

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC and
JAMES RUSSELL,

Complainant/Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 24-00 (Triple-Back ULP)
MEC Case No. 37-00 (Russell Grievance)

DECISION NO. 282 - MEC

DECISION AND ORDER

Schwerin, Campbell and Barnard, attorneys, by *Rob Lavitt*, appearing for and on behalf of the Inlandboatmen's Union of the Pacific and James Russell.

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 on August 4, 2000 when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice against the Washington State Ferries (WSF). IBU's complaint charged WSF with engaging in unfair labor practices within the meaning of RCW 47.64.130 by interfering with, restraining or coercing employees in the exercise of rights, and by refusing to bargain by making unilateral changes in the scheduling of triple-back watches. On November 9, 2000 IBU filed a grievance on behalf of employee James Russell contending that Russell's change in hours violated the extant contract between the parties.

In its review of these matters pursuant to WAC 316-45-110 the Commission determined that the facts, as alleged by the IBU in Case 24-00, may constitute an unfair labor practice, if later found to be true and provable. The Commission further found that the grievance in Case 37-00 arose out of the same events, and that it would serve economy and efficiency to consolidate these matters for hearing.

IBU has certified that the grievance procedures in the IBU/WSF collective bargaining agreement (CBA) have been utilized and exhausted. IBU has also certified that the Arbitrator's decision shall not change or amend the terms, conditions or application of said CBA; and that the Arbitrator's award shall be final and binding.

WSF filed a timely answer to the complaint and MEC Chairman John D. Nelson conducted a hearing in these consolidated cases on April 19, 2001. Briefs were received from the parties on June 25, 2001.

NATURE OF THE CASES

The IBU represents a unit of WSF employees, under chapter 47.64. RCW. James Russell is a member of that employee unit. This case is grounded in a Coast Guard mandated change of a long-standing practice by WSF, the scheduling of triple-back watches. While there is no contractual language setting forth the definition of triple-back watches, the parties agreed to a working definition as follows: A triple-back watch is three working shifts with two rest periods in a 40-hour period. While that definition is meant to apply to all triple-back watches, it should be noted that in the context of these cases the most frequent application of triple-backs is to the discussion of the Edmonds-Kingston "D" watch and "C" watch, which had been scheduled and bid in the spring of 2000. This schedule was to go into effect on the 18th of June 2000. James Russell had bid this schedule, which has been characterized as a part-time schedule in the normal bidding process which took place a couple of months before the effective date of the schedule. It was Russell's expectation that commencing June 18, he would be working the Edmonds-Kingston run from 2030-0030 Sunday through Thursday of each week of the schedule for a total of 20 hours per week.

In the time leading up to the Summer 2000 schedule and the attendant bids, WSF had been in ongoing discussions with the Coast Guard concerning the Coast Guard review of double-back watches. Apparently unaware of a triple-back practice, the Coast Guard expressed surprise, and informed the WSF in writing that it could no longer have triple-backs. During this same

timeframe WSF was under scrutiny by the Washington State Legislature, which was struggling with ways to cut Ferry budgets in the wake of the impact of I-695 passed the previous November. One of the cutbacks mandated by the Legislature was the late night run on the Edmonds-Kingston route. In the resulting schedules that were bid prior to the Summer 2000 effective dates, the WSF had further discussions with the Coast Guard, which agreed to some temporary extension of the triple-backs. Specifically, the Coast Guard agreed to temporarily permit some triple-back runs where the ferries were not crossing traffic lanes, or where the rest period preceding the next work period was longer, or where WSF agreed to supply an extra licensed officer on the ferry when crossing or traversing traffic lanes. Additionally, there was discussion concerning the need to eliminate a triple-back by the Edmonds-Kingston "C" watch wherein the Coast Guard permitted an oil dock trip to take place on the Edmonds-Kingston "D" watch, on the Monday night following the regular part-time shift. The "D" watch personnel would thereby extend their shift by the time required to take the boat down to the fueling dock. It was thought by WSF that such operation could be accomplished within the contractual constraints that would permit the trip without incurring overtime, but there is some reason to believe that WSF was overly optimistic in this regard. In any event, in discussions with the IBU concerning this proposed practice it was agreed that any employee who had bid this "D" watch who could not work the extra hours required by the fuel run would be allowed to be relieved for not only the period of this required fuel dock run, but also be relieved from the normally scheduled time of the shift which preceded the fuel run.

Whether there was bargaining over the mandated decision to eliminate the triple-backs is the question presented by Case 24-00. There clearly were discussions between the parties, with agreement reached as to how to handle the fuel dock run when that run was changed after the bidding process resulted in James Russell being awarded his part-time position for the duration of the Summer 2000 schedule.

POSITIONS OF THE PARTIES

Position of IBU

The IBU takes the position that WSF failed to bargain over the Coast Guard required elimination of the triple-back watches. While IBU acknowledges that discussion took place over accommodating WSF's need to reassign the fuel dock run in order to eliminate a triple-back for fueling, indeed, IBU believes an agreement was reached over that discussion on May 18, 2000. IBU further posits that WSF agreed in return for the fueling accommodation, to return to the original Edmonds-Kingston schedule. It is IBU's view that WSF later reneged on this agreement, and consequently made all triple-back watch changes unilaterally. A consequence of this action by WSF was to remove James Russell from the "D" watch schedule on those occasions, the Monday night run, when the ferry would go to the fuel dock before going out of service for the night.

Position of WSF

The position advanced by WSF is that the Coast Guard mandated elimination of triple-back watches. That through the process of revising schedules and tweaking budgets because of state legislative concerns, most triple-backs were eliminated. When it became apparent that the Coast Guard would not permit an exception on the Edmonds-Kingston fuel dock run, a resolution was reached with IBU on May 18, 2000 wherein the part-time or "D" watch could make the fueling run. In order to protect any employee who had been awarded a bid for the "D" watch, WSF agreed to relieve such employee from the assigned watch by an on-call employee. WSF denies that there was any agreement reached or even discussion had, concerning a return to the original summer schedule. WSF contends that it was the IBU who wrongfully withdrew from the Memorandum of Understanding reached May 18, 2000 and which was drafted by the IBU at the conclusion of discussion. In view of the contention that WSF was acting in accord with its putative agreement of May 18, 2000, the request to relieve James Russell from scheduling commitments on the fuel dock shift was appropriate and required by said agreement.

DISCUSSION

Whether bargaining was required over the Coast Guard mandate to eliminate triple-backs is a threshold question in the unfair labor practice issue. There is a body of MEC law, which holds that WSF has a statutory obligation to bargain over implementation and effects of actions mandated by outside entities which impact bargaining employees. *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). In determining whether WSF met this statutory obligation the factual situation herein is somewhat clouded by recollections which are at some variance. Time, of course can cause any of us to attribute as factual, statements which we should have made or which we merely thought of at the time or since. In sifting through the evidence presented, it is clear that the general subject of triple-back elimination was not a bargaining problem. Thus when presented with the information from Port Captain Malde that his discussions with the Coast Guard, which were ongoing in 1999 and early 2000, that touring watches would continue to be permitted, but that triple-backs would have to be eliminated, the IBU did not demand immediate bargaining over implementation and effects. There came a time after publication in the WSF newsletter to employees, Fleet Focus, that the Coast Guard was requiring an end to triple-back watches, that IBU demanded to bargain about the issue. In its demand to bargain IBU opined that WSF had a statutory obligation to bargain over any changes in policy, specifically the triple-back elimination. IBU also requested immediate bargaining over proposed schedule changes. WSF responded to the request by generally denying any obligation to bargain beyond the requirements of Rule 29.05 of the Collective Bargaining Agreement. The IBU then requested a meeting in accordance with Rule 29.05, and the meeting was actually held on July 14, 2000. Evidently the meetings to review schedules did not create additional problems, and as of the time of the hearing in this matter, all triple-backs had been eliminated.

Going back to the bidding process leading up to the awarding of bids for the 2000 summer schedule, there did not seem to be an issue until some "C" watch employees on the Edmonds-Kingston run contacted the Coast Guard to complain that although they had been informed that triple-backs had been eliminated, their "C" watch schedule would require them to perform a triple-back for purposes of the weekly refueling run. The Coast Guard reported these complaints

to WSF, and Captain Malde met with IBU Business Agent Dennis Conklin to discuss a resolution. Conklin also met with WSF Labor Relations Manager Mike Manning to reach an agreement over this issue.

The exact terms of agreement were not finalized until May 18, 2000. Prior to that date, Captain Malde had proposed, and the IBU agreed, that the "D" watch on the Edmonds-Kingston run, a watch which was scheduled from 2030-0030 Sunday through Thursday could be extended one night per week to do the refueling, and that the triple-back for fueling purposes which the "C" watch had been assigned could thus be eliminated. Of concern to WSF was avoiding overtime consequences for the "D" watch, and precluding a contractual requirement to re-bid the run if the fueling time exceeded 2 hours 55 minutes. Manning spoke with either Conklin or Regional Director Pete Jones on the 18th of May, and after each side had taken notes about the exact language of the agreement and read the notes to the other party, Jones agreed to have his secretary draft the language to send to WSF. Manning was scheduled to leave town for a vacation after work on the 18th, so IBU agreed to fax the drafted language to him yet on the 18th. The Letter of Understanding (LOU), in evidence as Employer's exhibit 2, states as follows:

The Inlandboatmen's Union of the Pacific/Puget Sound Region agrees to Washington State Ferries extending a four-hour shift to an eight-hour shift without incurring overtime.

This applies to the Edmonds/Kingston, E-night watch only and will terminate at the end of the 2000 summer schedule. As a result, a re-bid of Edmonds/Kingston will not be required by the Inlandboatmen's Union.

Any employee who bid the 4-hour watch and requests not [sic] work the 4-hour shift, or not work the singular day which went from 4 hours to 8 hours, will have their request honored and the shift will be filled with an on-call employee.

It should be noted that the parties stipulated that the reference to the E-night watch was in error and meant to describe the "D" watch.

IBU's Conklin was attending an arbitration on the day this letter was drafted. Conklin testifies that Pete Jones handled the fine-tuning of the language, directing that it be sent to Manning at

WSF in an expedited fashion. Conklin further testifies that the quid pro quo for this letter of understanding was a return to the original summer schedule for Edmonds-Kingston. WSF's Manning denies that there was any discussion of a return to the original summer schedule. Captain Malde, agreeing with Manning, testifies that a return to the original summer schedule would have created enormous problems in that the entire system may have had to be re-bid. In any event, under date of May 19, Conklin sent Manning a letter in which he stated that in return for the terms of the LOU quoted above, the WSF had agreed to reinstate the first published Kingston-Edmonds summer schedule. Conklin also testified that he had telephoned Manning prior to the latter's leaving for vacation on May 18th to alert Manning to this omission in the LOU draft. Conklin asserts that Manning agreed to this addition.

As to the existence of any "first published Kingston/Edmonds schedule" it appears that Business Agent Conklin meant the fall/winter/spring schedule under which the WSF operated until the bid process giving rise to the Summer 2000 schedule. Manning and Captain Malde refused to accept this condition, claiming that the operational needs of WSF would not permit going back to such a schedule. In support of this denial, Captain Malde testified that in his opinion, given the strong views of the Coast Guard, the reinstatement of triple-backs would cause the Coast Guard to tie the route up. Both Manning and Malde believed that agreeing to this "return" condition would cause chaos operationally, and would fly in the face of legislative mandated cuts in service as well.

In view of the disagreement over the language of the LOU draft, neither party ever signed the document. Notwithstanding, when James Russell complained to Conklin that his many responsibilities prevented him from working the 8 hour shift required to run to the refueling dock, Conklin arranged with WSF to excuse Russell from the refueling run as well as from his normal shift which he had bid. Russell was then replaced by a relief employee for the entire period of his normal shift on the night of the fuel run as well as the additional time the fuel run took. It should be noted that Russell had manifest scheduling problems including family responsibilities to his ailing wife, aging parents and a foster child with medical and developmental issues. He also had a permanent part-time job with Seattle-King County Metro, where he had bid a bus-driving route to fit around all of his other schedule problems.

In resolving the issues raised by the alleged refusal to bargain complaint, it is apparent that WSF denies the obligation under the RCW 47.64. Notwithstanding this position, WSF offered to bargain pursuant to Section 29.05 of the CBA. Indeed, discussions were had with the IBU pursuant to 29.05 both regarding the Summer 2000 schedule changes and later in July, preparatory to the bidding of the Fall, 2000 schedule. Section 29.05 states:

Before the Employer changes any vessel running schedules, the Employer will meet with the Union, if requested to do so, to advise and discuss the changes with the Union.

Thus the IBU had the clear opportunity to discuss any schedule changes which were contemplated by eliminating or reducing the triple-back watches. It is not clear from the record what the full extent of any such changes was. What is clear is that under the changes made to the Summer 2000 schedule to satisfy Coast Guard concerns, the IBU was informed by Captain Malde, and an effort to negotiate an understanding was made by WSF's Manning and IBU representatives Conklin and Jones. Whether there was a renegeing on the part of WSF when it came to finalizing the agreement is one of the most difficult issues to resolve on this record. After reviewing the testimony of all participants in the activities leading to the drafting of the LOU, it does not appear logical that WSF would have agreed to the condition of returning to the earlier schedule. While it is true that IBU had two participants engaging the issue with WSF's Manning at different times, it was the IBU that drafted the language of the document. While Conklin's letter was drafted the following day, it was not received by Manning until his return from vacation on May 30.

It is not contended by any party that the issue of triple-backs is addressed in any fashion in the CBA. While silent on the matter, the CBA does have some requirements for input from the IBU. Those provisions are found at Section 29.05, quoted earlier, and the provisions governing the bidding process.

WSF contends that the matter of scheduling must, in the final analysis, be left to its discretion under the management rights section of the CBA. With the contractual rules dealing with

required meetings with the IBU to discuss schedule changes, the rules dealing with tour watches and the total absence of any discussion concerning triple-backs it is the conclusion of WSF that there is no need to further discuss the matter of the triple-back elimination beyond such discussions, as requested by the union, concerning schedule changes.

Inasmuch as there is no evidence of ongoing harm, which resulted from the elimination of the triple-backs, there does not appear to be an ongoing bargainable issue. The Coast Guard, in its wisdom, and based on its experience with other similarly situated entities, felt that the triple-back watches posed a safety issue for the WSF, its employees and the Public, which the Coast Guard is committed to protect. The triple-backs were eliminated with some allowances made by the Coast Guard to insure an orderly transition. In implementing the new requirements, WSF did engage in notification and bargaining with the IBU to the extent required by the CBA. While one casualty of this schedule shift was employee Russell, it is noted that his request to be relieved of the increased hours required by the change was honored, in accordance with the agreement of the parties to the CBA.

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 a unit of WSF's employees under the cited statutes.
2. James Russell is an employee of the Washington State Ferries. He is classified as a deckhand and at times material to this proceeding was working a part-time watch on the Edmonds-Kingston route of WSF. Russell is represented by the Inlandboatmen's Union and is subject to the collective bargaining agreement between WSF and the IBU. This agreement specifies MEC as the Arbitrator of unresolved allegations of contract violations.

3. In March 2000, the U.S. Coast Guard notified the WSF that the Coast Guard would no longer permit WSF to schedule “triple-back” watches, due to Coast Guard concerns over safety issues. Ensuing discussion between the Coast Guard and WSF resulted in a phase out of triple-backs until by the Fall sailing schedule of 2000, there were no more triple-back schedules.
4. A triple-back watch is defined by the parties as three working shifts within a 40-hour period of time.
5. In April 2000, all IBU deck employees submitted bids for the work times they wanted under the Summer 2000 sailing schedule. Bids were awarded, to be effective with the new schedule, on June 18, 2000. James Russell was awarded a schedule characterized as a part-time graveyard schedule starting work at 2030 on Sunday and finishing at 0030 Monday, to be repeated the next four consecutive days.
6. The shift Russell was assigned to was the “D” shift on the Edmonds-Kingston run. In May 2000 the WSF and IBU entered discussions to add hours to the “D” shift to enable this shift to accomplish a fuel dock run previously performed by the “C” shift. This change was intended to eliminate a triple-back watch by the “C” shift, and was attended by language agreeing to relieve any employee who could not work the additional hours.
7. James Russell, due to personal scheduling issues, requested to be relieved from his extended shift and through the efforts of IBU, Russell was relieved.
8. IBU filed a formal charge of unfair labor practice, against WSF with this Commission. That charge along with WSF’s answer thereto were timely under the cited statutes and the applicable sections of the Washington Administrative Code.
9. IBU filed a formal request for arbitration regarding James Russell’s grievance that WSF had breached the agreement regarding timely notification of work hours and pay.

10. IBU and WSF have engaged in several discussions and bargaining sessions over the Coast Guard mandated elimination of triple-back watches. There is disagreement as to whether this matter was fully bargained.

On such findings of fact, 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 eliminating triple-back watches when it entered into discussion with IBU over scheduling decisions pursuant to rule 29.05 of the CBA.
3. While no written agreement was reached over the impact of triple-back watch elimination, the parties fully discussed such impact and by exchange of proposals on May 18, 2000, worked out a resolution for any employee assigned to the Kingston-Edmonds "D" watch whereby such employee could request relief from any additionally assigned hours.
4. Employee/grievant James Russell, impacted by this May 18 resolution, was permitted to be relieved from the watch that had been extended by the triple-back discussion. IBU intervened on Russell's behalf to assure that he was so relieved.
5. IBU has failed to establish by a preponderance of the evidence that WSF has refused to bargain over the triple-back change.
6. IBU has failed to establish a contractual violation by WSF with respect to the scheduling of James Russell's hours.

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 AND AWARD

1. The unfair labor practice charges filed by IBU on August 4, 2000, against the Washington State Ferries and docketed as MEC Case No. 24-00 are without merit and are hereby dismissed.
2. The grievance of James Russell and Request for Arbitration filed by IBU on November 9, 2000, in Case 37-00 is hereby denied.

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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 August 2001.

MARINE EMPLOYEES' COMMISSION

JOHN NELSON, Hearing Examiner/Arbitrator

JOHN SULLIVAN, Commissioner