

STATE OF WASHINGTON  
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the matter of the arbitration of the dispute between:	)	
	)	
INLANDBOATMEN'S UNION OF THE PACIFIC	)	CASE NO. 2357-A-79-190
	)	
and	)	DECISION NO. 935-MRNE
	)	
WASHINGTON STATE FERRIES	)	ARBITRATION AWARD

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Robert McIntosh, Assistant Attorney General, appeared on behalf of the employer.

R. H. "Hank" Hood, Field Representative, appeared on behalf of the union at the hearing. Hafer, Cassidy & Price, by Richard H. Robblee, Attorney at Law, filed the brief.

This matter comes before the Public Employment Relations Commission pursuant to the collective bargaining agreement between the Washington State Ferries, hereinafter referred to as the "Employer", and the Inlandboatmen's Union of the Pacific, hereinafter referred to as the "Union", and RCW 47.64.030 which provides:

47.64.030 Duties of commission in general. The authority is empowered to negotiate and to enter into labor agreements with its employees or their representatives, including provisions for health and welfare benefits for its employees to be financed either wholly or in part by contributions from the operating fund. The commission shall have the authority to administer labor relations and adjudicate all labor disputes on the best interests of the efficient operation of any ferry or ferry system. In adjudicating disputes, the commission shall take into consideration that though an individual employee shall be free to decline to associate with his fellow employees, it is necessary that he have full freedom of association, self-organization and designation of representatives of his own choosing who shall represent him in all respects before the authority to negotiate the terms and conditions of his employment and before the commission for the settlement of his labor disputes. The commission shall make such surveys of wages, hours and working conditions as it deems necessary, shall consider the prevailing practices for similarly skilled trade in the area in which the employee is employed. The commission shall adjust complaints, grievances and disputes concerning labor arising out of the

operation of the ferry or ferry system. (1975 1st ex.s. c 296 34; 1961 c 13 47.64.030. Prior: 1953 c 211 2; 1949 c 148 3, part; Rem. Supp. 1949 6524-24, part.)

#### BACKGROUND INFORMATION

The employer's basic work force consists of full time employees who work all year. The full time staff is supplemented by "temporary employees" who have no regular schedule or assignments, and who are called to work only when a regular staff member is absent from work. The grievants, Ivan Daves and Dana Mackey, are temporary employees.

The collective bargaining agreement provides in Rule 19, that increases and decreases of personnel are to be accomplished by applying the principle of seniority. Seniority commences upon the date an employee is hired. Seniority lists are prepared and posted, for all job classifications covered by the collective bargaining agreement. Employees are listed on all the seniority lists for which they have U. S. Coast Guard certification documents. Oilers are listed on the "wiper" seniority list because "wiper" is the entry level job for "oilers" and any certified oiler can work at either job.

Temporary employees are dispatched to fill vacancies throughout the entire Washington State Ferry System, encompassing the Puget Sound and San Juan Islands. Oilers and wipers were dispatched through the office of David Black, Operations Coordinator, who later was promoted to Director of Operations.

Vacancies generally fall into two categories - emergency call-outs and long term vacancies. Emergency call-outs involve unpredictable situations where job assignments cannot be made in advance of the need. Long term vacancies (e.g. vacations) are known sufficiently in advance to allow the employer to schedule reliefs by seniority.

Deviations from seniority in dispatching of employees can and do occur for reasons which are acknowledged as acceptable to both parties. For example, a deviation from seniority will be made where the employee with first claim to an assignment lives at such a distance from the port involved that it is not possible to travel to the vessel by sailing time. Similarly, if the employer is not able to reach an employee by telephone to make an emergency assignment, the employer moves on down the seniority list. In certain situations more senior employees with only "wiper" classifications will have to be passed over if the vessel involved has Coast Guard certification which requires "oiler" credentials. When a more senior employee accepts an assignment for a short term vacancy, an assignment for an overlapping long term vacancy will go to a less senior employee.

Temporary employees are permitted some latitude for indicating a preference for assignments on certain vessels or routes. However, it appears that this is an accommodation rather than a matter of right. The Labor Relations Manager of the employer, Thomas Hardcastle, testified without contradiction as follows in response to examination by the employer's attorney:

"Q. Was there any discussion between the parties concerning the availability of personnel?

A. Yes. It was stated emphatically by the union that these employees, who - these temporary employees - particularly those who are getting fairly close to the point where they could be come year round employees would have to be available at all times - readily available at all times to take jobs at any place in the system." (Emphasis added)

Ivan Daves was hired as a wiper on October 18, 1977. He was placed on the seniority list and was classified as a "temporary employee". He was certified as an oiler on January 2, 1979.

Daves lived in a remote rural area outside Anacortes, Washington and, until June, 1979, had no telephone. All messages were relayed through his mother's telephone.

Daves called the employer from a phone booth. He called the dispatchers office more than weekly but less than daily according to the testimony and records placed in evidence.

Daves refused at least one assignment where insufficient time was available for him to reach the Seattle area by sailing time. Although he indicated a preference to serve on San Juan ferry runs he never explicitly refused work elsewhere except for a period of time in November and December, 1979 when he was having a prosthetic limb repaired.

Dana Mackey was hired on June 26, 1977. He was placed on the seniority list as a wiper and was classified as a "temporary employee". He was certified as an oiler on October 8, 1978.

Mackey lived in Anacortes, Washington until the winter of 1979, when he moved to Seattle. He had a telephone and could be contacted at all times pertinent to these proceedings.

Black testified that he was unaware of Mackey refusing any work opportunities for which he could qualify.

#### EVIDENTIARY BASIS OF THE CLAIMS

The union bases its claims of seniority violations primarily, if not exclusively, on insurance records which show that employees with less seniority than Daves and Mackey worked more hours in certain months.

Positions of the Parties:

The union contends that Rule 19 requires the employer to assign employees to vacancies for which they qualify by seniority; and that it has made a prima facie case showing a violation. It would shift the burden of proof to the employer to show contract compliance, noting that only the employer has records indicating the types and numbers of vacancies during the time in question. It asserts that the employer's violation of Rule 19 has deprived the grievants of income and benefits. The union asks that the grievants be made whole for wages and benefits lost where less senior employees worked more between January 1, 1978 and August 31, 1979.

The employer contends that the grievants were properly assigned to vacancies to which they were qualified and available; that the grievants had indicated a preference to work on vessels on San Juan ferry routes; that Daves had no telephone for most of the time and was difficult to reach; that the grievants did not call the employer regarding openings as often as needed to have been assigned more jobs; that Mackey was unable to work for an extended period of time which should be excluded from consideration in these proceedings. It contends that the parties agreed in negotiations that deviations in scheduling assignments could occur; and that the employer did the best it could under the circumstances.

DISCUSSION

The employer is responsible for dispatching "temporary" employees and maintains all the records on dispatch of temporary employees. The union reasonably anticipated that the employer would call the most senior temporary employee whenever vacancies arose. However, the union has not relied in these proceedings on the employer's records. Instead, the union relies on health/welfare records showing only the gross number of hours credited in two-month periods and, it appears, made no effort to review or subpoena the employer's records.

The evidence indicates a large number of variables which affect the operation of the seniority system, and several additional variables which affected the operation of the seniority system in the cases of these particular grievants. The evidence presented by the union in terms of gross number of hours of various employees suggests, at best, that some more detailed evidence might show seniority violations. The evidence presented by the union falls far short of establishing a violation or forming the basis for a remedial order. In fact, the strongest evidence from which we could infer a violation is found in admissions made by management personnel Hardcastle and Black. Hardcastle testified:

"It doesn't say it, but it's within the limits of reason. Now when I say that; when we need employees

we aren't in a position where we can go down ten or twenty people until we get one - get a person. We use the most convenient means of hiring a person without exerting too much effort. I simply mean that those we know are readily available are likely to get the jobs." (Emphasis supplied)

Black testified:

"Well, I don't really have an answer, Hank. The one that comes to mind is where were these jobs and did this come down to a case of the squeaky wheel getting the grease. Did these guys phone so constantly looking for work that they got it or were they in areas we knew Ivan didn't want to travel to. That is what I think the question is and I don't have the answer." (Emphasis supplied)

Much as counsel for the union urges in the brief (he did not represent the union at the hearing) that there should be a shifting of the burden of proof to the employer, we must take this case as we find it and decide it on the record which we have before us. It appears that the employer has never failed to document its assignments because it has never been required by the union to do so.

Any remedial order made on this record would be entirely speculative. The grievants expected to work less than full time, but they permitted their situation to go on for substantially in excess of one year before they questioned whether they were being shortchanged. Random interplay between vacancies and assignments would normally have produced more hours of work for the grievants than for less senior employees; but until August, 1978 when Mackey qualified as an oiler and January, 1979 when Daves qualified as an oiler, less senior employees already qualified as oilers would necessarily have received oiler assignments for which the grievants were not yet qualified. Further, the distance of both grievants (until Mackey moved) from Seattle area ports could, as urged by the employer, have effectively disqualified them from some assignments made on short notice. In case of Daves, the failure to have a telephone is passed over too lightly by the union, and is found by the Commission to be a significant impediment to any liability finding or remedy computation. Finally, Daves was clearly unavailable for work during the period late in 1979 when he refused assignments.

Promptness is one of the most important aspects of grievance processing. As an ancient maxim states:

"Equity aids the vigilant, not those who slumber on their rights." Leschner v. Department of Labor and Industries, 2 Wn.2d 911, 927 (1947).

The collective bargaining agreement under which this dispute arose was effective from April 1, 1977 through March 31, 1980. The grievance was discussed with the employer on August 23, 1979 and was filed with the

Commission on October 1, 1979. While the employer has not expressly raised a timeliness defense in response to the union request for a make-whole remedy covering a 20-month period, any remedial order for such a period would have to be scrutinized carefully. It is neither reasonable nor sound labor relations to allow employees to sit on their rights for so long a time, doing or saying nothing, and then request a remedy that may have far-reaching economic repercussions. Had the employer been asked, under subpoena, to reconstruct the events concerning the employment of these grievants and others during the period in question, some difficulty could reasonably have been anticipated merely because of the passage of time.

So that compliance with the seniority provisions of the collective bargaining agreement might be audited, the party making assignments must, of necessity, keep adequate records of both who was called and the reasons for deviations from seniority. Those records must be made available, on request, to the other party to the collective bargaining agreement. If such records have not been kept in the past, the parties must immediately take steps to create such records. Had adequate records been kept and produced in evidence before us, the quoted portions of the testimony of employer witnesses strongly suggest that we might be finding some violations to have occurred. There is no grease in the seniority system of this contract for squeaky wheels, nor is there a convenience provision allowing the employer to undermine the system in order to reduce its exertion of effort. The Commission does not condone violations of collective bargaining agreements, but must conclude that we lack a record in this case on which to base a finding of a violation or a remedial order.

#### FINDINGS OF FACT

1. Washington State Ferries is an agency of the State of Washington having responsibility for the operation of a system of ferries on and crossing Puget Sound, and is the employer under RCW 47.64.

2. Inlandboatmen's Union of the Pacific is the collective bargaining representative of a bargaining unit, which among other classifications, includes oilers and wipers.

3. The employer and union entered into a collective bargaining agreement effective from April 1, 1977 to March 31, 1980 which includes contractual provisions applicable to this disputed matter which read as follows.

#### RULE 6 - MANAGEMENT RIGHTS

6.01 Subject to the terms and conditions of this Agreement, the Employer retains the

right and duty to manage its business, including the right to adopt regulations governing the appearance, dress, conduct, and work procedures of its employees as are reasonably required to maintain safety, efficiency, quality of service and the confidence of the traveling public. The Union reserves the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Rule 15. The existence of this clause shall not preclude the resolution of any such grievance on its merits.

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#### RULE 19 - SENIORITY AND ASSIGNMENTS

19.01 The Employer shall determine the number of year-round jobs in each job classification. These shall include that number of relief type jobs, including vacation relief, which the Employer determines to be needed on a year-round basis to cover assignments where the normally assigned employees are not available or where no permanent assignments have been made. All jobs not designated by the Employer as above shall be classified as "temporary." These shall include jobs not needed on a steady, year-round basis, whether they be extra assignments or temporary relief jobs not filled by employees on year-round assignment.

19.02 The Employer shall prepare and maintain working lists of year-round jobs, showing the names of employees assigned to such jobs by department and classification. Departments shall be Deck, Engine, Terminal, and Traffic Information. Seniority in each classification will be established on the date the employee is assigned to regular year-round employment in that classification. There shall be supplemental lists, by department and classification, of employees working less than year-round assignments, in order of dates of hire. On January of each year, each department's rosters will be furnished the Union and posted in places accessible to those department's employees. These rosters will be open for correction of seniority dates only for a period of sixty (60) days from the date of initial posting, on presentation of proof of error in writing, by an employee or employee's representative. Seniority dates not contested within sixty (60) days of initial posting shall not be changed thereafter, except for correction of typographical error.

19.03 Employees interested in year-round or temporary positions and promotions must notify the Employer and the Union, in writing, of the positions they wish to fill. The Employer shall maintain a file of all such requests and, upon receipt of such requests, shall immediately notify in writing the employee submitting such request of

its receipt. These requests will be kept on file for a period of one (1) year after receipt and then will be destroyed, unless the individuals indicate in writing their desire to extend the requests each subsequent year. When an opening occurs, the Employer may fill the job for a period of up to thirty (30) days from any source. If the person previously holding that job fails to return in thirty (30) days, the most senior year-round employee in that classification who has a request on file for that job and is available shall be assigned. If there are no available qualified year-round employees having requests on file, the most senior available qualified employee who does not have a year-round assignment shall be assigned to the job. This rule shall not apply to the filling of any openings in the positions of Terminal Supervisor, Information Supervisor, AB-Bos'n, shoreside maintenance employee or Foreman. If the regular employee returns from an approved absence after the job is filled under the above procedure, all affected employees will return to their previous assignments. When a regular employee accepts a temporary promotion, the employee may return to the employee's former job at the completion of the temporary job.

19.04 In reducing or increasing personnel in the respective departments, seniority shall govern. When lay-offs or demotions become necessary, the last employee hired in a classification shall be the first laid off or demoted. When employees are called back to service, the last laid off or demoted in a classification shall be the first restored to work in that classification.

19.05 Any employee who has established seniority and is elected to any full-time office in the Union or who is transferred to a position in Management shall retain seniority status throughout either term or terms in office or for the duration of employment with Management.

19.06 Ticket Takers who have acquired seniority as of July 1, 1972, shall maintain their classification and rate of pay although assigned to Terminal Attendant classification duties. Furthermore, Ticket Takers who have been assigned to Terminal Attendant duties shall not be required to take a Ticket Taker vacancy at another terminal.

4. Dana Mackey was employed by Washington State Ferries as a wiper on June 26, 1977. He became an oiler on August 8, 1978. He is classified as a "temporary employee."

5. Ivan Daves was employed by Washington State Ferries as a wiper on October 18, 1977. He became an oiler on January 2, 1979. He is classified as a "temporary employee."



6. Temporary employees do not work at year-round assignments at facilities or on vessels of the fleet. They are dispatched to fill vacancies on an on-call basis.

7. Dana Mackey and Ivan Daves are listed on the oiler/wiper seniority list. Oilers have a modified super-seniority over wipers because oilers can work as wipers but wipers cannot work as oilers.

8. Washington State Ferries has deviated from applying Rule 19 to vacancies occurring in oiler and wiper job classifications.

9. Washington State Ferries has employed persons less senior than Mackey and Daves for greater numbers of hours than Mackey and Daves.

10. The Inlandboatmen's Union of the Pacific has not submitted records sufficient to determine if a violation of Rule 19 has occurred.

#### CONCLUSIONS OF LAW

1. The Public Employment Relations Commission has jurisdiction over this matter under RCW 47.64.

2. The Employer has the responsibility to comply with Rule 19 in regard to the assignment of personnel.

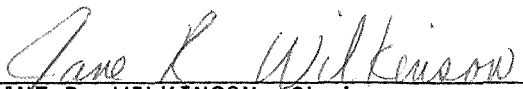
3. On the record made, the union has failed to sustain its claim that Rule 19 has been violated and that some specific remedy is warranted.

#### ORDER


The grievances of Dana Mackey and Ivan Daves are denied.

DATED at Olympia, Washington, this 14<sup>th</sup> day of November, 1980.

PUBLIC EMPLOYMENT RELATIONS COMMISSION

  
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JANE R. WILKINSON, Chairman

  
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ROBERT J. WILLIAMS, Commissioner

  
\_\_\_\_\_  
JOHN H. LEINEN, Commissioner