

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION  
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 12-01

DECISION NO. 317 - MEC

DECISION AND ORDER

Schwerin, Campbell and Barnard, attorneys, by Dmitri Iglitzin and Judy Krebs appearing 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.

**PROCEDURAL BACKGROUND**

This matter came on regularly before John D. Nelson of the Marine Employees' Commission (MEC) on May 9, 2001 when the Inlandboatmen's Union of the Pacific (IBU) filed the unfair labor practice complaint, which was designated MEC Case No. 12-01. 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.

There followed procedural motions by WSF— a Motion to Make the Complaint more Definite and Certain, along with a Motion to Dismiss. The final upshot was an Order by this Commission seeking compliance with WAC 316-45-110. This Order resulted in an amended Complaint along with some information required to make the Complaint more definite. Thereafter, the Commission ruled on a further motion of WSF seeking more clarification and dismissal. The

MEC granted dismissal on two causes of action and ordered IBU to make another attempt at clarification, denying the remaining issues raised by WSF, particularly the request to dismiss based upon the IBU raising allegations which were unrelated courses of action. IBU responded with further particulars, WSF filed a timely answer to the Complaint and the issues were set for settlement discussion and hearing. The hearing was held before Chairman John D. Nelson on November 6 and 13, 2001. After close of hearing, IBU moved to reopen the record to allow it to present newly discovered evidence bearing on the issues alleged. MEC reopened the record with no objection from WSF and additional hearing was conducted on January 11, 2002. Upon completion of the hearing the parties sought permission to file briefs in this matter, which were received on March 22 and 25, 2002.

#### **NATURE OF THE CASE**

The IBU represents employees of WSF under Chapter 47.64. RCW. The employees involved in the instant case are covered by the general agreement covering deck, terminal and information departments, or by the separate agreement negotiated in 2000 covering Terminal Agents. Terminal Agents had been covered by the general agreement until WSF and IBU agreed to the Terminal Agents having their own department. At that time those parts of the general agreement that were unique to Terminal Agents were taken from the general agreement and placed in a separate document which did not purport to change the duties of the Terminal Agents. While no "wordsmithing" was done on this somewhat cobbled agreement, it appears that the parties intended to create separate departmental standing for the Terminal Agents, apparently fulfilling the wishes of the agents themselves. There has not been a renegotiated agreement in place since the original separation of the Agents from the terminal contract occurred. The parties, through

correspondence, agreed to maintain conditions and practices without change during a time identified as the redefinition period.

To meet the issue of "skimming" of work by the Terminal Agents, both parties adduced evidence as to the practice of Terminal Agents stepping in to accomplish work performed by terminal employees. There is clearly a practice by which Terminal Agents have temporarily filled in for terminal department employees who didn't show up for work; employees who became ill and had to be relieved from their duties; during unexpectedly high traffic which overtaxed the traffic attendants; and on a more regular basis, the landing of the first boat of the morning on the Bremerton run. There is also some suggestion that at the Colman Dock and in Anacortes during the off-season, Terminal Agents would assist in docking the first boat of the day.

Pursuant to the Order reopening the record to allow IBU to present newly discovered evidence it was established that following the implementation of the Fall schedule and the attendant re-bid in 2001 there came to be a situation involving WSF's use of a Terminal Agent to assist in performing traffic attendant work. This involved the Kingston to Edmonds run, the first boat of the morning. Normally there would be two traffic attendants assigned to assist in the unloading of the incoming boat, directing traffic in the upper parking area at Edmonds, and directing such traffic to load the boat at Edmonds. On days other than Fridays, the two traffic attendants would accomplish these duties, but because of the schedule change, the Friday schedule was changed to accommodate an extra run late Friday evening. The extra boat meant that the Friday operation would take more than twenty hours. The traffic attendants work ten-hour shifts. To insure that there would be an overlap in coverage during the day, the initial shift of Fridays began at normal time, but the second traffic attendant was scheduled to come to work later. Rock McInnes, a traffic attendant, was assigned by bid the early starting time. After commencing his Friday shift, McInnes realized that

operating alone in handling the traffic required being in the upper holding area to direct that traffic, or being down on the dock, but he couldn't be in both places. McInnes felt that this created a safety issue and he complained to management. Management investigated his complaint and addressed the issue by assigning a Terminal Agent to assist in landing the first boat of the morning from Kingston on Friday mornings. This situation apparently existed through the duration of the Fall and Winter schedule when the extra boat is operated on Friday night. WSF maintains that this is a normal part of the shift from the Summer to Fall schedules. The record does not reflect how the staffing was handled in prior years. There was no discussion with IBU after this management solution was made.

The Information Agents work at the information booth at Pier 52. Their duties are to give out information and answer inquiries from the public. They are represented by the IBU as part of the Terminal and Information Department. In dispensing information the Information Agents respond to inquiries from walk up individuals at the Colman Dock information booth as well as responding to telephone inquiries from individuals who have called the WSF information number. In connection with their other duties, Information Agents take reservations for space on the international ferry run between Anacortes and Sydney, B.C. To secure these reservations, Information Agents obtain credit card authorizations as a deposit. No cash or check transactions are negotiated and the reconciliation of credit card charges is handled by WSF's accounting department.

By letter dated May 9, 2001 WSF notified the IBU of some changes it expected to make upon implementation of the Summer schedule. The changes affecting Information Agents was to assign them to monitor the WSF Web Page and fill orders for monthly passes by processing credit card authorizations for such passes. WSF posited that it had a right to make such changes,

including assigning the function of web sales, as it involved an issue of customer service. WSF also acknowledged a duty to negotiate over the "impacts and effects" of such assignment. While the IBU asserts that it told WSF initially that it was unwilling to sit down and negotiate any such change, it contends that it later had a change of heart and orally advised WSF of its willingness to bargain. WSF denies this contention, claiming the first notice was well after the filing of the unfair labor practice charge in this matter and WSF's implementation of the web sales assignment. In any event, the first written request to bargain over the assignment of web sales and certain other issues, occurred in a letter from IBU's Conklin to WSF's Manning dated August 2, 2001. Manning replied under date of August 6, 2001, forcefully denying any previous communication from the IBU in which the union reversed its previous position regarding impacts and effects bargaining. The IBU contends that any and all sales are the exclusive province of the Ticket Sellers and the only way Information Agents could be utilized to make sales is if they successfully transferred to the Terminal Department. The only way this could be accomplished is if no layoffs resulted in the Terminal Department from such transfer. WSF on the other hand maintains that because Information Agents have been performing credit card sales since interest arbitration in 1999, and at the time of the web sales implementation no Ticket Sellers made credit card sales, the Information Agents were the logical recipient of the web sales work.

WSF conducts seasonal bids, usually in connection with planned schedule changes, but permitted by contract to occur up to five times a year. This negotiated practice gives the represented employees the stability of knowing their schedule in advance for the duration of the extant sailing schedule, or until the next seasonal bid. There has apparently not been a "late-spring" bid in the past, and notification to employees in April, 2001 caught employees and the IBU by surprise.

WSF explains the reason for the late spring bid in 2001 as an outgrowth of public meetings WSF held with the public in various cities served by WSF. Such meeting produced a "public outcry" when WSF explained the need for fare increases. The essence of the public concern, as interpreted by WSF caused a review of staffing levels to determine whether a reduction in staffing could result in a smaller fare increase. WSF responded by reducing staff hours in some terminals and thus needing, in its view, to re-bid the schedule. The procedure for re-bids is controlled by Rule 12.02(8)(a) which states:

Prior to each major schedule change (currently Spring, Summer, Early Fall, late Fall, and Winter) the Employer will post the new system-wide Terminal work schedules at each Terminal. The schedule will reflect system-wide Terminal work schedules at each Terminal. The schedule will reflect system-wide part-time shifts and on-call assignments. Not more than five such postings will be required annually.

While implementation of the late spring bid was originally planned for April 4, 2001, it was delayed until April 16 to allow for considering and incorporating some of the union's suggestions. Bids were posted on April 16; positions were filled on May 6, 2001. WSF contends this was in excess of the contractual requirement of Rule 2.04 of Appendix B which states: "Except in cases of emergencies, the Employer shall give two (2) week's notice before instituting shift changes for terminal and information departments."

IBU maintains that the parties have had a practice of permitting two weeks between the final assignment of positions in a major schedule change bid, and the date new the employees assume positions. The importance of this distinction is that before a final assignment is made, there may have to be multiple re-bids and new versions to respond to employee complaints of errors in the bidding process. In the case of the late-spring bid it is likely that there were three versions of assignments sent out, the first on April 19 or 20, the third on or about April 25. The intervening

time periods provided terminal managers the opportunity to review assignments and make any changes necessary prior to publishing a new version.

The contract provision governing schedule changes appears to identify the timing of schedule change bids as Spring, Summer, early Fall, late Fall and Winter. The rule permits up to five such changes in a year. Testimony established that the late Fall bid has not been held for the last fourteen years, thus the late Spring bid was the fifth schedule change bid for the year preceding the filing of the charge, or for the Calendar year 2001 it would have been the second of five changes.

## **POSITIONS OF THE PARTIES**

### **Position of IBU**

The IBU takes the position that WSF unilaterally implemented changes in past practice regarding (1) its system for re-bidding work shifts, (2) its use of Terminal Agents to perform the work of Terminal Employees, (3) its use of Information Agents to perform Ticket Seller work and (4) its use of subcontractors to perform Ticket Seller work. IBU further posits that such changes in past practice were mandatory subjects of bargaining.

### **Position of WSF**

WSF maintains that there is a procedural basis to dismiss the IBU charges in their entirety. In two separate motions WSF sought to gain information on the particulars of the allegations made by IBU, which would enable WSF to prepare and defend the unfair labor practice allegations. WSF contends that IBU fell far short of satisfying its obligation in this regard and it urges dismissal on that basis.

WSF maintains that their action in conducting a late-Spring bid was carried out according to contractual rules. It further maintains that the initial decision is a staffing decision and as such a

fundamental prerogative of management, not subject to bargaining. Regarding the use of Terminal Agents to perform terminal department work, WSF posits that it has always expected Terminal Agents to help out with any and all terminal department functions when needed. WSF maintains this longstanding practice is supported by record testimony from every witness that testified on this issue. As to the issue of Web Sales, WSF concedes that the impact and effect of assigning such duties would require bargaining, but as to the initial decision, it maintains the right to make such assignment, and further defends that it was a logical assignment in that Information Agents were already doing credit card sales in connection with the Anacortes reservations. At the time of the institution of web sales, no employee was performing credit card sales except for the work done by Information Agents in connection with the Anacortes reservations.

### **DISCUSSION**

In some respects the issues of late-Spring schedule changes, terminal work skimming and Web sales are related. The genesis of each appears to be the public meetings in connection with the proposed tariff increases in early 2001. Responding to public concerns, WSF sought ways to meet a public perception that staffing reductions could result in a smaller fare increase. The alleged skimming came about as a result of adjustments to the schedule, and greater efficiencies through technology were instituted as a result of the new fare schedules with the web sales of monthly passes.

A threshold issue regarding the alleged subject unfair labor practice charges is the question of whether the issues in controversy are mandatory subjects of bargaining under the existing case law. MEC law is clear that bargaining will be required in determining the impact and effect of those changes that are found to be mandatory subjects under the statute. *See IBU v. WSF, 197-MEC (1998), enforced, Dept. of Transportation, WSF v. IBU et al. (Thurston County Sup. Ct., No.*



98-2-01525-7). We will not attempt to deal with the issue of sales of "bus passes" which can be used to travel both on the ferry and on the bus. While there was a reference to this subject in testimony of one of the witnesses, it was neither alleged nor was it fully litigated and it is not part of this proceeding.

Turning first to the schedule changes and late Spring bid, it is clear that the subject matter is a mandatory subject of bargaining. Thus there is a negotiated procedure, which governs the way in which seasonal bids, and assignments are carried out. The procedure is familiar to both parties to the contract, and all employees have experienced the process throughout much of their employment history at WSF. The contract provides at Rule 12.02(8)(a):

Prior to each major schedule change (currently Spring, Summer, Early Fall, Late Fall and Winter)the Employer will post the new system-wide Terminal work schedules at each Terminal. The schedules will reflect system-wide part-time shifts and on-call assignments. Not more than five such postings will be required annually.

What distinguishes this late Spring bid from past schedule change bids is that in the past there had not been a late Spring bid. The contract provision, however, provides for up to five schedule changes per year. While there is reference in the contract clause to what the current practice was when that clause was implemented, there is no restriction, which would forever, bind the WSF to follow that schedule change practice. It is clear from the record that there has not been a late Fall bid for a number of years. Accordingly, WSF is entitled to post five major schedule change bids annually, and the late Spring bid was the fifth for the year. Moreover, notice was given to IBU and the schedule change was delayed for a period while some of IBU's suggestions were incorporated in the new schedule. When the bid took place, IBU contends that employees were not given a two-week notice prior to implementation. Testimony is unclear as to any established practice defining how the two-week notice is calculated, but in the absence of any

established practice it is clear that there was in excess of two weeks between the April 16, 2001 posting of bids and the filling of positions on May 6, 2001. It is further clear that no layoff resulted from the late Spring bids and schedule revisions.

As to the "skimming" issue, there is evidence in the record of a sporadic practice of assigning Terminal Agents to fill in or cover the positions of terminal employees for a variety of reasons. Thus several witnesses recounted occasions wherein they had observed or heard of Terminal Agents relieving a ticket seller or traffic attendant on occasions which include illness, robbery, traffic overloads which were unexpected and in some instances, such as the landing of the first boat in the morning at the Colman Dock and at Anacortes in the fall and spring schedules. The time frame of such sporadic practice is unclear, but at least some of them occurred in the period surrounding the creation of the late Spring schedule.

The IBU presented evidence of a more regular practice, involving employee Rock McInnes who did traffic attendant work at the Edmonds Dock. Under the Fall schedule McInnes realized that on his Friday assignment, he was alone on the dock for the arrival of the first boat of the day from Kingston. McInnes felt this condition unsafe and complained to management. Management responded with observing this situation and suggesting to the Terminal Agent that a solution would be to have the Agent stand by on the first arrival Friday morning to assist if there were problems in controlling the traffic. This solution was implemented for the duration of the Fall schedule and presumably for the Winter schedule as well. Both Fall and Winter schedules had the extra sailing on Friday which occasioned spreading the traffic attendants work over a time period which exceeded twenty hours of operation. IBU contends that the WSF solution was a unilateral change in that it assigned a duty to Terminal Agents, which was clearly traffic attendant work. IBU concedes the somewhat sporadic practice of using Terminal Agents in the past for emergency

assignments filling in for terminal department employees, but contends any past practice should not be considered controlling because in 2001 IBU and WSF negotiated a separate collective bargaining agreement covering the Terminal Agents. Any past practice was neutralized by the new contract according to IBU. WSF, on the other hand maintains that the agreement to cover the Terminal Agents under their own contract was expressly done with an agreement “that there would be no negotiated change to the conditions contained in the agreement, or in the practice, during the filing and execution of the redefinition period.”

When IBU and WSF met to form a new agreement, they did not come to any accord nor is there any evidence of discussion about the past practice concerning the Terminal Agents. Rather, the parties took out those provisions unique to the Terminal Agents and signed the resulting agreement without "wordsmithing" the final product. While the parties had an opportunity to discuss past practice and incorporate an understanding in the contract arrived at for Terminal Agents, they chose not to do so, nor is there any evidence it was discussed. There has been no successor contract negotiated since the breaking out of the Terminal Agents.

On the basis of the record before the MEC, it cannot be said that the sporadic use of Terminal Agents at various terminals was prohibited by contract or by practice. The regular assignment of a Terminal Agent to the landing of the Kingston to Edmonds boat on Friday morning presents a different issue, which in the MEC’s view required notice and bargaining. The impact is not substantial, in that no employee was laid off as a consequence; the time lost to terminal department employees could amount to only a fraction of an hour one day per week for a limited period of time.

On the issue of Web sales, the record shows that there was a decision to start such sales in connection with the scheduled fare increases. WSF informed IBU that it intended to introduce such

sales and that it intended to assign this function to the Information Agents. WSF informed IBU of the anticipated commencement date, June 15, 2001 and invited negotiations over any concerns as to impacts and effects of this decision, including retroactivity, but asserted its right to make the decision. IBU initially declined to negotiate, but at some future date after filing the unfair labor practice charge and after implementation of the Web Sales program, offered to bargain. WSF responded to an IBU request to bargain made in a letter dated August 2, 2001, with a letter to IBU dated August 6, 2001, in which WSF expresses some confusion in that IBU had filed an unfair labor practice charge over this subject. WSF then reiterated its request to bargain if IBU would withdraw its complaint.

MEC does not find that WSF had an obligation to bargain over the initial decision, which WSF maintains was made to better improve service to the public. It correctly noted that its obligation was to negotiate impacts and effects. While it is apparent that the IBU initially declined this offer, there did come a time when it sought to bargain over this issue, and was then rebuffed by WSF unless IBU first withdrew its complaint. This would appear to be unlawful under a long line of NLRB cases holding that a demand that charges be withdrawn as a condition of negotiating is a refusal to bargain. *Stackpole Components Co.*, 232 NLRB 723.

On the facts of record and for the reasons outlined above, the Commission now makes the following:

### **FINDINGS OF FACT**

1. The Inlandboatmen's Union and the Washington State Ferries are entities covered by chapter 47.64 RCW. Complainant IBU is and at all material times was, the exclusive collective bargaining agency for WSF employees under the cited statute.

2. On April 16, 2001 WSF notified employees of schedule changes, which necessitated a new schedule bid. Bids were awarded with the new schedule changes effective May 6, 2001.

3. In connection with the Fall 2001 schedule changes, WSF assigned a schedule, successfully bid by Rock McInnes, in which employee McInnes was the only traffic attendant on duty for the initial run from Kingston to Edmonds on Friday mornings. There are normally two traffic attendants working the Ferry landing.

4. Employee McInnes complained that the resulting condition was unsafe. WSF investigated and assigned a Terminal Agent to stand by in the event an extra body was needed on the first AM run on Friday.

5. On May 9, 2001 WSF notified IBU of some changes it expected to make in connection with the Summer schedule implementation. Among such changes were the advent of Web sales, to be made by information agents.

6. IBU filed an unfair labor practice complaint alleging the late Spring schedule change, the skimming of Terminal department work and the assignment of ticket sales work to the information agents as unilateral changes in mandatory subjects of bargaining.

7. WSF agreed to negotiate over the impact and effects of the Web sales assignment but later attached a condition that IBU must first withdraw its unfair labor practice complaint.

On such findings, the Commission now reaches the following:

### **CONCLUSIONS OF LAW**

1. The Marine Employees' Commission has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW; especially RCW 47.64.130 and 47.64.280.

2. WSF discharged its bargaining obligation with respect to the issue of making the late Spring schedule change when it notified employees and the IBU of its intent in Spring, 2001.

3. WSF had a right under Rule 12.02(8)(a) to make such change and the late Spring schedule change was carried out in accordance with the contract.

4. WSF did not skim terminal department work when it made sporadic and temporary assignments of terminal department work to Terminal Agents.

5. With the implementation of the Fall, 2001 schedule, the McInnes complaint and subsequent investigation WSF made a regular and continuing assignment to a Terminal Agent which lasted for the duration of the Fall schedule, and may have continued into the Winter schedule. WSF failed to bargain over this regular and continuing assignment. Such failure is a refusal to bargain.

6. WSF had a right to implement Web sales and to make the assignment of work. It also had a duty to bargain with IBU over the impact and effects of this assignment, which it acknowledged.

7. WSF refused to bargain when it conditioned its agreement to bargain over impact and effects on IBU's withdrawal of the unfair labor practice complaint.

Having read and carefully considered the entire record and having entered its Findings of Fact and Conclusions of Law, this Commission now hereby enters the following Order:

### **ORDER**

1. The unfair labor practice complaint filed by IBU against WSF on May 9, 2001 is sustained in part and dismissed in part.

2. As to the allegations concerning the late Spring bid, MEC finds no merit and hereby dismisses that part of the unfair labor practice complaint.

3. WSF is ordered to cease and desist from refusing to bargain over the regular assignment of terminal department work to Terminal Agents.

4. If WSF is continuing to assign a Terminal Agent to the initial Kingston-Edmonds run on Friday mornings, it must cease such practice and agree to bargain with IBU over any regular assignment of Terminal Agents to terminal department work.

5. In view of the limited nature of this regular assignment, this Order is intended to stop the practice of such regular assignments if they are ongoing, but no back pay remedy is required.

6. WSF must cease and desist from refusing to bargain with IBU over the impact and effects of WSF's assignment of Web sales to information agents. Any agreement reached must be retroactive to the initial date of Web sales assignment.

**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

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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 May 2002.

MARINE EMPLOYEES' COMMISSION

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JOHN NELSON, Hearing Examiner

Approved by:

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JOHN SULLIVAN, Commissioner

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JOHN BYRNE, Commissioner