpose of the employee coverage is to provide supplemental benefits. The employee coverage is in an appendix to the plan, so it does not appear that the Department of Labor would have any reason to rule that the employee and pilot benefits are inseparable.

Conclusions

1. A plan exists.
2. There probably is a promise of benefits by COLRIP, but not by the PSOA or individual ship owners/operators.
3. Pilots clearly are not employees of either COLRIP or the ship owners/operators.
4. Plan III's coverage of COLRIP employees clearly does not bring that plan under ERISA.

Note: In the absence of ERISA coverage, there is no need to determine whether an ERISA problem is a new problem or an old problem.

Dated at Salem, Oregon, this 9th day of February, 1993.



Karl Craine
Hearings Officer

Section 3. COLUMBIA AND WILLAMETTE RIVER PILOTAGE GROUND

13225 N Lombard, Portland, OR 97203

COLUMBIA RIVER PILOTS

ORDERS

Orders for a Columbia River Pilot will be accepted only between the hours of 8:00 A.M. and 4:00 P.M. Special arrangements can be made for tentative orders during the night, but such arrangements must be made prior to 4:00 P.M.

When incoming from sea (without the service of Bar Pilot), vessels or agents must give notice between the hours of 8:00 A.M. and 4:00 P.M. and at least 12 hours prior to estimated time of arrival at Astoria. Calls may be placed with Portland office (289-9922) or by radio to COLRIP ASTORIAORE.

Vessels must confirm ETA Astoria at least two hours before arrival by calling Astoria office (325-2641) or by radio to COLRIP ASTORIAORE.

NOTE: For emergency order, after hours, Sundays and holidays, telephone numbers will be furnished upon request.

ITEM	SERVICE	RATES & CHARGES	MINIMUM
1	Inbound from Astoria or Outbound to Astoria	\$2.856 per foot draft and .0719 per gross registered ton.	500 gross registered tons or less, \$250.00 over 500 gross registered tons, \$312.50
1a	Length Charge	\$125.00 each 50 feet, or fraction thereof, more than 599' LOA, inbound or outbound.	
2	Stopping at points between Astoria and Portland (either inbound or outbound), each stop.	\$475.00	
3	Pilot reporting and ship movement cancelled within Portland or Vancouver harbor. In addition to regular detention charge, if any.	\$87.50	
4	Pilot reporting and ship movement cancelled outside Portland or Vancouver Harbor. In addition to regular detention charge, if any.	\$125.00.	

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OREGON PILOTAGE TARIFF A-56

Section 3. COLUMBIA AND WILLAMETTE RIVER PILOTAGE GROUND

ITEM	SERVICE	RATES & CHARGES	MINIMUM
4a	Pilot made available and ship movement cancelled at Astoria. In addition to regular detention charge, if any.	\$187.50	
5	Detention per hour or fraction thereof. No detention if pilot detained one hour or less. If pilot detained more than one hour, detention for first hour will be charged. Maximum charge per day.	\$75.00 First Hour \$112.50 Additional Hours \$750.00	
6	Whenever a vessel has to stand by, or anchor, and cannot proceed to berth because occupied or for any other reason, the indicated charge will be made, per hour or fraction thereof, in addition to shift charge to berth. Maximum charge per day.	\$75.00 First Hour \$112.50 Additional Hours \$750.00	
7	Launch service necessary for transportation of pilots to or from vessels will be for the account of the vessels, except launch service for the normal interchange of bar and river pilots at Astoria.	At cost	
8	Docking a vessel stern first in slip, or head down, at master's, owner's or agent's request. (Not applicable to harbor moves.)	\$125.00 -	
9	Shifting or turning vessels at dock in Portland Harbor.	\$350.00	

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Section 3. COLUMBIA AND WILLAMETTE RIVER PILOTAGE GROUND

	SERVICE	RATES & CHARGES	MINIMUM
10	Shifting or turning vessels outside Portland Harbor.	\$400.00	
11	Moving vessels not propelled by their own power outside Portland or Vancouver Harbor.	Double regular pilotage.	
12	Shifting vessels not propelled by their own power in Portland or Vancouver Harbors, or on distances of less than 10 miles outside Portland or Vancouver Harbor.	One and one-half times regular shift charge.	
13	Swing ship for compass adjustment, three turns or less Each additional turn:	\$187.50 \$ 75.00	
	Harbor moves, Portland Harbor	\$350.00	
15	Interport moves	\$475.00	
16	Barges under tow: Nine (9) hours or less pilotage service. Over nine (9) hours - under fifteen (15) hours Over fifteen (15) hours	Regular Pilotage One and one-half times regular pilotage Double regular pilotage.	.\$250.00 \$375.00 \$500.00

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