STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

SHIPWRIGHTS LOCAL 1184	)	
	)	MEC Case No. 6-88
Grievant,	)	
v.	)	DECISION NO. 43-MEC
	)	
WASHINGTON STATE FERRIES,	)	FINDINGS OF FACT,
	)	CONCLUSIONS OF LAW
Respondent.	)	AND HEARING EXAMINER'S
	)	DECISION AND ORDER

Kenneth J. Pederson, Attorney at Law, appearing for and on behalf of the Grievant.

Kenneth Eikenberry, Attorney General, by Robert McIntosh, appearing for and on behalf of the Respondent.

BACKGROUND

For a period of over six years (February, 1982 through May, 1988) Washington State Ferries (WSF) paid penalty or premium pay under a variety of formulas for work involving the handling of hazardous materials, primarily creosote, asbestos and fiberglass. This penalty pay has been authorized under and by successive managers of the WSF's Eagle Harbor maintenance and repair yard as appropriate under Article XXI Dirty Work, which has been part of at least the three most recent Metal Trades Union collective bargaining agreements with WSF.

On May 25, 1988, in response to a newspaper investigation and resulting article on the subject, Kern Jacobsen, Engineering Superintendent for WSF, ordered Paul Kressin, the manager of the Eagle Harbor yard, to "suspend the payment of all premium pay not specifically covered by a labor agreement or other appropriate written authorization" (Ex. 10) pending his investigation of the appropriateness of the hazardous materials payments. On June 11, 1988, Mr. Jacobsen submitted a written report of the results of his investigation (Ex. 13). On September 13, 1988, after receiving the Assistant Attorney General's opinion indicating no valid legal basis for receiving past premium payments and that there were legal arguments to support termination of those payments, Mr. Jacobsen instructed Mr. Kressin "to terminate those payments (for asbestos, fiberglass and creosote) effective the date of (their) suspension" (Ex. 12).

On September 16, 1988, Shipwrights Local 1184 filed a grievance with WSF on the matter, seeking restoration of penalty pay for work with asbestos, fiberglass and creosote retroactive to May 16, 1988. By letter dated November 22, 1988 the matter was submitted to the Marine Employee's Commission for arbitration. On December 7, 1988, the required Submission of Grievance for Arbitration was prepared by

Grievant. The matter was originally scheduled for hearing on February 2, 1989, but was postponed due to inclement weather until February 23, 1989. The hearing commenced at 9:00 a.m. before David P. Haworth, Hearing Examiner, at the "Spike" Eikum Conference Room, Colman Dock in Seattle. Briefs, originally scheduled for postmark by April 10, 1989, were delayed one week to April 17, 1989 due to delay in transcript preparation.

ISSUE

The following issue statement was agreed to by the parties.

"Whether the Employer's cancellation of the premium payments for asbestos, creosote and fiberglass work violated the collective bargaining agreement and binding past practices, if any, between the parties…If so, what is the appropriate remedy?" (TR 10, 11, 15)

POSITIONS OF THE PARTIES

Grievant's Position

A. "Dirty work" pay for creosote, asbestos and fiberglass work is established as a matter of custom and practice.

   1. Custom and past practice are routinely considered to be part of collective bargaining agreements.

   2. Payment of premium pay for WSF for work with asbestos, creosote and fiberglass represents such a past practice.

B. WSF yard managers had the authority, both express and apparent, to institute the practice.

   1. Yard managers had authority to act as agents for WSF.

   2. Yard managers had apparent authority to authorize the payments at issue.

   3. By failure to act over the six-year payment period, WSF certified the actions of its yard managers.

C. WSF owes union members back-pay, together with interest, for work done since suspension of premium payments.

Respondent's Position

A. The premium payments are prohibited by the provisions of RCW 47.64 which require collective bargaining agreements to be in writing.

B. The premium payments are prohibited by the collective bargaining agreement because they are inconsistent with the clear language of Article XXI and violate the entire agreement language of Article XXVII.

C. Continuation of the premium payments is not supported by the past practice of the parties.
   1. Since the language of the Agreement is unambiguous, past practice cannot be used to interpret it.
   2. Since the past practice was not ascertainable as a fixed established practice accepted by both parties, it cannot be used to interpret the agreement.

FINDINGS OF FACT

1. After January, 1980, the point at which WSF's investigation began, the first instance of non-contractual premium pay occurred on February 18, 1982, for "excessive dust in compartment under layment removal." The relevant pay order was signed by Clark Lovjoy, foreman, and initialed by Neil Quinn, then the Eagle Harbor manager. (Ex. 13, p. 1)

2. All requests for the premium pay at issue were initiated by workers involved in working with the material in question and agreed to by their foreman.

   a. The first creosote premium pay was made in March, 1982. Clark Lovjoy, foreman, initially rejected a February, 1982 request for such pay made by a work crew. Subsequently, Jack Nannery, shop steward, and Lovjoy reached agreement that "one-for-one" (double time) premium pay would be permitted for such work (TR 43-48). This practice continued until the May, 1988 suspension of all such pay.

   b. The first fiberglass premium pay was made in April, 1982 (TR 57, Ex. 13, p. 1). The crew leadman, Cam Moen and Lovjoy agreed that premium pay for such work was appropriate (TR 59). Initially, the same "one for one" basis was used. Subsequently, work crew members felt this was too excessive and came to a "gentleman's agreement" with shop steward Nannery to change to a "one for four" basis (TR 60). The second practice

continued until the May 1988 suspension.

c. The first asbestos premium pay was made in October 1983 (TR 50, Ex. 13, p. 1). Nannery and Lovjoy again agreed premium pay for handling this material was warranted (TR 53). This rate began on a similar "one for one" basis as that for creosote (TR 70, 71) for all time involved in asbestos working including setup and cleanup. It was subsequently modified to "one for one" only during physical abatement procedures (TR 73, 74). The practice continued until the May 1988 suspension.

3. No yard manager was directly involved in either the negotiation or agreement for any of these premium pay arrangements. However:

a. Mr. Neil Quinn, yard manager when the premium pay agreements were reached, initialed his approval on subsequent pay actions authorizing the premium pay (Ex. 7). He also stated to Mr. Kern Jacobson, Engineering Superintendent, that he considered work with any type of hazardous material dirty work which should receive premium pay (Ex. 13, p.B1).

b. Mr. Paul Kressin, present yard manager and successor to Quinn, after some review continued to approve pay orders for such pay. He felt the practice an appropriate interpretation of the contract due to the nature of the work and approval of such payments by his predecessor. He was also reluctant to oppose the union at a time when he was trying to implement some changes. (TR 83, 84, Ex. 13, p.B1)

Neither yard manager discussed these payments with his superiors (Ex. 13, p.2).

4. There is no written documentation support:
- Any of the premium pay agreements,
- Specific procedures for approving premium pay, or
- Authority for approval of premium pay. (Ex. 13, P.3, Ex. 6)

5. DOT Directive DOI-01 (Ex. 14) delegates authority for execution of documents, but "does not negate other authority and responsibilities exercised…as a matter of common practice…"

6. There is no evidence that any WSF management level above that of yard manager was aware of the premium pay practices at issue in this matter until May 1988.

a. Although some testimony (TR 48) attributed personal approval to Mr. Nick Tracy, then WSF General Manager, this was by hearsay only and not corroborated. The then-yard manager Quinn and Mr. Jim Osbjornson, his supervisor, could verify no such involvement.

b. Involvement by the WSF payroll department appears to have been largely clerical or technical in nature, with no evidence of any policy review (Ex. 6).

7. The premium pay practices continue through periods covered by three Collective Bargaining Agreements. The language in the referenced section of these Agreements (Article XXI – Dirty Work) remained unchanged in all three agreements. (Ex. 1, 2, 3)

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. "An arbitrator's decision on a grievance shall not change or amend the terms, conditions or application of the collective bargaining agreement." (Chapter 47.64.150 RCW)

3. The steps defined in Article XII – Grievance Procedure of the 1985-87 Metal Trades/WSF Collective Bargaining Agreement (the "Agreement") are applicable to this matter and have been correctly followed by the parties.

4. The issue and positions of the parties in this matter relate directly to the provisions and language of Article XXI – Dirty Work of the Agreement.

5. The language of Article XXI is as follows:

ARTICLE XXI
DIRTY WORK

> Section 1. Employees required to work in tanks, bilges, or under floor plates where oil or water has accumulated, or in boilers, uptakes or stacks shall be paid double time for the entire period so employed unless such places are reasonably clean.

> Section 2. When employees are required to clean or work in septic tanks or transfer sewage containing human waste, they shall be paid the double time rate.

6. This language is clear, unequivocal, and unambiguous. Such clear-cut language cannot be ignored and must be enforced. (Elkouri and Elkouri, How Arbitration Works, p. 348-349, 4th Edition.)

7. The binding quality of a past practice, even if established by mutual agreement, must be due to the written agreement on which it is based. (Ford Motor Co., 19LA 237, 241-242 (1952), as cited in Elkouri & Elkouri, How Arbitration Works p.441, 4th Edition.)

8. Past practices which are choices by management in the exercise of managerial discretion as to convenient methods at the time are, "in absence of contractual permission to the contrary, subject to change in the same discretion." (Ibid.)

Premium pay for creosote, asbestos and fiberglass work was clearly a long-time matter of custom and practice at Eagle Harbor. It was clearly institute, however, as a matter of management convenience in agreements between workers and foreman Lovjoy initiated by specific project situations. Yard managers, not involved in any of these specific agreements, subsequently ratified the practice by initially relevant pay orders.

Yard managers believed they had the authority to approve such payments under Article XXI of the contract. There was no evidence introduced that they were expressly delegated authority to act as agents of WSF management in matters modifying written contract language. As soon as WSF management became aware of the premium pay practice they ordered suspension and, subsequently termination, so no implied authority was indicated.

Custom and past practice are routinely considered to be part of collective bargaining agreements, but not in cases where relevant contract language is clear, unequivocal and ambiguous. Article XXI of the Agreement is clear, unequivocal and unambiguous. The verbatim continuation of such clear, unequivocal and unambiguous language through the successive collective bargaining agreements between the parties provides further indication that principals of both parties and their agents were unaware of the existence of this practice.

Accordingly, I must conclude that there is no basis for considering the past practice of premium payments for creosote, asbestos and fiberglass work as contractually binding upon WSF. WSF's cancellation of those premium payments was therefore not in violation of the collective bargaining agreement or any binding past practices between the parties.

ORDER

Based on the foregoing Findings of Fact and Conclusions of Law, the grievance filed by Shipwrights Local 1184 on this matter is accordingly dismissed.

Dated at Seattle, Washington, this 8th day of May, 1989.

HEARING EXAMINER

/s/ David P. Haworth

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