

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES COMMISSION

		<u>PERC CASE NOS.</u>	<u>MEC CASE NOS.</u>
CHRISTOPHER L. BERES, et al.,	)	4340-A-82-361	3-82
	)	4344-A-82-362	4-82
Grievants,	)	4359-A-82-366	5-82
	)	4360-A-82-367	6-82
vs.	)	4361-A-82-368	7-82
	)	4362-A-82-369	8-82
WASHINGTON STATE FERRIES,	)	4364-A-82-371	9-92
	)	4365-A-82-372	10-82
Respondent,	)	4366-A-82-373	11-82
	)	4367-A-82-374	12-82
INLANDBOATMEN'S UNION,	)	4368-A-82-375	13-82
	)		
Intervenor.	)		
	)		
_____	)		

Reaugh & Prescott, by James E. Macpherson and Joseph E. Fischnaller, Attorneys at Law, appeared on behalf of the grievants.

Kenneth Eikenberry, Attorney general, by Robert McIntosh, Assistant Attorney General, appeared on behalf of the respondent.

Hafer, Cassidy and Price, by Pamela G. Bradburn, Attorney at Law, appearing on behalf of respondent.

DECISION NO. 2 – MEC

1. The Commission has the authority to act as an arbitrator in this matter.
2. The grievant's rights were violated, by the loss of their AB/OS seniority accrued prior to their appointments to Mate positions after the Hood Canal Bridge sinking and the related refusal of the Washington State Ferry system to return them to AB/OS positions.

3. The threat by the Inlandboatmen's Union to file grievances on behalf of any of their members who would be replaced may have been a factor in the WSF decision regarding grievant's loss of AB/OS seniority. The failure of the IBU and WSF to adopt either an agreed-upon practice or contract language to deal with this special situation, which they knew would arise, further complicated the issue. This decision nonetheless was the sole responsibility of the WSF.
4. The appropriate remedies are:
  - (1) reinstatement of grievants to the Able-Bodied/Ordinary Seaman (AB/OS) seniority rosters with such seniority as each had accrued prior to his/her appointment to Mate positions after the Hood Canal Bridge sinking, plus such time he/she would have accrued had he/she been reinstated to the AB/OS rosters upon changes to "extra relief" status, minus any days for which he/she worked either in full-time or "extra-relief" status as Mates and for which he/she gained credit on the Mates' seniority roster; and
  - (2) reimbursement of an amount equal to the wages he/she would have earned had he/she been reappointed as AB/OS following the reduction of Mate positions, minus any wages earned from any source and any unemployment compensation received following his/her lay-off from full-time employment as Mate, provided, however, that no backpay shall be allowed for time taken off by any grievant for injuries, maternity leave or other similar reason unless the grievant would have received such compensation during the leave.

## INTRODUCTION

The named grievants filed complaints with the Washington State Public Employment Relations Commission (PERC) on November 22, 1982, wherein they allege that the Washington State Ferry System (WSF), has violated their seniority rights, established through collective bargaining agreement with the Inlandboatmen's Union and through past practices.

PERC accepted and consolidated the complaints for resolution. However, before PERC was able to resolve the complaints, the Washington State Legislature repealed the

authority of PERC over labor relations in the WSF (Chapter 47.64, RCW) and created the Marine Employees' Commission (MEC) (ESSB 3108; Ch. 15 L83) giving authority to the MEC to resolve grievances in WSF. Accordingly, the MEC assumed jurisdiction over the above-listed PERC cases on August 26, 1983. The Inlandboatmen's Union (IBU) filed as an intervenor. Leave to intervene was granted. Pursuant to notices, hearings were held in Seattle, Washington, on September 14, 15 and 22 and October 4, 10 and 19, 1983, by Chairman David P. Haworth and Commissioner Donald E. Kokjer, in accordance with WAC 316-65-510 adopted by MEC on August 26, 1983, and by stipulation of the parties. Commissioner Louis O. Stewart, who also participated in this decision, was not present at the hearing but did read the transcript of the hearing, the parties' briefs and reviewed the exhibits.

The Marine Employees' Commission has considered the evidence and arguments, and establishes the following Background, Positions of the Parties, Findings of Fact, Conclusions of Law and Order.

#### BACKGROUND

The grievants are 11 Washington State Ferry employees who were employed at one time as able-bodied seamen (AB) and/or ordinary seamen (OS) and who had worked for varying amounts of time in a variety of positions in the IBU bargaining unit. The sinking of the Hood Canal Bridge on February 13, 1979 created the need for an additional 20 deck officer jobs within the System. These positions were under the jurisdiction of the Masters, Mates and Pilots' Union. Qualified or nearly qualified IBU employees were encouraged by the WSF to take the actions necessary to fill these positions. The opportunity for additional pay (\$3.00 to \$5.00 per hour) and the progress towards attainment of permanent deck officer status provided incentives for those IBU personnel to accept this unusual opportunity. As a result, between April 1979 and November 1979, the grievants obtained deck officer positions at which they worked continuously until October, November or December of 1982. The grievants duration of continuous deck officer employment thus ranged from some 36 to 43 months.

As the result of this change in status, the grievants' employment came under the Masters, Mates and Pilots bargaining unit and were subject to the terms of that unit's contract. They were, therefore, required to pay dues to that unit and, in order to avoid double dues, within one to nine months of obtaining deck officer employment the grievants took "withdrawals" from the IBU.

During this period, a number of policies, statements, memos and letters attempted to define the parties' understanding of job status and return rights. None of these was fully tested or accepted by all parties. During this period, one of these policies was challenged in the case of Gary Gabelein vs. Washington State Ferries.

In the Fall of 1982, the Hood Canal Bridge was replaced, resulting in the elimination of 12 deck officer positions. In addition, a budgetary cutback required by the State Transportation Commission caused a loss of an additional 9 deck officer positions also during the Fall of 1982. These events, combined with a normal end of the summer schedule, which temporarily eliminated 26 deck officer positions, caused the grievants' status to be changed from full-time deck officers to "extra relief deck officers".

In the past, such a change in status would have resulted in employment in AB/OS positions during periods when "extra relief deck officer" employment was not available. Following their change to "extra relief deck officer" status, the grievants accordingly sought to return to AB/OS jobs during the periods when no deck officer work was available to them. As a result of the budget cutbacks, an AB seniority date of mid-Summer or Fall 1976 or an OS date in 1979, was required to keep a year-round assignment in the IBU's bargaining unit.

Citing the length of time the grievants had been employed as deck officers, the fact that their names were no longer on the AB/OS seniority lists, and based on advice by the IBU that these individuals were no longer eligible for such employment and a threat by

the IBU to file grievances if grievants were reinstated to AB/OS positions, WSF management denied the grievants' claim to jobs held by other IBU members during periods when no deck officer work was available.

Following the decision of WSF management, the grievants submitted their dispute for arbitration.

### POSITIONS OF THE PARTIES

The positions of the parties to this dispute, as summarized in the post-hearing briefs submitted on their behalf, are as follows:

. Grievants

1. The WSF/IBU contract is unambiguous; seniority can only be lost through termination or layoff of more than 365 days (Rule 19.09).
2. WSF/IBU contract language, in addition to Rule 19.09, is consistent with the grievants' position.
  - a. Rule 9.03
  - b. Rule 19.01 – Statement of Adherence to Seniority
  - c. Rule 19.02 – Establishing Seniority
  - d. Rule 19.04 – Seniority Rosters
  - e. Rule 19.06 – Filling of Vacancies
  - f. Rule 19.07
3. Even if the IBU contract were ambiguous, past practice supports the grievants' position.
4. Seniority is a vested right lost only through clear contract provisions.

5. Removal from the seniority roster does not result in loss of earned seniority, except as provided in the contract.
6. Reasonable attorneys' fees should be awarded.

### Washington State Ferries

WSF's position is that of fundamental neutrality on the merits of this case. It contends that its decision not to permit the grievants, while serving as extra-relief deck officers, to claim jobs held by IBU members during periods when no deck officer work is available, was a reasonable decision, based upon the facts and circumstances known at the time, and should therefore not give rise to backpay liability on the part of WSF, even if the decision were incorrect under present facts and circumstances.

### Inlandboatmen's Union

1. Allowing grievants to displace IBU members from year-round assignments contravenes both the IBU and the MM&P contracts.
  - a. The evidence does not support the grievants' contention that their Mate positions were temporary.
  - b. Grievants' desire to bump across bargaining unit lines, ignores the existence of separate bargaining units and the resultant legal implication.
  - c. Neither the WSF/IBU nor the WSF/MM&P contract specifically gives grievants the right to return to AB/OS positions after working more than a year as Mates.
  - d. Returning grievants to positions in the IBU unit is contrary to the contractual requirement that hiring be done through the IBU.

2. Allowing grievants to return to AB/OS positions would have been a radical departure from the parties' past practices.
  - a. The parties' practices regarding movements between AB/OS and Mate positions supplement the contract.
  - b. The details of the practices have evolved over time.
  - c. Allowing the grievants to return to this case would be a radical departure from the parties' past practices.
  
3. Denying grievants' request to return was a reasonable decision consistent with the nature of the employment relationship.
  - a. The IBU's position was consistent with the accrual and use of seniority under the WSF/MM&P and the WSF/IBU contracts.
  - b. Under the circumstances, the position taken by the IBU toward the grievants' request to return was reasonable.
  
4. If grievants are allowed to return to AB/OS positions, they should not have accumulated AB/OS seniority while working as mates.

#### FINDINGS OF FACT

1. All parties stipulated to the use of the temporary rules adopted on August 26, 1983, but not filed with the Code Reviser as of the date of the hearing, as the rules applicable to this hearing.

2. Repeated transfer of personnel between IBU and MM&P bargaining units is a common historical pattern. This results from the seasonal nature of job requirements, which typically expand and contract in these two bargaining units during and after summer and holiday peak periods. All participants have generally supported this pattern over the years, as all benefit from it.
3. Periods of transfer have tended to be seasonal. Typically, after an MM&P tenure in the vicinity of a year's duration, MM&P seniority has been sufficient to achieve permanent year/round employment under that bargaining unit.
4. The fact that such transfers have rarely exceeded a year in individual instances has not been the result of policy or agreed-upon practice, but rather is an accidental effect resulting from requirement patterns. There is nothing in either past practice or prior grievance decisions that supports a one-year maximum time period in conjunction with repeated transfer between these units.
5. Although the grievants' situation is unique because of the extended duration of employment of the grievants in deck officer positions and the ultimate combined reduction impacts of the Hood Canal Bridge reopening and budget reduction, as well as the more normal seasonal layoff patterns, every interested party knew that the expanded need for deck officers would end. All parties had opportunity to prepare for the eventuality by testing and clarifying past practice models in order to enable them to clearly meet this situation, but past practices were not so tested or clarified.
6. In particular, the grievants may have had sufficient time as deck officers to be likely to qualify for permanent year-round deck officer employment under normal circumstances. Likewise, under normal circumstances, they could logically have anticipated displacing temporary AB/OS personnel rather than permanent personnel as is the case in this situation.
7. When the April 1, 1977 – March 31, 1980 WSF/IBU contract expired, was



renegotiated and a new contract was made effective April 1, 1980, during the Hood Canal ferry run period, new and specific language was adopted to establish criteria by which seniority could be broken. No reference in this language addressed the Hood Canal ferry run situation.

8. AB/OS seniority rosters are the responsibility of the WSF. Over the period in question, the WSF role had become inconsistent, with IBU having active involvement in review and finalizing of rosters. Procedures for maintenance, distribution and posting of rosters by WSF were inconsistent and unsystematic.
9. During the common historical pattern of repeated transfer of personnel between IBU and MM&P bargaining units, such personnel have retained their original seniority dates upon return to the IBU unit. There is nothing in the IBU/WSF Collective Bargaining Agreement, past practice or previous grievance decisions that supports the loss of AB/OS seniority in conjunction with repeated transfer between these units. In these instant cases, however, because of the prospect of continuous employment as Mates, certain IBU members began to accrue seniority as Mates, joined the MM&P, and temporarily severed connections with the IBU by taking out withdrawal cards.
10. The grievants had taken withdrawal from the IBU unit only to avoid paying dues. This process has no relationship to retention of seniority.

#### CONCLUSIONS OF LAWS

1. The Marine Employees' Commission has jurisdiction in this matter under the provisions of ESSB 3108, Chapter 15, Laws of 1983. The temporary rules adopted by the Commission on August 26, 1983, and stipulated to by the parties, govern this proceeding.

2. The testimony in the case of Gary Gabelein vs. Washington State Ferries was accepted as evidence, subject to a later ruling as to its admissibility. The Commission concludes that the testimony is admissible under the provisions of the Administrative Procedures Act, but is not determinative because: (1) the testimony in question was not the basis for the ruling in the Gabelein case, (2) in any case it is offset by testimony offered at this hearing, and (3) the issue in the Gabelein case is not the same as before this tribunal.
  
3. The Commission's consideration included, but was not limited, to the following sections of the April 1980 to March 1983 agreement between Washington State Ferries and Inlandboatmen's Union of the Pacific:
  - . 9.03
  - . 19.01 – Statement of Adherence to Seniority
  - . 19.02 – Establishing Seniority
  - . 19.04 – Seniority Rosters
  - . 19.06 – Filling of Vacancies
  - . 19.07
  - . 19.09

The following conclusions apply to the relevance of these sections to this case.

. Section 19.01 – Statement of Adherence to Seniority

“The Employer recognizes the principle of seniority in the administration of promotions, transfers, layoffs and realls. In the application of seniority under this Rule, if an employee has the necessary qualifications and the ability to perform in accordance with the job requirement, seniority shall prevail.

In reducing or increasing personnel in the respective departments, seniority shall govern. When layoffs or demotions become necessary, the last employee hired in a classification shall be the first laid off or demoted. When employees are called back to service, the last laid off or demoted in a classification shall be the first restored to work in that classification.”

Section 19.02 – Establishing Seniority

“Seniority in each department will be established on the date the employee is assigned to regular year-round employment in that department.

Exception: In the Terminal Department, there shall be three seniority groups as set forth in Rule 19.03(B).”

These sections (19.01 and 19.02) relate to the principle of seniority and apply to this case.

Section 19.04 – Seniority Rosters

“On the first Monday in March of each year, the Employer shall furnish the Union with seniority rosters for each department showing the names of employees assigned to year-round jobs by department and classification. The employer shall also post these rosters in places accessible to employees of that department. These rosters will be open for correction of seniority dates only for a period of sixty (60) days from the date of initial posting on presentation of proof of error, in writing, by any employee or employee’s representative. Seniority dates not contested within sixty (60) days of initial posting shall not be changed thereafter, except for correction of typographical errors.”

This section clearly spells out the procedures for preparation, review and position of seniority rosters. Based on testimony at the hearing, the administration of these procedures by WSF was less than rigorous, with the resultant problem of misunderstanding and lack of effective communication. The sixty (60) day period for review and correction applies only to seniority dates and has no relevance to the actions required or not required to main seniority itself. Further, this list by definition shows only the names of employees assigned to year-round jobs. By virtue of their transfer to Mate positions, the grievants did not have year-round AB/OS jobs during the period in question and so could logically be expected not to be on the seniority rosters, as provided for in Appendix A of the Agreement. Their absence from this list, therefore, has no bearing on the existence or lack of seniority for the grievants in the IBU

unit.

Section 19.06 – Filling of Vacancies

“Employees interested in year-round positions or temporary promotions must notify the Employer and the Union in writing of the positions they wish to fill. The Employer shall maintain a file of all such requests and, upon receipt of such requests, shall immediately notify in writing the employee submitting such request of its receipt. These requests will be kept on file for a period of one (1) year after receipt and then will be destroyed unless the individuals indicate in writing their desire to extend the requests each subsequent year. When a permanent opening occurs in any classification of the department involved, the Employer shall notify the Union in writing, and the Union shall post the notice at the Union hall for thirty (30) days. The Employer may fill the job with a new employee during this thirty (30) day period. If the Employer does not fill the job with a new employee and if the person previously holding that job fails to return during this thirty (30) day period, the most senior year-round employee in the classification involved who has a request on file for that job and is available shall be assigned. If there are no available year-round employees having requests on file, the most senior available employee who does not have a year-round assignment shall be assigned to the job. This rule shall not apply to the filling of any openings in the positions of Terminal Agent, Information Clerk I, A/B –Bos’n, or shoreside maintenance employees.

If the regular employee returns from an approved absence after the job is filled under the above procedure, all affected employees will return to their previous assignments. When a regular employee accepts a temporary promotion, the employee may return to the employee’s former job at the completion of the temporary job.”

This section, by describing the procedures for filling of vacancies, provides an indication of agreed-upon standard procedures applying to re-entry into the IBU bargaining unit. The absence of definitions of terms such as “regular employee”, “temporary promotion” and “approved absence” limits the applicability of this section to the case, however.

Section 19.09

“Seniority shall only be broken by termination, or by layoff of more than 365 consecutive days.” (Emphasis supplied)

This section clearly specifies the terms under which seniority can be broken. It is clear that neither of these conditions existed in the case of the grievants. There is also nothing in the current IBU agreement that specifically defines relevant policies for the grievants' situation. Thus, this section directly and unambiguously applies and governs in this case.

4. There is nothing in either past practice or prior grievance decisions that supports a one-year maximum time period in conjunction with repeated transfer between these units.
5. The current Agreement between the Masters, Mates and Pilots and the Washington State Ferry System is informative, but does not bear on this case.
6. The Tidewater Associated Oil Company case cited in all briefs provides a precedent for the lack of transferability of seniority between bargaining units. Therefore, no IBU unit seniority should accrue for the grievants ((during their time employed under)) for any work time resulting in accrual of seniority as Mates in the MM&P bargaining unit.
7. RCW 49.48.080 does not authorize award of attorneys' fees in this matter.

### ORDER

The Washington State Ferry System (WSF) shall immediately:

1. Restore each grievant to the AB/OS seniority roster;
2. Recompute each grievant's total seniority by adding to the seniority time accrued as an AB or OS as of each date of appointment to a Mate position after the Hood Canal Bridge sinking all time worked as Mate until the initial date(s) of seniority as Mates. Add to such recomputed AB/OS time lost as a result of WSF's refusal to reinstate the respective grievant to an AB/OS position after his/her

reclassification to "extra relief" status and request to return to AB/OS employment, minus any time accrued on the Mate seniority roster subsequent to the lay-off from a full-time Mate position.

3. Reinstatement each eligible grievant to the AB/OS position to which he or she would have been entitled, if any, in accordance with the recomputed total time on the seniority roster, as described in 2. above, "bumping" only those AB/OS's who had less accrued seniority;
4. Pay each grievant an amount equal to the wages he/she would have earned had he/she been reappointed as AB/OS following the reduction of Mate positions, minus any wages earned from any source and any unemployment compensation received following his/her lay-off from full-time employment as Mate, provided, however, that no backpay shall be allowed for time taken off by grievant for injuries, maternity leave or other similar reason unless the grievant would have received compensation during the leave; and
5. Reimburse the Washington State Unemployment Compensation Fund for any moneys paid from that Fund to any of these grievants, if such Fund has not already been reimbursed.
6. Maintenance of membership in the respective unions shall continue to be governed by the respective Union Security clauses.

The grievants' petition for an award of attorneys' fees is denied.

DATED at Olympia, Seattle, Washington, this ~~28th~~ 29<sup>th</sup> day of ~~February~~ June, 1984.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner

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Reaugh & Prescott, by James. E. Macpherson and Joseph E. Fischnaller, Attorneys at Law, appeared on behalf of the grievants.

Kenneth Eikenberry, Attorney general, by Robert McIntosh, Assistant Attorney General, appeared on behalf of the respondent.

Hafer, Cassidy and Price, by Pamela G. Bradburn, Attorney at Law, appearing on behalf of respondent.

ORDER RE-ISSUING DECISION NO. 2 – MEC AS MODIFIED

The Marine Employees' Commission having issued Decision No. 2-MEC on February 28, 1984, and having taken such Decision back under advisement effective March 29, 1984, and having retained jurisdiction, and several of the above grievants having moved that this Commission modify and re-issue such Decision, and having heard and considered the motions filed by the plaintiff's and respondent, Washington State Ferries, on May 25, 1984, the arguments of all parties and counsel of record herein, and having considered the testimony and records and briefs previously entered herein, the Marine

Employees' Commission orders as follows:

Decision No. 2-MEC dated February 28, 1984, is re-issued in its entirety with the following modifications:

DECISION NO. 2-MEC

I. Decision Summary No. 4 is deleted and replaced by the following:

4. The appropriate remedies are:

(1) reinstatement of grievants to the Able-Bodied/Ordinary Seaman (AB/OS) seniority rosters with such seniority as each had accrued prior to his/her appointment to Mate positions after the Hood Canal Bridge sinking, plus such time as he/she would have accrued had he/she been reinstated to the AB/OS rosters upon changes to "extra relief" status, minus any days for which he/she worked either in full-time or "extra-relief" status as Mates and for which he/she gained credit on the Mates' seniority roster; and

(2) reimbursement of an amount equal to the wages he/she would have earned had he/she been reappointed as AB/OS following the reduction of Mate positions, minus any wages earned from any source and any unemployment compensation received following his/her lay-off from full-time employment as Mate, provided, however, that no backpay shall be allowed for time taken off by grievant for injuries, maternity leave or other similar reason unless the grievant would have received such compensation during the leave.

FINDINGS OF FACT

II. An additional Finding of Fact is included as follows:

9. During the common historical pattern of repeated transfer of personnel between IBU and MM&P bargaining units, such personnel have retained their original seniority dates upon return to the IBU unit. There is nothing in the IBU/WSF Collective Bargaining Agreement, past practice or prior grievance decisions that supports the loss of AB/OS seniority in conjunction with repeated transfer between these units. In these instant cases, however, because of the prospect of continuous employment as Mates, certain IBU members began to accrue seniority as Mates, joined the MM&P, and temporarily severed connections with the IBU by taking out withdrawal cards.

Renumber existing No. 9 as No. 10.



CONCLUSIONS OF LAW

III. Conclusion of Law No. 6 is amended to read as follows:

6. The Tidewater Associated Oil Company case cited in all briefs provides a precedent for the lack of transferability of seniority between bargaining units. Therefore, no IBU unit seniority should accrue for the grievants for any work time resulting in accrual of seniority as Mates in the MM&P bargaining unit.

ORDER

IV. Order No. 2 is deleted and replaced by the following:

2. Recompute each grievant's total seniority by adding to the seniority time accrued as an AB or OS as of each date of appointment to a Mate position after the Hood Canal Bridge sinking all time worked as Mate until the initial date(s) of seniority as Mates. Add to such recomputed AB/OS time lost as a result of WSF's refusal to reinstate the respective grievant to an AB/OS position after his/her reclassification to "extra relief" status and request to return to AB/OS employment, minus any time accrued on the Mate seniority roster subsequent to the lay-off from a full-time Mate position.

V. Add a new Order No. 6 to read as follows:

6. Maintenance of membership in the respective unions shall continue to be governed by the respective Union Security clauses.

Dated at Seattle, Washington, this 29<sup>th</sup> day of June, 1984.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner