

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

ROBERT S. O'HARA,)	
)	
Complainant,)	MEC Case. NO. 2-90
)	
v.)	DECISION NO. 66-MEC
)	
WASHINGTON STATE FERRIES)	DECISION AND ORDER
and INLANDBOATMEN'S UNION)	AMENDING EXAMINER'S
OF THE PACIFIC,)	DECISION NO. 65
)	
Respondents.)	
_____)	

Robert O'Hara, pro se, appearing for and on behalf of the complainant.

Kenneth Eikenberry, Attorney General, by Patricia Nightingale, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

Hafer, Price, Rinehart and Schwerin, attorneys, by John Burns, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

INTRODUCTION AND BACKGROUND

On December 27, 1990, the International Inlandboatmen's Union of the Pacific (IBU) filed an "Exception to Hearing Examiner's Decision and Order (No. 65)," alleging an incorrect statement in Findings of Fact No. 2 and 3. Finding of Fact No. 2 cited a Rule 21.15 in the 1985-1987 Washington State Ferries (WSF)/IBU collective bargaining agreement. The complaint stated that there is no such language in that agreement. Finding of Fact (FF) No. 3 was inaccurate in that it was based on FF No. 2. IBU further alleged that the incorrect FF No. 2 was the basis for Conclusion of Law No. 7; therefore Conclusion of Law No. 7 was also inaccurate. Exception was taken to the entire Decision and Order, alleging that

the Order, in turn, was based on the inaccurate Findings of Fact No. 2 and 3 and Conclusion of Law No. 7.

On January 4, 1991, Complainant O'Hara filed a Petition for Review of Examiner's Decision No. 65, asking MEC to award him \$23,260.32 for lost wages and benefits which occurred during the time he was on leave subsequent to his assignment to return to the Winslow route on or about October 14, 1990 until June 22, 1990, and/or following his lay-off October 8, 1990 until the present time. He also requested MEC to instruct WSF "to annotate the seniority roster in some way to prevent a recurrence" of the situation leading to the cause of his unfair labor practice complaint (ULP).

In his latter petition, O'Hara commented on the IBU Exception to Decision No. 65-MEC and conceded that "Rule 21.15 did not exist in the 1985-87 contract, true. . . ." However, O'Hara cited Rules 1.11, 1.12, 21.07(D) and 21.09 as "(making) it clear that such transfers have long been allowed."

On January 7, 1991, WSF also filed an "Exception to Hearing Examiner's Decision and Order (No. 65), . . . on the same basis as expressed by (IBU). . ."

On January 8, 1991, IBU filed an "Objection to (O'Hara's) Apparent Attempt to Expand the Scope of the Complaint After the Decision by Complainant."

On January 9, 1991, WSF filed a "Response to Complainant's Request for Review of Decision and Order No. 65-MEC."

Although Examiner Stewart declined to participate in the appellate review of his own work following Examiner's Decision and Order No. 53 and the subsequent Decision No. 58 (Order Remanding the Case for Further Hearing), Stewart did participate in the instant Decision

and Order No. 66. "Petition for Review" of Decision No. 53 called for evaluation of his own work; however, the "Exception" filed by IBU called for fact-finding in the case of alleged errors. Examiner Stewart could have made corrections pursuant to WAC 316-45-330; but he deemed the IBU "Exception" to be tantamount to a petition for review. WAC 316-45-330 prohibits the hearing examiner from modifying an examiner decision after a petition for review has been filed.

Having re-read the entire record, including the original ULP, the first hearing transcript, the post-hearing briefs, Decision No. 53, O'Hara's Petition for Review, Decision No. 58-MEC Remanding the Case for Further Hearing, transcript of the remanded hearing and post-hearing briefs, Examiner's Decision No. 58, the instant "exceptions" and second Petition for Review by Complainant O'Hara, the Marine Employees' Commission now enters the following findings of fact, conclusions of law, and an order amending Examiner's Decision No. 65-MEC.

FINDINGS OF FACT

1. Complainant O'Hara did not go back to his 40-hour/week watch at Winslow, as stated in Finding of Fact No. 1 of Examiner's Decision No. 65-MEC. Instead, he applied for leave of absence and, later, an extension of that leave. The record is not clear and unambiguous as to O'Hara's employment status following the expiration of his extended leave of absence to the present time.
2. Rule 21.15, as cited in Finding of Fact No. 2 in Examiner's Decision No. 65-MEC, did not exist in the 1985-1987 WSF/IBU collective bargaining agreement.

3. Rule 21.15 was not amended but was entirely new language, in the 1987-1989 WSF/IBU agreement.
4. Conclusion of Law No. 7 in Examiner's Decision No. 65-MEC repeats the error in Finding of Fact No. 2.
5. Examiner Stewart limited testimony in the original ULP hearing on the subject of transfers from 40-hour per week watches to less-than-40-hours per week watches to only such transfers which may have occurred subsequent to the signing of the 1987-1989 WSF/IBU Agreement. Therefore the record is silent as to past practice regarding such transfers prior to signatures on behalf of IBU on 6/26/89 and/or WSF on 9/29/89.
6. The 1985-1987 WSF/IBU Agreement is silent regarding an employee transfer from a 40-hour per week watch to a less-than-40-hour per week watch. Said Agreement is also silent on the authority of IBU to require its approval of or to object to such a transfer.

Having entered the foregoing findings of fact, the Marine Employees' Commission now enters the following conclusions of law and order.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has continued jurisdiction over the parties in this case and this subject matter. Chapter 47.64 RCW, particularly RCW 47.64.130 and 47.64.280; chapter 316-45 WAC.
2. Because Finding of Fact (FF) No. 2 in Decision No. 65-MEC (Examiner's Decision and Order Following Remand of Decision

No. 53) is patently in error, MEC should order FF No. 2 stricken from Decision No. 65-MEC.

3. FF No. 3 in Decision No. 65-MEC also contains an error, and should be amended to read as follows:

Rule 21.15 was (~~amended~~) new language, added for the first time in the 1987-1989 WSF/IBU agreement to read as follows:

RULE 21 - SENIORITY AND ASSIGNMENTS

. . . .

21.15 Full-time employees may bid for a part-time shift without loss of seniority provided the employee demonstrates that retaining full-time work would create an extreme hardship. Hardship status shall require Employer and Union agreement.

4. Conclusion of Law (CL) No. 7 was based upon the foregoing erroneous Findings of Fact 2 and 3, therefore CL 7 is also in error, and should be amended, to read as follows:

7. The interpretation of Rule 21.15 from the 1987-1989 agreement in Examiner's Decision No. 53 was in error. Rule 21.15 of the (~~1985-1987~~) 1987-1989 WSF/IBU agreement (~~((See finding of Fact No. 2, supra.) was still in effect as of October 6 10, 1989 (RCW 47.64.170(7),))~~) did not take effect until November 15, 1990. See CL 3 and 5, supra. There is no other provision in the 1987-1989 WSF/IBU Agreement requiring IBU approval of or allowing IBU objection to a transfer from a 40/hour per week watch to a watch of less than 40 hours per week. Therefore the IBU disagreement with O'Hara's transfer

was invalid, and Port Captain Mecham's rescission of the transfer must be declared null and void.

By IBU's act of objecting to O'Hara's transfer and by WSF's act of acquiescing to IBU's objection and rescinding O'Hara's transfer, IBU and WSF have deprived Complainant O'Hara of a right guaranteed by chapter 47.64 RCW, and have each violated RCW 47.4.130. MEC should find O'Hara's complaint of unfair labor practice sustained, and should order that O'Hara be reinstated in WSF employment.

5. Conclusion of Law No. 8 contains an inaccurate reference to the possibility of O'Hara continuing to work on his last assignment to the Winslow watch and should be stricken.
6. The remaining Findings of Fact and Conclusions of Law as amended and renumbered are deemed to be correct and valid, and should be appended to and made part of the instant Decision No. 66-MEC.
7. Decision No. 58-MEC, remanding Examiner's Decision and Order No. 53, stated clearly that the hearing in Case No. 2-90 was to be re-opened solely for the purpose of taking further testimony on whether or not the WSF/IBU rescission of O'Hara's transfer was in accordance with an effective agreement. If Complainant O'Hara believed that he had a valid claim for payment of lost wages and benefits, it was necessary to file such claim in or with his Petition for MEC Review of Examiner's Decision and Order No. 53. Therefore, this Commission must declare that O'Hara's claim for payment of lost-time wages and benefits in a Petition for Review of Decision No. 65, was untimely, and such claim should be denied.

Having entered the foregoing Conclusions of Law, the Marine Employees' Commission now enters the following order.

ORDER

1. Examiner's Decision and Order No. 53 entered July 13, 1990, and remanded for additional hearing by Decision no. 58-MEC on September 11, 1990, is in error and should be and is hereby reversed.

2. Examiner's Decision No. 65, entered on December 13, 1990, shall be amended as follows:
 - A. Finding of Fact No. 2 shall be stricken, and the remaining Findings of Fact re-numbered accordingly.

 - B. Finding of Fact No. 3 (renumbered No. 2) shall be amended to read as follows:

Rule 21.15 was new language, added for the first time in the 1987-1989 WSF/IBU agreement to read as follows:

RULE 21 - SENIORITY AND ASSIGNMENTS

.

21.15 Full-time employees may bid for a part-time shift without loss of seniority provided the employee demonstrates that retaining full-time work would create an extreme hardship. Hardship status shall require Employer and Union agreement.

- C. Conclusion of Law No. 7 shall be amended to read as follows:

7. The interpretation of Rule 21.15 from the 1987-1989 agreement in Examiner's Decision No. 53 was in error. Rule 21.15 did not take effect until November 15, 1990. See CL 3 and 5, supra. There is no other provision in the 1987-1989 WSF/IBU Agreement requiring IBU approval of or allowing IBU objection to a transfer from a 40/hour per week watch to a watch of less than 40 hours per week. Therefore the IBU disagreement with O'Hara's transfer was invalid, and Port Captain Mecham's rescission of the transfer must be declared null and void.

D. Conclusion of Law No. 8 shall be stricken, and the remaining Conclusions of Law re-numbered accordingly.

The remainder of the Findings of Fact and Conclusions of Law in Examiner's Decision No. 65 are hereby declared to be valid and are made an integral part of the instant Decision No. 66-MEC.

3. The objection by the Inlandboatmen's Union of the Pacific (IBU) to Complainant Robert O'Hara's transfer to "C" watch-Port Townsend and Port Captain Jerry Mecham's rescission of said transfer in October 1989 were each invalid, and each is hereby declared null and void.
4. The Petition for Review filed by Complainant O'Hara on January 4, 1991, is hereby declared untimely, and the claim for lost wages and benefits contained therein is denied.
5. Washington State Ferries shall immediately reinstate O'Hara in his assignment to "C" watch-Port Townsend or transfer him to another watch suitable to Robert O'Hara.

6. Washington State Ferries shall credit O'Hara fully for all seniority he earned and accumulated up to and including whatever seniority is normally credited for periods of approved leaves of absence. IBU shall audit said seniority credit for accuracy.
7. Complainant O'Hara shall immediately pay IBU Regional Director Larry Mitchell the sum of \$10.00 plus reproduction cost of subpoenaed records, provided that demand for such fee was made at the time O'Hara's subpoena was served on Mitchell.
8. This order shall not be construed as binding on WSF or IBU or any other party with regard to any other complaint based upon the renewal of WSF collective bargaining agreements for 1987-1989. Such additional complaints, if any shall be considered on their own merits.

Dated this 16th day of January, 1991.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner