

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

JOHN PELLAND,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 26-03

DECISION NO. 403 - MEC

DECISION AND ORDER

APPEARANCES

Margaret Pelland, appearing on behalf of John Pelland.

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

Wolfstone, Panchot and Bloch, by *Steve Ross*, Attorney, appearing for the International Organization of Masters, Mates and Pilots.

BACKGROUND

THIS MATTER IS BEFORE the Marine Employees' Commission, (MEC) based upon an unfair labor practice complaint filed by John F. Pelland on December 13, 2002. The case, docketed as MEC Case No. 26-03, alleged that Washington State Ferries, (WSF) had violated RCW 47.64.120(1) when it failed to fill Extra Relief Positions for Licensed Deck Officers by strict seniority.

Complainant Pelland amended his complaint on April 4, 2003 to include allegations of a violation of RCW 47.64.130(1)(a) claiming WSF had interfered with, restrained or coerced Pelland in the exercise of his statutory rights, and further discouraged Pelland's membership in the Master, Mates and Pilots Union.

On April 16, 2003 WSF requested dismissal of the complaint, which request was opposed by Complainant and denied by the MEC.

In due course, MEC acknowledged the unfair labor practice filing, and further, on April 24, 2003 issued an Order denying WSF's request for dismissal of the Complaint. In setting the case for hearing, MEC also ordered the participation of both the Master, Mates and Pilots Union and the Inlandboatmen's' Union of the Pacific as necessary parties.

WSF responded to the complaint with an Answer and a denial that it had engaged in the unfair labor practices alleged. With issues thus joined, the matter came on for hearing before then Chairman, John D. Nelson, the hearing conducted on July 22, 23, and 24, and August 12, 2003.

Briefs were timely filed by Complainant, WSF and MM&P.

NATURE OF THE PROCEEDING

Pelland alleges that WSF unilaterally changed its practice of assigning Relief Deck Officers in the summer season of 2002, without bargaining with the International Organization of Masters, Mates, and Pilots (IOMM&P or MM&P herein).

In addition to the original charge of unilateral change, Pelland amended his Complaint to allege that the complained of unfair labor practice by WSF also discouraged membership in MM&P, discouraged membership in the Inlandboatmen's' Union of the Pacific (IBU) and interfered with, restrained and coerced Pelland in the exercise of his rights under RCW 47.64.130(l)(a).

All of the elements of the amended complaint are derivative from the original charge of unilateral change. In related matters, Pelland filed grievances under both the IBU contract and the MM&P contract. Information elicited during the hearing phase of this case and thereafter in

briefs of the parties suggests that the IBU grievance was, thereafter, withdrawn. The MM&P grievance was considered by WSF and MM&P to have been settled. Pelland disagrees with the settlement characterization.

Both WSF and MM&P maintain that there can be no unilateral change herein because the contracting parties, in the context of Pelland's grievance proceeding, conclusively resolved the issues giving rise to the grievance, which were co-extensive with the issues raised by Pelland's unfair labor practice complaint. WSF further posits, and MM&P appears to concur, that the practice complained of by Pelland, permitting the use of retired Deck Officers during the summer season, had been the agreed upon policy of WSF/MM&P for in excess of 20 years.

It appears that there were elements of Pelland's grievance concerning other issues of bypassing, which were addressed by the grievance process. Such resolution was apparently made but remained unfulfilled at the time of this hearing, presumably awaiting outcome of this process.

While not raised directly by the parties, nor addressed in briefs, an important issue that needs to be addressed by the MEC is the question of Pelland's standing to raise the issue of unilateral change, in that he is not a party to the collective bargaining relationship, but rather stands in the shoes of a third party beneficiary to the collective bargaining relationship. The resolution of the issue of standing is necessary if complainant Pelland is successful in proving that a unilateral change occurred.

Pelland contends that the controlling contract provisions support his claim of unilateral change. Specific contract provisions which complainant contends define his particular situation include:

2.01.06 Deck Officer The term “Deck Officer” shall include all Masters Mates, Chief Mates, Second Mates, and Temporary Mates in the employ of the Employer.

2.01.12 Extra Relief Deck Officer An “Extra Relief Deck Officer” is a Deck Officer assigned to an extra relief position. The number of Extra Relief Deck Officers shall be limited to a specific number to be determined by negotiations and agreement between the Union and the Employer, and subject to review from time to time.

2.01.13 Extra Relief Position The term “Extra Relief Position” or Extra Relief Assignment” refers to a position which is expected to exist for less than thirty (30) days.

2.01.27 Seniority “Seniority” is that quality of rank possessed by a Deck Officer, with respect to other Deck Officers, acquired as a result of the Deck Officer’s length of service either with the Employer generally, or in each classification of Deck Officers.

20.06 Mates’ Seniority Roster The Mates’ Seniority Roster shall consist of all Deck Officers who have established Mate seniority and have not been promoted to Master. A Mate’s seniority date will be established as of the first date worked as a Mate, provided the Mate possesses minimum license qualifications. Provided, however, that any employee who has worked as a vessel crew member for the Employer for six (6) months or more shall establish a Mate’s seniority date as of the day on which the employee presents the Mate’s seniority license to the Employer and meets all minimum license qualifications.

20.14 Extra Relief Positions The Employer shall fill all Extra Relief Positions only with an Extra Relief Deck Officer and, in so doing, the Employer shall be strictly and absolutely governed by seniority, and shall be required to fill each Extra Relief Position opening with the most senior Extra Relief Deck Officer possessing the minimum license qualifications for the available Extra Relief Position opening

20.20 Service By Retired Deck Officers Present or previously employed Deck Officers who retire in good standing from the Employer’s service may, with the approval of Union and the Employer, obtain a summer temporary appointment not to exceed ninety (90) working days during the period May through September of each calendar year. The temporary appointment is contingent each year upon the Deck Officer providing, at the Deck Officer’s expense, a current copy of the applicant’s up to date license, a drug free certificate, and a medical certification of fitness for duty and completing an orientation and refresher training as may be required by the Employer. The assignment of a retiree should not supplant work normally assigned to designated relief Deck Officers, or prevent promotion of regularly assigned Deck Officers. Retirees shall be used primarily for comp time

relief, and in defined emergencies may be used to fill in for a Deck Officer who is absent due to illness. An “emergency” is defined as a situation in which no qualified Deck Officers are available and a service disruption is imminent. Retirees will not be used for the principle purpose of avoiding overtime assignments.

The MM&P Delegate Committee will schedule the comp time by March 1st of the year in which comp time is proposed to be used. . . . MM&P and the Employer agree that the assignment of retirees does not provide any special rights or privileges relative to retirement, seniority or any other benefit. Upon hiring, retirees will be made aware of this contract provision.

There is no dispute among the parties, that Complainant Pelland meets the qualifications of Extra Relief Deck Officer. When hired as an unlicensed deck hand, Pelland obviously presented maritime experience. He knew of the practice at WSF of hiring unlicensed crew and allowing them to progress to licensed positions upon meeting United States Coast Guard qualifications, and subject to position and vessel orientation, advance to licensed positions. Pelland also knew that such advancement was subject to the availability of positions and that he would eventually move into a different seniority system and be subject to representation by a different union. Pelland chose to join the MM&P when he did. No one in the WSF management or in the MM&P hierarchy gave Pelland any assurances as to when his conversion would take place or what his expectations as to the mix of unlicensed vs. licensed work would be. Indeed, he bid a regular watch for the Summer Sailing Schedule, and to the extent licensed openings occurred on the assigned days of his scheduled AB position on the Winslow “G” watch, he would have to be relieved in order to advance to the licensed assignment.

Pelland obtained a copy of the MM&P contract after some apparent difficulty, and proceeded to study its contents, concluding that the some of the above-cited provisions should provide opportunities for dispatch to licensed positions. His concern grew as he perceived that even on his own watch, there appeared to be retirees working in licensed positions that he felt he

was qualified and contractually enabled to perform. Pelland grieved this perceived by-pass in July 2002. There followed other instances of Pelland observing retirees filling licensed positions, which he maintained, should have gone to him or other extra relief deck officers, and when he hadn't had any satisfaction on his grievance, he re-filed on August 26, 2002. He also filed a grievance with IBU on September 12, 2002. As noted above, the IBU grievance was later withdrawn; the MM&P grievances were processed to a point that is characterized by WSF and MM&P as resolution. Pelland steadfastly denies resolution, maintaining that the issue continues in that his efforts were not supported by his representative in the contractual Delegate Committee, or thereafter in his request for Adjudication.

In November 2002, Pelland was assigned to a Vashon route as a Mate. This was in the context of the bidding for the Winter Sailing Schedule, and the assignment was explained to Pelland to have occurred because no one bid for the position, and Pelland was the least senior Deck Officer without a permanent assignment. Pelland later learned that there were in fact individuals with less seniority who would have been available for the Vashon "G" watch assignment. Pelland considered this assignment to be retaliatory. WSF contends that this assignment was made in error based upon a contract interpretation that was made at the time, which concluded that Pelland was the least senior Deck Officer without a permanent assignment. The two individuals with less seniority had regular non-licensed assignments whereas Pelland was working on-call for that period.

WSF argues that no unilateral change can be found in circumstances present herein. MM&P agrees with that conclusion, and advances a further argument that the matter has been dealt with through the operation of the contractual grievance procedure, and that MEC has no

jurisdiction to conduct a *de novo* review after the contractual parties have reached resolution under RCW 47.64.150.

ISSUES AND ANALYSIS

It is noteworthy in this case that both parties to the MM&P/WSF contract maintain that the issues before the MEC in this complaint are parallel to the issues presented in Pelland's grievance. Each party to the contract denies that any unilateral change occurred. Both maintain that the grievance has been resolved, although Pelland contends otherwise. What is apparent from all of the circumstances is that at its heart, this case is about interpretation of the collective bargaining agreement. Pelland's claim of unilateral change, when the actual parties to the contract deny any change, is difficult to sustain. While there may be year-to-year fine-tuning and tweaking of the contractual requirements and application of various seniority rosters, it is undisputed that retired Deck Officers have been utilized in various capacities for more than 20 years. The contractual nuances of comp time or defined emergencies or imminent service disruption, all conditions that permit the use of retirees during the Summer Sailing Schedule, are precisely the kind of issues to be decided and resolved by the parties. The MEC has no authority to modify an agreed-upon interpretation in these circumstances. RCW 47.64.150.

For guidance in handling this matter, the MEC has looked at similar kinds of cases brought before the National Labor Relations Board for adjudication. In *Alpha Beta Co.*, 273 NLRB 1546 (1985) the Board announced its intention to apply the deferral principles set forth in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984) to settlement agreements reached during grievance and arbitration proceedings. In discussing the requirements for deferral, the Board notes that a union can bind unit employees to the terms of a grievance settlement. The Board observes that the union's conduct remains subject to the duty of

fair representation, citing *Metropolitan Edison v. NLRB*, 460 U. S. 693 (1983). It will be noted that no issue of fair representation is before the MEC.

Thus, the NLRB holds that "...when a grievance settlement is reached prior to arbitration, we examine whether the unfair labor practice issue was considered by the parties. This criterion is satisfied when the contractual issue and the unfair labor practice issue are factually parallel, and the parties were generally aware of the facts relevant to resolving the unfair labor practice..."*United States Postal Service*, 300 NLRB 196 (1995).

In the matter before the MEC, Complainant Pelland, brings unfair labor practice allegations which substantially parallel his grievance filing which complains of having been bypassed by retired Deck Officers. Pelland has no standing to claim unilateral changes in these circumstances. The parties to the contract have modified their agreement from time to time to address concerns of current and retired Deck Officers. It is their instrument to modify. No individual can credibly claim that a unilateral change has occurred when the parties convincingly contend otherwise.

The MEC finds that the issues presented in Pelland's grievances are factually parallel to those alleged as unfair labor practices. WSF and MM&P resolved the grievances, which resolution is binding upon Pelland despite his disagreement with same. While that resolution was unfulfilled at the time of hearing, it should be accomplished forthwith, if not already done. The subject unfair labor practice allegations will be dismissed.

In reviewing all of the evidence herein, including pre-hearing Motions, evidence presented at hearing and the briefs of the parties, the MEC makes the following factual findings and legal conclusions.

FINDINGS OF FACT

1. Complainant John Pelland was working a bid watch of 80 hours per payroll period, in an unlicensed AB seaman position on the Winslow "G" during the 2002 Summer Sailing Schedule.
2. Pelland was qualified as a Deck Officer and maintained seniority on the MM&P Mates' seniority roster with a date of February 4, 2002.
3. Pelland met contractual requirements for standing and seniority for Extra Relief positions during the Summer Sailing Schedule in 2002.
4. Pelland was dispatched to some Extra Relief positions in Summer 2002.
5. Retired Deck Officers were regularly and frequently dispatched during the Summer Sailing Schedule period.
6. Complainant Pelland filed grievances with MM&P on July 17, and August 26, 2002.
7. Pelland's grievances raised issues of having been by-passed by retired Deck Officers during the Summer Sailing Schedule time period.
8. WSF and MM&P met and discussed Pelland's grievance, concluding that there had been some identified issues of by-passing among the instances where it was determined that no violation occurred.
9. Following the Summer Sailing Schedule in 2002, Pelland was working as an on-call AB in the Deck Department.
10. When bids were entertained during November 2002, no person bid for the Chief Mate position on the Vashon "G" Watch. Pelland was assigned this position.

11. The Vashon “G” Watch assignment to Pelland was made in error, in that there were individuals with less seniority than Pelland who should have been assigned. This matter was not immediately realized, and Pelland continued to work the bid period on the Vashon “G” Watch.

CONCLUSIONS OF LAW

1. The Marine Employees’ Commission has jurisdiction in this case.
2. The 1999-2001 contract between Washington State Ferries and Masters, Mates and Pilots remains in full force and effect by operation of law even though its stated expiration date has past. RCW 47.64.170.
3. The unfair labor practice allegations raised are factually parallel with grievances filed by Complainant.
4. The grievances concerning alleged by-passing of Complainant Pelland have been resolved by the parties.
5. In resolving issues raised by the grievances, the parties were aware of the unfair labor practice charges before the MEC.
6. Complainant Pelland is bound by the resolution of his grievances made by WSF and MM&P.
7. The assignment of Pelland to the Vashon “G” Watch was not retaliatory.
8. WSF has not engaged in a unilateral change in violation of RCW 47.64.130.

RECOMMENDED ORDER OF DISMISSAL

On the basis of the above discussion and Conclusions, it is recommended that the Marine Employees’ Commission dismiss the complaint in its entirety.

REQUEST FOR REVIEW

Any party may request review by the Commission of the examiner's findings of fact, conclusions of law and order. Such request must be made within twenty days following the date of the order issued by the examiner by filing the original petition with the Commission at its offices in Olympia and by serving a copy on each of the other parties to the proceedings. Additional requirements regarding the petition are set forth in WAC 316-45-350 (a copy of which is enclosed).

If no request for review is filed in a timely fashion and no action is taken by the Commission on its own motion within thirty days following the examiner's final order, the Marine Employees' Commission will issue a second Order, which will state that the examiner's findings of fact, conclusions of law and order automatically become the findings of fact, conclusions of law and order of the Commission and that this Order has become final and binding in accordance with RCW 47.64.280. That second Order will start the period running for any appeal to the Washington State Superior Court, pursuant to RCW 34.05.542 and 34.05.514.

DATED this _____ day of March 2004.

MARINE EMPLOYEES' COMMISSION

JOHN NELSON, Hearing Examiner