

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION  
OF THE PACIFIC on behalf of JUDY  
PARTYKE, MIKE SWINEHEART and  
ROBIN RAMSEY,

Grievant,

v.

WASHINGTON STATE DEPARTMENT  
OF TRANSPORTATION, FERRIES  
DIVISION,

Respondent.

MEC CASE NO. 18-09

DECISION NO. 594 - MEC

DECISION AND AWARD

**APPEARANCES**

Schwerin, Campbell, Barnard and Iglitzin, by *Robert Lavitt*, Attorney, appearing for the Inlandboatmen's Union of the Pacific.

Rob McKenna, Attorney General, by *Don Anderson*, Assistant Attorney General, appearing for the Washington State Ferries.

**NATURE OF THE PROCEEDINGS**

On June 15, 2009, the Inlandboatmen's Union of the Pacific (IBU) filed a request for grievance arbitration with the Marine Employees' Commission on behalf of relief employee Judy Partyke. The matter was scheduled for settlement and hearing. Settlement efforts were unsuccessful. Due to continuance requests, Case 18-09 had not yet been heard when on March 24, 2010, IBU filed a request to amend the case by adding two similar grievances to be combined with 18-09 for hearing. The additional grievances involved WSF on-call employees Mike Swineheart and Robin Ramsey. At issue in each of the grievances is the filling of temporary vacancies in year around positions.

IBU and WSF agreed to MEC arbitration of all three grievances as one issue. On July 21, 2010, Commissioner John Cox conducted a grievance arbitration hearing.

## **ISSUE**

Did Washington State Ferries (WSF) violate the Collective Bargaining Agreement (CBA) when it filled temporary vacancies in year-round positions for less than the entire shift of the absent year around employees?

### **RECORD BEFORE THE ARBITRATOR**

The MEC has the following record before it:

1. Request for Grievance Arbitration, filed October 15, 2009 and docketed as MEC Case 18-09.
2. Amended Request for Grievance Arbitration, filed March 24, 2010.
3. Amended Notice of Scheduled Hearing, dated March 26, 2010.
4. Transcript of the hearing conducted on July 21, 2010.
5. Union Exhibits 1—4 accepted into evidence during the hearing.
6. Post-hearing briefs from both WSF and IBU, filed September 24, 2010.

Some of the events at issue in these grievances took place during the term of the 2009-2011 CBA; others during the 2007-2009 CBA. The language in the following applicable contract provisions is the same in both contracts. Although not submitted as exhibits at hearing, the Arbitrator takes official notice of these contracts.

### **APPLICABLE CONTRACT PROVISIONS**

#### **RULE 1 – DEFINITIONS**

##### **1.24 Terminal Shift Change**

The term “shift change” shall mean all shift changes by one (1) hour or more and/or the employee’s scheduled days off are changed. If either occurs, all shifts will be opened for bid at that terminal. Sunday schedules may prevail on holidays without constituting a shift change.

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**OTHER DEFINITIONS AND TERMS.** Unless the context of a particular section in question indicates otherwise, all other words and terms used in this agreement shall be given their common and ordinary meaning.

## **RULE 4 – MANAGEMENT RIGHTS**

**4.01** Subject to the specific terms and conditions of this Agreement, the Employer retains the right and duty to manage its business, including but not limited to the following: the right to adopt regulations regarding the appearance, dress, conduct of its employees, and to direct the work force consistent with work procedures as are necessary to maintain safety, efficiency, quality of service, and the confidence of the traveling public. The Union reserves the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Rule 14. The existence of this clause shall not preclude the resolution of any such grievance on its merits.

## **Rule 14 – GRIEVANCE PROCEDURE**

### **14.03 Filing and Processing**

#### **D. Authority of the Arbitrator**

1. The arbitrator will:
  - a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
  - b. Be limited in his or her decision to the grievance issue (s) set forth in the original written grievance unless the parties agree to modify it;
  - c. Not have the authority to order the Employer to modify his or her staffing levels, unless the arbitrator finds that the Employer has violated the staffing levels required by this Agreement.

## **APPENDIX B**

### **RULE 1 – HOURS OF EMPLOYMENT, OVERTIME AND ASSIGNMENT**

- 1.01** The principle of the eight (8) hour day is hereby established. For all practical purposes, eight (8) consecutive hours shall constitute one (1) work day. Forty (40) hours shall constitute a work week, and eighty (80) hours shall constitute a two (2) week work schedule. The following work schedules shall be observed:
- A. Five (5) consecutive eight (8) hour days followed by two (2) consecutive days off; or
  - B. Ten (10) consecutive eight (8) hour days followed by four (4) consecutive days off, or
  - C. Four (4) consecutive ten (10) hour days followed by three (3) consecutive days off.

D. No work schedule shall have less than eight (8) hours off between scheduled shifts unless otherwise noted in Appendix B, Rule 1.06 (b)(1)(b) and Rule 1,06 (b)(2)(a).

....

**1.03** Part-time and On call employees shall be allowed to work ten (10) consecutive hours per day. . . .

**1.04 Terminal Shift Change**

In the event that shifts change or new shifts are established for seasonal purposes, full-time, year around employees at each terminal shall bid on shifts according to seniority in their classification and shall have preference in such bidding over employees at all other terminals. For the purposes of this rule a shift change means when any shift changes by more than one hour and/or the days off change, then all shifts will open up for bids at that terminal. (Sunday schedule may prevail on holidays without constituting a shift change). Full-time shifts will not be open for bid at schedule change unless there has been a change in shifts as provided in this Rule.

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**1.06 Filling of Temporary Terminal Positions**

B. Temporary Positions-Less that Forty-Five (45) Days  
Job openings of less than forty-five (45) days will be filled at the affected terminal in the following manner:

1. Weekly Assignments

a. Supervisor(s) will assign relief for known vacancies on a weekly basis by reassigning Part-time employees and assigning On call employees based on their seniority and availability. The weekly schedule will be posted on the Wednesday prior to the beginning of the following Sunday work week. The schedule will be posted in a location that can be viewed by all employees. This schedule and any changes will be provided for all affected employees and it will be the responsibility of each employee to read and make note of their assignments.

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2. Daily Assignments

a. Daily vacancies will be offered to Part-time and on call employees, by seniority based on their

availability schedule as defined in appendix B, Rule 1.06(B)(1)(b), when the number of hours of the vacancy is greater than their daily hours and will be restricted to one (1) reassignment per day. In the event all Part-time and on call employees refuse the offer, the Supervisor will assign the employee with the least date of hire. Failure of the employee to respond to a call placed by the Supervisor within fifteen (15) minutes will allow the Supervisor to offer the vacancy to the next senior employee in line.

- b. The Supervisor will use their discretion in filling of vacancies that occur outside of the scheduled supervisor hours or when notified within four (4) hours prior to the start of a shift. If possible, the most senior available unassigned Part-time or on call employee should be notified first.

## **POSITIONS OF THE PARTIES**

### **IBU's Position**

This case is about the plain meaning of the contract language. The assigning of relief and on-call employees to a shift with different hours than the scheduled shift of the employees they are relieving, amounts to a shift change. The CBA requires notice and bidding procedures in that situation. WSF has violated the CBA in that regard and by assigning nine hour shifts when the contract allows only eight or ten hour workdays. When a full shift is not filled, it shortchanges employees of hours and puts additional duties/stresses on the other employees working that shift.

### **WSF's Position**

Testimony from three terminal supervisors shows that it has been the custom and practice for over 25 years that terminal supervisors have the right to exercise discretion in covering temporary vacancies. They have routinely assigned relief and on-call employees to fill temporary vacancies in year-round positions for less than the entire work shift. Those employees have never claimed they were entitled to work the entire shift until now. The language in Appendix B, Rule 1.06 has remained the same since 1993. Past practice demonstrates that the parties' intent was to give terminal supervisors the right to exercise discretion in covering temporary vacancies.

## **FINDINGS OF FACT**

1. WSF and the IBU are parties to a collective bargaining agreement covering personnel in the terminal department.

2. All three grievants, Judy Partyke (Grv 09-02), Robin Ramsey (Grv 09-32) and Mike Swineheart (Grv 09-43) are employed in the terminal department, occupying either relief or on-call positions.

3. The MEC consolidated the three grievances under Case 18-09.

4. Relief and on-call employees bid to work permanent shift positions that temporarily become vacant when the normally scheduled employee is on leave.

5. Grievant Robin Ramsey is an on-call employee not assigned to a terminal. On September 6, 2009, year-round employee Avery Hayes took a single-day vacation. He works a ten-hour day. On that day, the terminal supervisor assigned Grievant Robin Ramsey to cover only eight hours of the ten-hour shift. Additionally on September 6, Ms. White, an Auto Attendant 2, was sick. She works a ten-hour day. The terminal supervisor assigned Jacquelyn Power, an on-call employee, to cover eight hours of the ten-hour shift.

6. Grievant Mike Swineheart is an on-call employee at the Kingston Terminal. On November 21, 2009, Michelle Zuarri, a year-round ticket seller was out on sick leave. Her shift is a ten-hour work day. On that day, the terminal supervisor assigned Grievant Mike Swineheart to cover only eight hours of the ten-hour shift.

7. Grievant Judy Partyke, employed by WSF for 14 years, testified that she was never personally assigned to work less than the full shift when assigned to cover a temporary vacancy. However, Ms. Partyke's grievance points out that during the week of February 1, 2009, permanent ticket seller Terry Whalen was absent from work for three days. He works a ten-hour day. During his absence, the terminal supervisor assigned Sherry Mousset to cover eight hours of the ten-hour day. And, when Ms. Nancy Lowry was absent on February 6, the terminal supervisor assigned J. Mirkovich to cover nine hours of Ms. Lowry's ten-hour shift.

8. WSF has assigned relief and on-call employees to shifts with different hours than those assigned to permanent employees they are relieving.

9. Rule 1.24 and Appendix B, Rule 1.04 require bidding on all shifts if a shift changes by more than one hour and/or the days off change. The only exception stated in Rule 1.24 and repeated in Appendix B, Rule 1.04 allows applying the Sunday schedule to holidays.

10. The word “shift” is defined in Webster’s Dictionary as “a scheduled period of work or duty.” *Webster’s Ninth New Collegiate Dictionary*, 1086 (1983). A change in the start, end or duration of a scheduled work period is a “shift change.”

11. Appendix B, Rule 1.01 allows only eight or 10 hour work shifts.

12. Appendix B, Rule 1.06 requires WSF to fill temporary terminal job vacancies.

13. Rule 4.01, Management’s Rights clause, is subject to the specific terms and conditions of the CBA.

### **CONCLUSIONS OF LAW**

On the basis of the record before him, the findings of fact and contractual and legal analysis, the Arbitrator makes the following conclusions.

1. A current IBU/WSF Collective Bargaining Agreement was in force and effect at the time of the alleged violations.

2. The Arbitrator has jurisdiction over the parties and the dispute (RCW 47.64.280, chapter 316-65 WAC).

3. The Arbitrator cannot infer from unambiguous contractual provisions that the Union intended to allow WSF to waive bargained protected rights of the relief and on-call employees unless the intention is “explicitly stated.” More succinctly, such agreement with the Union must be clear and unmistakable. For WSF to assume past practice allows it to modify clear language in the Agreement, it must show that such practice was fully discussed and explored and that the Union unmistakably agreed to the change in the application of the CBA language. WSF provided no agreement of change or even evidence regarding past practice such as, but not limited to, time cards, payroll records or employee schedules regarding relief or on-call employees who were paid less than the scheduled hours of the employees they replaced. WSF’s testimony was also vague and without documentation about specifically where, when, under what circumstances and who directed that a short shift could be worked and specifically at what terminals and when such practices occurred.

4. There is no dispute that Supervisors and WSF management personnel have a duty to be fiscally prudent; however, their testimony to save a few hours in violation of clear contract language at the expense of long service relief and on-call employees and create inconvenience to the traveling public (such as the July 4 example from the hearing) is not what the parties agreed to in the CBA.

5. During negotiations, WSF was not prohibited from proposing modifications to the language in the agreement to allow the scheduling of relief or on-call employees to work less hours than the shift they were assigned to relieve. In spite of that, WSF failed to pursue the necessary changes in contract provisions which, if agreed upon, would permit WSF to assign relief and on-call employees less than full shift assignments. Neither the clear language in the CBA nor an alleged past practice supports or allows WSF's intermittent practice of penalizing relief or on-call employees when performing relief.

6. Before coming to a conclusion or decision, the Arbitrator must consider frequently expressed rules of interpretation:

- Words are presumed to bear their ordinary meaning.
- Without some contradictory indication, a word or phrase is presumed to have the same meaning throughout the CBA.
- The provision of the CBA should be interpreted in a way that renders them harmonious, not contradictory.
- If possible, every word should be given effect; no word should be read as surplusage—*noscitur a sociis*. “A word is known by the word with which it is associated.” In the CBA, a shift is defined as 8 hours, 10 hours or schedule. The words “9 hours” obviously do not refer to a shift.

7. If the Arbitrator were to accept that the language was ambiguous as alleged by WSF, he would still be bound to interpret it consistent with the overall intent of the CBA— *ut magis valeat quam pereat*. “So that it may survive rather than perish.” An ambiguous provision should be interpreted in a way that makes it valid rather than invalid; however, in this case, I can find no ambiguity. The ordinary meaning of the word “shift” is clear. There is no agreed-upon practice or agreement that provides that WSF, when they choose, can assign relief or on-call employees to work less hours than the shift they are assigned to relieve.



8. Use of the word “will” throughout Appendix B, Rule 1.06 is mandatory. The Employer inconsistently interpreted the use of “will,” sometimes as permissive and other times as mandatory, to explain its contention that the above section does not require it to fill vacancies, but only provides the required procedures once WSF decides to fill them.

9. WSF violated the CBA when it

- Assigned relief and on-call employees to shorter shifts than those of the employees they were relieving, without complying with notice and bidding procedures.
- Assigned a work schedule that was not based on eight or ten-hour days.
- Did not fill temporary vacancies in the terminal department as required by Appendix B, Rule 1.06.

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**AWARD**

1. The IBU's grievance is sustained.
  2. Mike Swineheart, Robin Ramsey and other relief and on-call employees who were assigned to work less shift hours than the employee's shift they were relieving, during the 2007-2009 Collective Bargaining Agreement and continuing, are to be paid the hours of the shift to which they were assigned.
  3. Interest on the back pay, requested under WAC 316-65-560, is not appropriate and is denied.
  4. The Arbitrator will retain jurisdiction until this Decision and Award is implemented.
- DATED this 7th day of December 2010.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN COX, Arbitrator

Approved by:

/s/ JOHN SWANSON, Commissioner

/s/ PATRICIA WARREN, Commissioner