

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

GREGORY HODGES,)	MEC Case No. 9-92
)	
Grievant,)	DECISION NO. 94 - MEC
)	
v.)	
)	DECISION AND ORDER
WASHINGTON STATE FERRIES and)	
INLANDBOATMEN'S UNION OF)	
THE PACIFIC,)	
)	
Respondents.)	
_____)	

Gregory Hodges, pro se, appearing for and on behalf of himself.

Christine Gregoire, Attorney General, by Robert McIntosh and Anne L. Spangler, Assistant Attorneys General, for and on behalf of Washington State Ferries.

Schwerin, Burns, Campbell and French, attorneys, by John Burns and David Campbell, attorneys, appearing for and on behalf of Inlandboatmen's Union of the Pacific.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on August 31, 1992, when Gregory Hodges filed a request for grievance arbitration against Washington State Ferries (WSF) and the Inlandboatmen's Union of the Pacific (IBU). Hodges charged that WSF and IBU had deprived him of assignment to "South Sound Roving Relief" during the summer months by a misinterpretation of the seniority clause (Rule 21) in the IBU/WSF collective bargaining agreement. Hodges certified that the grievance procedures in the IBU/WSF collective bargaining agreement had been utilized and exhausted.

The request for grievance arbitration was docketed as MEC Case No. 9-92 and was assigned to Commissioner Louis O. Stewart to act as arbitrator pursuant to WAC 316-65-070.

A notice of hearing to be held on December 16, 1992 was served on the parties pursuant to WAC 316-65-080 on or about September 30, 1992. However, on December 9, 1992 IBU filed a Motion to Dismiss the arbitration request. The Motion to Dismiss asserted that MEC had no jurisdiction to arbitrate this matter, because Hodges had filed the request for grievance arbitration without the union's approval alleged to be required by RCW 47.64.150.

Also, on December 9, 1992 Hodges requested a continuance to enable him to consult legal counsel necessary to offset the IBU Motion to Dismiss. Arbitrator Stewart granted the continuance.

Subsequently, the hearing was rescheduled for April 22, 1993. The parties were notified that the IBU Motion to Dismiss would be heard first and then possibly the substantive issue. On April 15, 1993 IBU requested another continuance because of unavailability of a key witness. Arbitrator Stewart denied the request, but agreed to restrict the hearing only to argument on the Motion to Dismiss, and not to take testimony in an evidentiary hearing on the substantive issue.

On April 20, 1993 Grievant Hodges filed a Motion to Dismiss IBU as a respondent. Arbitrator Stewart held a telephone conference with counsel for IBU and WSF and Hodges. In that conversation WSF objected to dismissing IBU as a respondent, on the grounds that WSF agreed with the IBU Motion to Dismiss and would have made such motion had WSF known that IBU might be dismissed. Arbitrator Stewart therefore agreed to a WSF motion to add WSF to IBU as the makers of the Motion to Dismiss. It was agreed that IBU need not attend and participate in the April 22 hearing.

MEC Chairman Boyd and Commissioner Kokjer did not attend and participate in the hearing, but have read the entire record.

INTRODUCTION AND BACKGROUND

Grievant Hodges is an Able Bodied Seaman, a member of IBU, and has been working on temporary assignments for WSF for several years. He has not applied for year-round employment for personal reasons, but did look forward to increased employment in the summer season. In 1992 he applied for assignment to the "South Sound Roving Relief," unsuccessfully. He asserts that his application "was passed over in favor of another person with a later [seniority] date," in violation of the seniority clause of the IBU/WSF Agreement, Rule 21. The following decision and order is restricted only to consideration of statute (chapter 47.64 RCW) and rule (chapter 316-65 WAC) in determining the procedural motions filed by IBU and WSF and Hodges.

IBU MOTION TO DISMISS

On December 9, 1992 IBU filed a motion to dismiss Hodges Request for Arbitration on the grounds that IBU had not approved Hodges' request and that Hodges can only file such request directly with MEC with IBU approval. RCW 47.64.150. IBU asserted that Hodges had never actually filed a grievance, had never exhausted his contractual remedies, and cannot show good cause for failing to do so. IBU further contended that even if Hodges had exhausted his pre-arbitration contractual remedies, "MEC arbitration would still be unavailable because the contract provides an arbitration remedy," and Hodges did not avail himself of that remedy. Finally, IBU contends that if Hodges had attempted to utilize the contractual arbitration procedures, and if he believed that IBU had failed to represent him faithfully, Hodges' remedy would then have been to file an unfair labor practice charge against IBU with MEC

(RCW 47.64.170(1); WAC 316-65-005), and not a request for grievance arbitration.

HODGES' MOTION TO WITHDRAW HIS COMPLAINT AGAINST IBU

On April 21, 1993 Grievant Hodges filed a motion to dismiss IBU as a respondent in this matter. Hodges asserted that he had learned from analysis of certain interrogatories from WSF that WSF alone had made the decision which deprived Hodges of his desired watch assignment.

WSF OBJECTION TO DISMISSAL OF RESPONDENT IBU, AND WSF MOTION TO AMEND IBU MOTION TO DISMISS HODGES' ARBITRATION REQUEST

After receiving Hodges' motion to dismiss IBU, supra, Arbitrator Stewart conducted a conference telephone call between and among counsel for IBU and WSF and Hodges and himself. During the call WSF objected to dismissing IBU on the grounds that WSF was in full support of the IBU contention that MEC has no jurisdiction in this matter, and that WSF would have filed such a motion if IBU had not, and that WSF would be deprived of a timely motion by an abrupt dismissal of IBU and its motion. Arbitrator Stewart informed WSF counsel that he would entertain a motion to amend the IBU motion by adding WSF as a maker of said motion. WSF did then make such a motion.

Having read and thoroughly considered the entire record, the Marine Employees Commission now enters the following findings of fact.

FINDINGS OF FACT

1. Grievant Hodges is an on-call employee of WSF.
2. Grievant Hodges is a member of IBU.

3. Although Hodges complained that both IBU and WSF denied him a full-time summertime assignment by a misinterpretation of Rule 21, Hodges has withdrawn the complaint against IBU and has stated that his grievance is solely against WSF.
4. Arbitration procedures for ferry employees are governed by RCW 47.64.150 as follows:

47.64.150 Grievance procedures. An agreement with a ferry employee organization that is the exclusive representative of ferry employees in an appropriate unit may provide procedures for the consideration of ferry employee grievances and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision shall not change or amend the terms, conditions, or applications of the collective bargaining agreement. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.

Ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are so provided, shall submit the grievances to the marine employees' commission as provided in RCW 47.64.280.
(Emphasis added.)

5. The IBU/WSF Agreement contains an arbitration clause in Rule 16 - Disputes, Step III, as follows:

STEP III - ARBITRATION

1. Within ten (10) days of the receipt of the Employer's decision if the matter has not been satisfactorily resolved the Union may submit the matter to arbitration by as herein provided.
2. In the event the Union decides to submit the matter to arbitration it will notify the

DECISION AND ORDER - 5

Employer of this action and will request the FMCS to submit a list of N.W. arbitrators from

the State of Washington of which one (1) will be chosen. The arbitrator shall be selected by each party to the Arbitration alternately striking one name at a time from the list until only one name remains.

3. The arbitrator selected shall conduct a hearing at which the facts and arguments relating to the dispute shall be heard. The arbitrator shall have no power or authority to alter, add to, or subtract from the terms of the Agreement. The jurisdiction of the arbitrator shall be limited to rendering a decision solely on the issue(s) presented to him.
4. The arbitrator's decision shall be final and binding on the Union, affected employee(s) and the Employer.
5. The arbitrator shall issue his decision not later than thirty (30) calendar days from the date of the closing of the hearing, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the arbitrator. The decision shall be in writing and shall set forth the arbitrator's opinion, conclusions and decision on the issues submitted.
6. All costs, fees and expenses charged by the arbitrator will be shared equally by the parties. All other costs incurred by a party resulting from an arbitration hearing will be paid by the party incurring them.

6. The record is inconclusive as to whether Hodges did exhaust his contractual dispute remedies at Steps I and II before filing his arbitration request with MEC.

Having read and carefully considered the entire record, including but not limited to the complaint, the hearing transcript, and the parties' briefs the Marine Employees' Commission now hereby enters the following conclusions of law.

1. MEC has general jurisdiction over the labor-management relations between and among the employee, employer, labor union, and subject matter involved in this case. Chapter 47.64 RCW; especially RCW 47.64.280.
2. MEC may not change or amend the terms, conditions, or applications of the MM&P/WSF collective bargaining agreement. RCW 47.64.150.
3. As this Commission concluded in Linda Wheeler v. WSF, MEC Case No. 7-84, Decision No. 8-MEC, and again in Robert S. Reynolds v. WSF, MEC Case No. 8-91, Decision No. 79-MEC, RCW 47.64.150 distinguishes between grievance arbitration procedures to be included in a collective bargaining agreement (first paragraph) and the procedure to be followed when no procedures have been negotiated. RCW 47.64.150 establishes two distinct methods of grievance arbitration. The employee may utilize the procedures established in the contract. Only if there are no procedures established, the employee may submit the grievance to the MEC.

But, because the IBU/WSF Agreement does contain procedures for arbitration of disputes, MEC must conclude that Hodges may not submit his grievance directly to MEC, but must utilize the procedures set forth in said agreement.

However, the procedures set forth in the IBU/WSF Agreement, Rule 16 - Disputes, Step III - Arbitration, do not provide for the invoking of arbitration only with the approval of IBU, and are not in compliance with RCW 47.64.150, which clearly requires affirmative language: viz., The procedures shall provide for the invoking of arbitration only with the approval of the employee organization.

4. WAC 316-65-010, based upon RCW 47.64.150, is not intended to impose a mandatory union approval requirement that was not imposed by statute.
5. As shown in Finding of Fact 5, grievants under these procedures must "notify the Employer of this action and . . . request the FMCS to submit a list of N.W. Arbitrators from the State of Washington of which one (1) will be chosen. . . ." If MEC were to continue with the arbitration procedure in this case, MEC would then be altering the terms of Rule 16, Step III, which is prohibited by RCW 47.64.150. Conclusion of Law 2, supra.
6. With regard to the argument of IBU counsel that, if Hodges were dissatisfied with his lack of union approval of his arbitration request, his remedy would have been to file an unfair labor practice charge against IBU with MEC, this Commission deems that so important and so serious that some of the Commission's conclusions in Reynolds v. WSF, *ibid*, should be repeated here.

Hodges may have been relieved of the requirement that disputes be settled through contractual grievance procedures in Rule 16 if there were a breach of the union's duty of fair representation. Hines v. Anchor Motor Freight, 96 S. Ct. 1048, 1058, 1059; Republic Steel Corp. v. Maddox, 370 U.S. 650 (1965); Vaca v. Sipes, 386 U.S. 171 (1967). In Vaca, the Supreme Court held that "the collective bargaining system . . . subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. [I]n [Republic Steel], this Court recognized that the congressional grant of power to a union to act as exclusive collective bargaining representative. . . would raise grave constitutional problems if unions were free to exercise . . . power to further discriminate. The duty of fair

representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 386 U.S. 182.

7. The elements needed to prove breach of duty of fair representation are:
 - a. Arbitrary or bad faith conduct on the part of the union. Vaca v. Sipes, ibid.
 - b. Substantial evidence of fraud, deceitful action or dishonest conduct. Humphrey v. Moore, 375 U.S. 335, 348 (1975).

The burden of demonstrating breach of duty by a union involves more than demonstrating mere errors of judgment. Hines v. Anchor Motor Freight, 96 S. Ct. 1048, 424 U.S. 570-571.

8. But Hodges not only failed to present any substantial evidence of fraud, deceitful action or dishonest conduct on the part of IBU; in fact he withdrew his grievance against IBU. This Commission must conclude that there was no breach of its duty to represent Hodges.
9. Under CR 12(h)(3) where MEC determines that it is without jurisdiction, pursuant to the WSF affirmative defense not overcome by an inferred breach of duty of fair representation, it should dismiss the complaint on that ground and proceed no further. Voracheck v. United States, 37 F.2d 797 (8th Cir. 1964).

The Commission having reached the foregoing findings of fact and conclusions of law now enters the following order.

ORDER

The request for grievance arbitration filed by Gregory Hodges against Washington State Ferries and the Inlandboatmen's Union of the Pacific on August 31, 1992 is hereby dismissed.

DONE this 11th day of June 1993.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner