

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

DAVID SHAW and RICK HAMITER)	MEC CASE NO. 4-88
)	MEC CASE NO. 5-88
Complainants,)	
)	
v.)	DECISION NO. 42-MEC
)	
INLANDBOATMEN'S UNION OF)	
THE PACIFIC AND WASHINGTON)	
STATE FERRIES)	
)	
Respondents.)	HEARING EXAMINER'S
)	DECISION AND ORDER
_____)	

Norman B. Binns, Attorney at Law, appearing for and on behalf of the complainants.

John Burns, Attorney at Law, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Robert A. McIntosh, Assistant Attorney General, State of Washington, appearing for and on behalf of Washington State Ferries.

James Webster, Attorney at Law, appearing by invitation of the Hearing Examiner, for and on behalf of the Pacific Coast District National Marine Engineers Beneficial Association.

BACKGROUND

On October 21, 1988 David Shaw, through Attorney Norman Binns, filed a complaint with the Marine Employee's Commission alleging unfair labor practices by Employer Washington State Ferries and Inlandboatmen's Union of the Pacific. Specifically, complainant alleged that the respondents had violated RCW 47.64.130(1)(a) and (c) and 47.64.130(2)(a). A similar complaint was also filed with the MEC on November 14, 1988 by Attorney Norman Binns on behalf of Rick Hamiter. The MEC assigned No. 4-88 to the David Shaw case and No. 5-88 to the Rick Hamiter case. For the purpose of a hearing the MEC consolidated the two cases and appointed Donald E. Kokjer as Hearing Examiner.

A hearing was scheduled for January 6, 1989 at 10:00 a.m. in the Conference Room at Colman Dock, Seattle.

During the hearing on January 6, 1989 it became apparent to the Examiner that the matters alleged by complainants required input from a third party not named in the complaints. Accordingly the hearing was recessed and rescheduled for January 26, 1989. In addition to respondents, the District 1, Pacific Coast District National Marine Engineers Beneficial Association was invited to appear. MEBA was furnished a copy of the recessed meeting transcript and all pertinent data concerning the two complaints.

The hearing convened at 10:00 a.m. before Donald E. Kokjer, Examiner, at the "Spike" Eikum conference room, Colman Dock, Seattle. All parties including MEBA were present.

POSITIONS OF THE PARTIES

Position of Complainants

- A. Complainants contend that WSF has violated the provisions of its employment contract with its employees and has engaged in unfair labor practices by:
1. Not granting complainants' applications for interdepartment transfer;
 2. Not informing complainants in any reasonable fashion of their acceptance/nonacceptance for said transfer;
 3. Not setting up an informal grievance meeting to discuss complainant's grievances'
 4. Deliberately and willfully hiring engineroom replacement personnel who are members of a union (NMU) that (1) does not represent WSF employees; (2) is not a bargaining agent for WSF employees; and (3) is not a signatory to the current employment contract.
- B. Complainants also contend that the Inlandboatmen's Union has violated the provisions of its employment contract with WSF; has aided and abetted WSF in their violation of unfair labor practice; and has violated its fiduciary duty to its members by:
1. Not following through on employee-members' filed grievance and
 2. Not timely notifying them that they had no intention of doing so.

Position of Respondent WSF

WSF contends that the jobs petitioners seek (Oilers) are under the jurisdiction of the MEBA which is not a party to the complaint filed with the MEC. The labor agreement between WSF and the IBU was no longer a controlling factor once the MEBA was certified as bargaining representative for oilers and wipers. WSF asks that the case be dismissed for failure to join MEBA as “an indispensable party for the relief sought by grievants.”

Position of Respondent IBU

Complainant’s allegation that they are entitled to Oiler positions is not an issue that the IBU has a responsibility to pursue. The IBU contends that their former contractual duty disappeared once the MEBA was certified to represent the Oilers and Wipers. IBU accordingly seeks dismissal of the case.

Having read the entire record and considered the positions of the parties, the Examiner now reaches the following findings of fact.

FINDINGS OF FACT

1. Complainants David Shaw and Rick Hamiter are members of the Inlandboatmen’s Union of the Pacific (“IBU”), a “collective bargaining representative” within the meaning of RCW 47.64.011(3).
2. At all times material hereto, petitioners Shaw and Hamiter were members of the IBU and held non-year-round positions in the terminal department of Washington State Ferries. Transcript (hereafter “TR”) 50-53, 78, 83, 87,100.
3. Pursuant to Section 21.08 of the Collective Bargaining Agreement (Exhibit 12) between the parties, David Shaw applied for a transfer to an engine room position (Oiler or Wiper) on February 1, 1988. TR 9; Exhibit 1. Rick Hamiter applied for a similar transfer on May 6, 1988. TR 78, 100.

4. Before any Oiler/Wiper positions became available, all of the engine room jobs were removed from the jurisdiction of the IBU. By MEC Order dated April 25, 1988, effective on April 26, 1988, the IBU ceased to represent Oilers and Wipers working in WSF engine rooms. Exhibit 18.

5. On April 26, 1988, District 1, Pacific Coast District National Marine Engineers Beneficial Association (MEBA) became the sole bargaining agent of Oilers and Wipers replacing the IBU. Certification of Results of Election (Exhibit 18) provided that:

Effective April 26, 1988, persons employed by the Washington State Ferry System in the position of Oiler and Wiper are members of the bargaining unit represented by MEBA.

6. A chronology of events relating to the Shaw-Hamiter requests for transfer from the Terminal Department to the Oiler/Wiper follows:
 - (a) 2/1/88: Shaw files written request for interdepartmental transfer. (Ex. 1)
 - (b) 4/19/88: Non-licensed engineroom personnel bargaining agent election; MEBA wins, IBU loses. (Ex. 17-21)
 - (c) 4/25/88: IBU decertified; MEBA certified as exclusive bargaining agent for unlicensed engine room personnel. (Ex. 17-21)
 - (d) 5/16/88: Hamiter files written request for interdepartmental transfer. (Ex. 16)
 - (e) 5/13/88: IBU foiled petition for review, Thurston County Superior Court. (Ex. 17-21)
 - (f) 5/20—5/27/88: Five positions became open in the engineroom. (TR 95 and 109)
 - (g) “End of May”: Employer contacted MEBA relative to complainant’s transfer requests. (TR 97, 98, 99)
 - (h) 7/25/88: IBU notified Shaw that the grievance has progressed to the point of picking an arbitrator – but that the future of the arbitration would hinge on the results of the decision due 7/28 from Superior Court. (TR 23)

- (i) 7/28/88: Oral Decision, Thurston County Superior Court, upholding decertification of IBU and certification of MEBA.
 - (j) 10/11/88: Letter from IBU to Shaw indicating that IBU was not going to proceed with the grievance and that Shaw should petition the MEC.
7. On May 24, 25, 26, and 27, 1988 WSF hired persons provided by MEBA to fill the vacant engine room positions. TR 109-110; Exhibit 24.
 8. These events caused Shaw and Hamiter to file a grievance with the IBU under terms of the WSF/IBU labor agreement. Exhibits 5 and 6. This grievance, filed with WSF on June 17, 1988 (Exhibit 6), was withdrawn by the IBU on July 28, 1988.
 9. The record is silent about any failure on the part of WSF to respond to this grievance. Shaw's efforts were directed at encouraging the IBU to process the grievance and represent him. TR 19-30; Exhibit 7, 8, 9, 10, 13. The IBU informed Shaw by phone prior to August 25, 1988 (TR 57) and in writing on October 11, 1988, that it would not and could not pursue his grievance and that it was "up to MEBA to enforce" any transfer rights which Shaw might have. Exhibit 14; TR 62-63. The IBU further suggested that Shaw might obtain a remedy "by going through the MEC."
 10. Shaw followed the IBU advice. TR 41. He called the MEC on August 25, 1988. TR 57. The MEC responded on August 26, 1988. Exhibit 15.
 11. No complaint was filed against the MEBA, the current representative of the positions in question, and there is no evidence that the complaining parties ever asked the MEBA to enforce the contract provisions at issue on their behalf.
 12. Prior to 1988 there were two non-year round employees in the IBU bargaining unit who had been permitted to transfer to Oiler or Wiper positions.

Based on the foregoing facts, the Examiner now reaches the following conclusions of law:

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over this matter pursuant to chapter 47.64 RCW and chapter 316-45 WAC.

2. The 1983-1985 labor agreement between WSF and the IBU (Exhibit 12) and the 1985-1987 agreement (Exhibit 11) contain an identical section 21.08 therefore we do not reach the issue of which applies in this case.
3. Transfer rights outside of the bargaining unit is a permissive subject of bargaining.
4. Complainants cannot rely on the provisions of section 21.08 of the labor agreement since this transfer clause as a permissive subject of bargaining that crosses bargaining unit boundaries was no longer enforceable by IBU or WSF after the decertification of the IBU as representative of Oilers and Wipers. Transfer rights under the WSF/IBU contract from IBU controlled classifications to Oiler and Wipe became unenforceable once the MEBA was certified as representative of the Oilers and Wipers.
5. Since the MEC Certification Order (Exhibits 18 and 19) only MEB A has authority to bargain concerning wages, hours, and working conditions for the classifications of Oiler and Wiper. IBU has no authority to enforce provisions of its labor agreement with WSF that are applicable to Oiler and Wiper positions. Under commonly recognized labor law principles, when a union is decertified as the bargaining representative for a portion of a bargaining unit during the term of a labor contract, the union no longer is authorized to enforce the agreement's provisions applicable to the portion of the unit in which it was decertified. Retail Clerks v. Montgomery Ward, 316 F.2d 754, 53 LRRM 2069 (7th Cir 1963).
6. Once MEBA was certified the bargaining representative for the Oiler and Wiper positions, WSF had a duty to bargain with MEBA concerning these positions. WSF has no authority to unilaterally enforce the IBU/WSF labor agreement provisions that pertain to positions that are now in the bargaining unit represented by MEBA. See American Seating, 106 N.L.R.B. 250 (1953).
7. Chapter 47.64.170(7) RCW states in part "Until a new collective bargaining agreement is negotiated or until an award is made by the arbitrator, the terms and conditions of the previous collective bargaining agreement shall remain in force..." This statute does not apply to the situation where a decertification and new certification has occurred because such extension of the IBU contract as it relates to Oilers and Wipers would have the effect of greatly reducing the newly certified representative's (MEBA) ability to act as bargaining representative for the Oilers and Wipers.
8. Chapter 21.08 of the IBU-WSF Labor Contract (Exhibit 12) is clear and unambiguous.

9. Neither Shaw nor Hamiter is a “year-round employee.” TR 41, 44, 50-53, 78, 83, 87, 100. Section 21.08 of both the 1983-85 and 1985-87 IBU/WSF Collective Bargaining Agreements provides in relevant part that:

An employee who holds a year-round assignment may request a transfer from his Department to another Department provided that the employee meets the minimum qualifications and is qualified to perform the job duties for which he is requesting a transfer to [sic] and provided further that no year round employee in that Department is laid off.

10. Voluntary past practice of inter-departmental transfers of non “year round employees” by WSF and IBU does not overcome the effect of the clear and unambiguous language in Section 21.08 of the WSF/IBU labor contract. Courts have recognized that the acts of parties to a written contract are admissible in the aid of construing the meaning of that contract only where the terms of the contract are ambiguous. See *Whitten v. Anchor Motor Freight, Inc.*, 521 F.2d 1335, cert. denied 425 U.S. 98, L. Ed. 2d 807, 96 S. Ct. 2188.
11. Because Shaw and Hamiter are not year round employees, even if Section 21.08 were still in effect with respect to transfers to Oiler and Wiper positions, Section 21.08 would not be a basis for granting complainants the relief they seek.
12. The IBU does not breach its duty of fair representation by its failure to pursue a grievance where the IBU has no right to bargain with the employer on the issue being grieved.

Based upon the foregoing findings of fact and conclusions of law the Examiner now enters the following order.

ORDER

1. Complainants unfair labor practice charges against WSF and the IBU are hereby dismissed.

2. Complainants fair representation charge against the IBU is hereby dismissed.
3. No remedy is ordered, however, complainants may follow the hiring procedures of the bargaining unit into which they seek to transfer.

Dated at Olympia, Washington, this 30th day of March, 1989

HEARING EXAMINER

/s/ DONALD E. KOKJER

MEC Rules under Chapter 316-45-350 WAC detail methods to follow in a petition for review of an Examiner's Decision.