

CONFERENCE COMMITTEE ON SB 907

May 28, 1991 Hearing Room B Tape 5 SENATE MEMBERS
PRESENT:Sen. Dukes, Chair Sen. Bradbury HOUSE MEMBERS
PRESENT:Rep. Derfler Rep. Hugo Rep. Parks STAFF PRESENT:Ruth
Larson, Committee Administrator Scott Kaden, Committee Assistant Sue
Hanna, Legislative Counsel

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statements made during this session. Only text enclosed in quotation
marks report a speaker's exact words. For complete contents of the
proceedings, please refer to the tapes. -

TAPE 5, SIDE A

005 SEN. DUKES: We have before us amendments, SB 907-B-25 (EXHIBIT
A); they are the closest to an agreement between the multiple players.
010 SUE MANNA: Has worked with the Coast Guard on amendments. We ran
into trouble trying to exempt some foreign vessels. We didn't want every
little sailboat coming down from Canada to have to have a pilot on
board. All the Coast Guard was concerned about was that Oregon's
exemptions would be rationally based. These amendments are rationally
based, having done a survey of other states, looking particularly at
Washington, with consideration given to the unique problems of the
Columbia bar. These vessels need to be exempted by the Board; so the
Board of Maritime Pilots can bar from exemption a small boat if it is
dangerous. On line 17, page 4, a word was dropped; delete "9" and insert
"10". 067 DUKES: Our focus is on page 2. The new language would say,
"The primary consideration is public safety; if a proposed rule would
result in the elimination of the competition among pilots or pilot
organizations that exist in this state on January 1, 1991, the Board
shall first make a determination that the proposed rule is necessary to
protect the safety of the public." There is some discussion whether the
word should be "necessary" or "essential." I believe that the agreement
was to change the word to "es ential." 075 DERFLER: I would suggest
that "elimination" be changed to "limitation." 078 DUKES: Let's do
each change, one at a time. MOTION: Sen. Bradbury moves to change
"necessary" to "essential" on page 2, line 9 of the -25 amendments.
VOTE: Hearing no objection, Chair Dukes so moves.

086 PARKS: On the end of line 9, page 2, I would suggest adding the
phrase, "and there is no other way to protect the safety of the public"
or "is essential and there is no other way to protect the safety of the
public."

096 DUKES: That's a change in meaning. 110 MANNA: To be grammatical,
you would have to leave "protect the safety of the public" following
"essential to." You need to break it into an (a) protect the safety of
the public, and (b) there is no other way.

121 HUGO: As an attorney, Rep. Derfler, could any rule meet that test?

123 DERFLER: I think it is a higher standard, I'm sure you can. The
burden would be on the Board to that creating a monopoly was necessary
for the public safety.

132 BRADBURY: My understanding from Tom Clifford, is that if you put in
language which states there is no other way to do something, it is
virtually an unmeetable test - there's always some other way to do

something, so you've created a situation where you can't do anything because there is always some other way. I would like to hear from counsel what standard of proof that entails.

140 MANNA: I would agree with Sen. Bradbury's characterization. It is an extremely high standard; higher than what is used in criminal cases to establish guilt.

147 PARKS: Counsel stated that it would be a very simple thing for the Pilot Board to not exempt a previously exempt vessel. This would be a simple thing, for the Board to have a hearing and to find, in their judgement, it was necessary or essential or some weaker standard, to eliminate the competition on the river. I'm willing to discuss something in between, but I'm not willing to leave the standard up to the Pilot's Board. Currently, in the administrative hearings, if there is some evidence that supports a decision, then the courts will uphold it. Throughout these hearings there will be three or four positions on every position, so there will always be some evidence to support it.

166 DUKES: You stated that you would support some language in between; to me, that is what this is. I didn't start out wanting language looking anything like this. For me, this is a considerable advancement, and I look at "essential" as a fairly high standard. Certainly, higher than necessary.

173 PARKS: I may be able to develop better language, given time.

179 HUGO: What is the test for "essential"? 180 MANNA: I do not know how this has been interpreted; I would say that it is pretty high. We are not going to look at this where we give deference to a state agency in their rule making authority. You have a specific word here, and you have a record of conference committee hearings which address this issue. If the Board came up with a rule, and it went to court to determine if it was "essential", they are not going to use simply the standard of straight deference

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194 HUGO: What does the phrase, "make a determination. mean in administrative law?

197 MANNA: When we are looking at rule making, they will probably have to make findings and they will have to say that because a particular situation happened, such as the current changing, and then what they find will have to be linked to their conclusion.

207 HUGO: These findings and determinations would be made prior to the rule making?

211 MANNA: Prior to the adoption of the rule; they could initiate the rule making during the course of their hearings.

213 HUGO: If the party felt aggrieved by their determination, is that determination appealable?

218 MANNA: Yes; under chapter 183 in the Administrative Procedures Act.

223 HUGO: I understand that the rule can be appealed; I wonder if the determination can be appealed.

226 MANNA: I believe it cant

232 PARKS: I thought that they wouldn't have standing to appeal a determination until the rule had been enacted which adversely affected them.

235 MANNA: I would have to check the ORS to make sure, but if I were arguing on behalf of a pilot, I would argue that I had standing if the rule would deny me my livelihood. There is case law in this area, where a person's livelihood is threatened.

245 HUGO: The words "necessary" or "essential" are important to me because the way this is drafted, it says the Board shall first make a determination that the public safety is at risk, and that the proposed rule is essential to protect public safety. There are two steps here. The determination is a separate step from adopting a rule. Both could be argued, separately. My goal is to take this out of administrative procedures and to get to a court of law if either side felt aggrieved. If this doesn't get us procedure into court, I don't know what does. It seems that we are protecting all the parties, we are telling the Board that I don't want any rules that even come close to violating the intent of this. I'm most interested in pages 3 and 4, which is the audit. I'm after something that precludes the Board from doing something unless there crisis and safety is at risk.

280 PARKS: I agree with Rep. Hugo. I don't want the procedure to change until there is an inventory of what the situation is.

289 DUKES: I doubt that the Board, after all this debate, would make a rule that goes against the intent.

MOTION: Rep. Parks moves to amend SB 907-B-25 by inserting "and there is no other way" following the word "essential" on page 2, line 9.

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MOTION: Rep. Derfler moves to change "elimination" to "limitation" on page 2, line 6 of the-25 amendments.

317 BRADBURY: I will oppose the motion. I don't want to see anyone limiting competition, but it's one of those standards, where virtually anything could be a limitation of competition. We should be concerned about the Board making rules which puts someone out of business; that's what "elimination" means.

327 DERFLER: What if was to limit their business to 50 percent?

330 DUKES: The Board does not have the authority to determine that any group can handle a certain amount of business. They can limit the number of pilots on the river, but they can't tell a pilot that s/he can only take half their traffic, unless the pilot is doing more business than they can handle safely.

347 MANNA: I believe the statutes allow the Board to limit the number of pilots, but I don't believe they have done so.

350 DERFLER: I thought "limitation" would be a better word than "eliminate."

353 HUGO: Other than establishing tariffs, can the Board affect the amount of money or business a pilot or organization can undertake.

358 MANNA: I'm not real sure - I don't think so. You might want to put a qualify "limitation" such as "significant." Otherwise, "limitation" is pretty broad.

MOTION: Sen. Dukes moves to insert "significant" prior to "limitation" on page 2, line 9.

VOTE: The passes, 5-0 in a roll call vote. Voting aye: Parks, Derfler, Hugo, Bradbury, Dukes.

MOTION: The chair moves to amend SB 907-B-25 on page 4, line 17, after the word "and" insert "insert." This is a technical change to fix a drafting error.

VOTE: Hearing no objection, Chair Dukes so moves.

MOTION: Sen. Bradbury moves to retreat from the House amendments, that the bill be further amended and repassed.

VOTE: In a roll call vote the motion passes, 5-0. Voting aye: Derfler, Hugo, Parks, Bradbury, Dukes.

469 DUKES: Adjourns the meeting.

Submitted by,

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SUMMARY

Exhibit A- proposed amendments, SB 907, staff, 4 pages.

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