

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 33-00

DECISION NO. 310 - MEC

DECISION AND ORDER

Schwerin, Campbell and Barnard, attorneys, by *Dimitri Iglitzin* and *Judy Krebs* for and on behalf of the Complainant, Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

This matter came on regularly before the Marine Employees' Commission (MEC) on August 28, 2000 when the Inlandboatmen's Union of the Pacific (IBU) filed the unfair labor practice complaint which was designated case No. MEC 33-00. After reviewing the complaint, the Commission determined that pursuant to WAC 316-45-110 the facts alleged may constitute an unfair labor practice, if later found to be true and provable.

Following settlement efforts, MEC set this matter for hearing, with hearing dates of July 9 and 10, 2001 followed by another settlement discussion between the parties which proved unproductive. The final day of the hearing before MEC Chairman John D. Nelson was held on November 8, 2001. Following the hearing a brief was received from the Complainant.

The complaint alleges that Washington State Ferries (WSF) changed its policy regarding the leave without pay with regard to employees in both the deck and the terminal departments of

the WSF represented by the IBU. This change in policy was alleged to have been announced in May, 2000.

POSITIONS OF THE PARTIES

Position of IBU

IBU contends that a liberal policy of leave without pay usage has been maintained for many years by WSF in both the deck and terminal departments. When WSF formulated and imposed a new policy in May 2000 without notice to or bargaining with IBU, it engaged in an unfair labor practice which must be remedied by a return to the status quo ante, with a restoration of any sick leave, vacation time or comp time used by IBU bargaining unit members because they were unable to take leave without pay. IBU further seeks reimbursement of costs and attorney fees associated with the prosecuting of these charges, and a general order requiring WSF to bargain with IBU concerning any changes in the prior practice of granting leave without pay.

Position of WSF

WSF takes the position that payroll/accounting audits conducted in 2000 revealed that a practice had evolved wherein the IBU represented employees made after-the-fact claims to leave without pay (LWOP) in lieu of earned vacation or sick leave. This pay category, pay code 30, showed up in an audit of pay records as well as in a new accounting system known as Automated Operating Support System (AOSS) which allowed the tracking of the various pay codes. When this became clear to WSF officials, steps were taken to rein in this practice. WSF does not deny taking steps to curb the practice of taking LWOP, but maintains that employees never had the right to such a practice, and that upon learning of its existence, WSF stopped the practice.

THE ISSUE

1. Did WSF change its policy regarding the use of LWOP?
2. Was the practice of using LWOP an established working condition?
3. If a change in the practice of use of LWOP was effected, was the IBU given notice and opportunity to bargain?
4. Did WSF commit an unfair labor practice within the meaning of RCW 47.64.130(1)(e) with respect to the LWOP policy, and if so, what remedy attaches?

Having carefully considered the entire record, including the unfair labor practice complaint and answer thereto, the hearing transcript and exhibits and the post-hearing brief, this Commission now hereby enters the following findings of fact.

FINDINGS OF FACT

1. Dennis Conklin has been the Business Agent for the IBU represented employees at WSF since 1991. Prior to that time he worked for WSF as a deck hand since 1979. Conklin testified that he often took time off and the mate on the vessel would ask him if he wanted to be paid or not to be paid for the time off he had taken. In his testimony, which was unrebutted, Conklin described how he would not indicate in advance as to how his time off was to be accounted for, but would identify which days he chose to account for as LWOP after he returned from the time off. Conklin testified that in his experience it was common for people in the deck department to take vacation days and sick leave days as LWOP. Conklin recalls that some employees did this so they could accumulate or save their vacation leave or sick leave.
2. Conklin had specific discussions with WSF during the 1991-1993 collective bargaining negotiations wherein a change from the IBU medical plan to the State of Washington medical plan necessitated discussion of LWOP. A change in the contractual eligibility was

negotiated so that new employees would not be covered immediately under the medical plan, but had to work for a six-month period to be eligible. During these negotiations WSF indicated a concern over use of LWOP, but permitted the existent practice to continue when IBU agreed to give up their maintenance of benefits language regarding the IBU medical plan.

3. Lisa Whitley, an Ordinary Seaman in the deck department, had on various occasions taken LWOP in lieu of vacation pay or sick leave pay. In May 2000, pay records reflect that Whitley had requested May 8, 2000 as LWOP, but her request was disallowed and she was charged sick leave for that day. When Whitley complained to Conklin, the latter called Bob Wheeler, who has been Crew Resource Manager since April 2000. In his position, Wheeler has the responsibility to manage dispatch. Conklin asked why Whitley was charged sick leave. Wheeler responded that WSF was undertaking a change in policy. Conklin urged reconsideration based on a long practice, and Wheeler agreed to adjust the matter to provide Whitley the requested LWOP.

4. Conklin received reports from various other employees in both the deck department and the terminal department that requests to use LWOP were being denied. Upon checking with WSF managers, Conklin was advised that LWOP in lieu of paid leave accounts, would no longer be permitted.

5. The collective bargaining agreements covering deck and terminal employees do not address the use of LWOP in lieu of paid leave categories. There is no reference in the agreements to leave without pay.

6. Within the terminal department, vacation requests are bid in blocks of time, usually up to a year in advance of taking the time. Requests are granted based upon seniority in the terminal department. In the deck department, an employee requests vacation time by sending an

econogram to the dispatcher who then grants or denies the request based on staffing considerations. Sick leave is requested and granted as needed in both deck and terminal departments, with relief replacement of the employee requesting the sick leave.

7. Robert Wheeler has worked in a variety of positions with the WSF since 1973. Most recently he was appointed to the position of Crew Resource Manager in April 2000. His official duties include the management of the dispatch function. Wheeler is a member of the audit team that was established around March 2000 as a result of certain findings of the State Auditor. Wheeler's audit team reviewed all payroll records, including code 30, or LWOP claims made by deck and terminal department employees. In its review of these claims, Wheeler's audit team concluded that many of the LWOP hours were being made by employees who had called in sick but then converted the sick leave to code 30, LWOP upon filing the pay order. Wheeler characterized this practice as "backdoor LWOP" In Wheeler's view this raised a potential for abuse, and Wheeler recommended that this practice be halted. Through the vehicle of an Advisory to the Fleet dated July 13, 2000, WSF notified all employees of certain common errors that would result in "redline" editing of payroll claims. Among errors that could be redlined was: "claims for leave without pay without prior approval"

8. Employees who had pay orders redlined were advised to contact Bob Wheeler for further explanation. The Advisory further provided that approval of the redlined claim was possible upon an explanation acceptable to the audit team.

9. It became WSF policy that both deck department and terminal department employees were prohibited from taking LWOP in lieu of sick leave or vacation time if the employee had a balance of time remaining in the sick leave or vacation account.

10. No prior notice to or negotiation with IBU was undertaken by WSF regarding the newly stated policy on LWOP.

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

CONCLUSIONS OF LAW

1. MEC has jurisdiction over the subject matter and the parties involved in this case. Chapter 47.64 RCW, especially, RCW 47.64.130 and RCW 47.64.280.

2. In an effort to tighten procedures and eliminate an area in which it saw a potential for abuse, WSF implemented a change in working conditions in May 2000 with formal notification to employees by way of the Advisory dated July 13, 2000.

3. The change effected was manifestly a change in the past practice of allowing deck department employees to select pay code 30, LWOP, in lieu of vacation or sick leave. While it is less clear that the same practice with regard to after-the-fact permission to change a pay code to LWOP existed in the terminal department, it is nonetheless clear that a change in practice with respect to the disallowance of LWOP whenever there are balances in other payroll accounts amounted to a change in practice which affected both deck and terminal departments.

4. The change in use of and accounting for LWOP was a substantial change in the conditions of employment. There was no notice to nor opportunity for bargaining afforded the IBU.

By unilaterally changing the past practice of LWOP use, WSF has violated RCW 47.64.130 and WAC 316-45-003. *Inlandboatmen's Union of the Pacific v. Washington State Ferries*, 193 MEC (1997). *City of Wenatchee*, Decision 6517-A (PECB 1999).

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

ORDER

1. The unfair labor practice complaint, filed by IBU against WSF on August 28, 2000 is hereby sustained.

2. Washington State Ferries is hereby found to be in violation of RCW 47.64.130(1)(e).

3. WSF is ordered to cease giving effect to that part of the Advisory to the Fleet dated July 13, 2000, which threatens redlining of payroll claims for leave without pay without prior approval.

4. WSF will cease and desist from refusing to bargain with IBU over any proposed changes in the LWOP policy. The current practice of redlining employees who have requested LWOP, if such employees have balances in vacation, comp time, or sick leave accounts, must be rescinded. Any proposed change in the LWOP policy will be made only after giving notice to IBU and affording an opportunity to bargain.

5. IBU will notify WSF within 30 days from the date of this Order as to which employees have been denied LWOP, as well as which employees have been redlined in their payroll request for LWOP, code 30. As to those employees identified under this Order, WSF shall give those employees a choice of "buying back" any such denied LWOP request wherein the employee was required to expend leave from some other identified payroll account.

6. Any employee identified under the previous paragraph of this Order, who chooses to "buy back" leave must do so within 60 days from the date of this Order.

7. The MEC has considered the request for attorney's fees and declines to award them in this matter.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC's unfair labor practice ruling with the Commission within ten days from the date this final order is mailed. Any petition for reconsideration must state the specific grounds for the relief requested. Petitions that merely restate the party's previous arguments are discouraged. A petition for reconsideration does not stay the effectiveness of the Commission's order. If no action is taken by the Commission on the petition for reconsideration, within twenty days from the date the petition is filed, the petition is deemed to be denied, without further notice by the Commission.

Dated this _____ day of February 2002.

MARINE EMPLOYEES' COMMISSION

JOHN NELSON, Hearing Examiner

Approved By:

JOHN SULLIVAN, Commissioner

JOHN BYRNE, Commissioner