STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

CHARLES MARINGER, Complainant, v. WASHINGTON STATE FERRIES and INLANDBOATMEN'S UNION OF THE PACIFIC, Respondents.)	)	MEC CASE NO. 3-89 DECISION NO. 49-MEC DECISION AND ORDER

Ivan Johnson, Attorney at Law, appearing for and upon behalf of the complainant.

Kenneth Eikenberry, Attorney General, by Robert McIntosh, Assistant Attorney General, appearing for and upon behalf of the Washington State Ferries.

David Freiboth, Patrolman/Business Agent, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

INTRODUCTION AND BACKGROUND

Charles Maringer is an Able Bodied Seaman of many years' experience. He has been employed by Washington State Ferries (WSF) in an on-call capacity five times from 1964 up to the present time. On August 8, 1989, Maringer filed an unfair labor practice complaint (ULP) against both WSF and the Inlandboatmen's Union of the Pacific (IBU).

His complaint alleged that WSF had violated his right as a ferry employee to just and fair compensation, benefits and working conditions as set forth in RCW 47.64.006(7). He alleged that WSF, in forcing him to make a choice either of remaining available for work during slack seasons, in which case he could not support his five children, or of signing away his accumulated work hours toward

seniority by accepting other employment during said slack seasons, was exercising coercion under the terms of RCW 47.64.130(1)(a).

Maringer's complaint charged that IBU, in agreeing with WSF, had also committed unfair labor practices under the terms of RCW 47.64.130(2)(a)(i). Maringer charged that IBU had failed to represent him by agreeing to the WSF practice and by not attempting to obtain an interpretation of the WSF/IBU collective bargaining agreement under which Maringer could enjoy his statutory right.

In sum, Maringer's complaint alleges not only that WSF and IBU are committing unfair labor practices against him as a person over the age of forty supporting children in their interpretation of the WSF/IBU collective bargaining agreement, but also that said WSF/IBU agreement itself violates his statutory rights.

MEC INVESTIGATION PROCEDURE

Following receipt of Maringer's ULP, on August 10, 1989, Janis Lien, MEC Administrative Assistant, served notice to Maringer that his complaint would be discussed by MEC at its next regular meeting for the purpose of determining under WAC 316-45-110 whether or not the facts he alleged would constitute a violation of law, if later found to be true and provable. Lien also notified Maringer that at this discussion MEC would require certain additional information and clarification as to whether he intended his action to be against WSF or IBU and whether a ULP or a grievance. Lien's letter advised Maringer that the August 10 discussion of the complaint would not be an evidentiary hearing.

On August 21, 1989, Maringer filed an amended complaint charging that "part of the present labor agreement allows, permits, or encourages both the employer and the Union to interfere with, restrain or coerce employees in the exercise of rights guaranteed by Chapter 47.64 RCW. …"

MEC did schedule on its August 25, 1989 agenda and did conduct a discussion of the Maringer complaint. Both Maringer and his attorney, Ivan D. Johnson, were present and participating, as were representatives of both WSF and IBU.

On September 11, 1989, MEC Commissioner Donald E. Kokjer, assigned as examiner, notified Maringer and WSF and IBU that the Commission had determined that the "alleged facts may constitute unfair labor practice(s) within the meaning of RCW 47.64.130 if found to be true and provable . . . ." Accordingly, on September 22, Examiner Kokjer served notice on all parties he would hold a public hearing on the ULP on October 19, 1989. That notice also notified the respondents, WSF and IBU, that they "may make answer to…(the) complaint by filing an answer thereto with (MEC). The answer shall be served on (MEC) on or before October 9, 1989, and on the same date a copy shall be served on Ivan D. Johnson."

That notice also essentially repeated WAC 316-45-210, informing respondents that "a respondent shall specifically admit, deny or explain each of the facts alleged in the complaint. … The failure of a respondent to file an answer or the failure to specifically deny or explain in the answer a fact alleged in the complaint shall, except for good cause shown, be deemed to be an admission that the fact is true as alleged in the complaint, and as a waiver of the respondent of a hearing as to the facts so submitted."

On October 9, 1989, WSF filed an answer denying certain alleged facts, admitting others and disclaiming knowledge about several.

IBU did not file an answer nor a statement of cause.

Examiner Kokjer convened the hearing as scheduled at 10:00 a.m., October 19, 1989, and then recessed the hearing to allow time for the parties to discuss settlement. When the parties reported at 10:45 a.m. that they had reached no settlement, the actual hearing

began. Examiner Kokjer reminded David Freiboth, IBU, that the failure of IBU to answer the complaint, and a failure to show good cause, constituted an admission of the facts as alleged.

Freiboth remained at the hearing and did testify as a WSF witness.

At the conclusion of the hearing, Examiner Kokjer announced that the hearing transcript would be due on November 13, 1989, and that post-hearing briefs would be postmarked December 7, 1989. MEC received the WSF brief on December 8, 1989. On December 11, 1989, Lien phoned Maringer's attorney, Ivan Johnson, who indicated he had not obtained his copy of the transcript and, therefore, had not prepared a brief. On December 14, 1989, Examiner Kokjer granted Johnson a continuance until January 2, 1990 for filing a brief. Because Johnson already had access to the December 7 WSF brief, Kokjer allowed WSF time to file an additional discretionary brief by January 11, 1990. Complainant's brief was filed on December 29, 1989. On January 9, 1990, by letter WSF declined to file an additional brief.

POSITIONS OF THE PARTIES

Complainant

Maringer contends that Rule 21.04 of the WSF/IBU collective bargaining agreement allows, permits, or encourages both WSF and IBU to interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Chapter 47.64.006(7), viz., just and fair compensation, benefits, and working conditions for ferry system employees. That rule and/or the implementation of it discriminates against persons over 40, particularly those with large families. During slack seasons, little on-call work is available; and economic necessity requires the breadwinner of a family to seek other work and thus becomes unavailable to the employer for extended periods. Although Rule 21.04(2) provides

that the employee's "date of hire" (on which seniority is based) may be adjusted from time to time because of such unavailability, in actual practice the WSF Personnel Department strikes the employee's date of hire and assigns a new date, showing the date of return to work as the new "date of hire" as if he were a new employee, and wipes out all prior work-hours accumulated toward achieving seniority. "Season after season, such employees lose all their seniority acquired during the peak season, even though their unavailability might have been as little as one day."

After working "on-call" only seventeen days in two months in October and November, 1988, Maringer asked WSF Personnel Department for a leave of absence, so that he could ship out to earn some money to support his five children. The Personnel Department refused his request.

When Maringer went to his union, IBU, the exclusive employee representative for Deck Department employees, he was told he could not get a leave of absence.

The WSF Personnel Department insisted that if Maringer would sign a statement indicating he would not be available until the following spring, he could return after all other "on-call" employees were hired, but with zero hours of accumulated seniority time. Maringer did sign such a statement, but now contends that his signature was coerced.

Maringer did ship out of the country. When he reported his availability for work on the 14th or 15th of June, 1989 (TR 13), he was informed that after six persons were transferred from the dock to the boats, he "would be on-call before anyone else this year." Although he listed a home phone number and a "beeper" phone number with the dispatcher, he was not actually called to work until July 9th. (TR 16) July 9, 1989, became his hire-date as in the case of a new employee. His accumulated work hours of 1987 and

1988 were thereby cancelled.

Maringer asserts that two other "on-call" ABS (Jeff Stewart and Ron Taomasso) were given work in the shipyard; and an oiler, covered by the same WSF/IBU agreement, asked for permission to ship out and was told to go ahead and did, and returned to work (presumably without difficulty).

Maringer showed that he has a record of being a skilled, competent, and dependable Able-Bodied Seaman by offering in evidence several letters of commendation from other maritime employers, supervisors and ship captains.

Maringer also complained during the hearing that he has not been called for work at all in 56 days following the discussion of the ULP by MEC on August 25, 1989.

Maringer insists that a "hire-date" be adjusted only to the extent that the employee is actually not available for work, and proposes that correction as a remedy to his complaint. Maringer requests that the respondents be ordered to pay his costs, including attorney's fees.

Washington State Ferries

In its answer to the ULP, filed October 9, 1989, WSF denied that the WSF/IBU agreement allows, permits, or encourages both the employer and the Union to allow, permit, or coerce employees in the exercise of rights guaranteed by Chapter 47.64 RCW. WSF denied that the agreement is unfair and that it discriminates against persons over forth, particularly those with large families. WSF disclaimed knowledge that the requirement that a "family man" must seek outside employment during slack season, and therefore (by Rule) denied it. WSF further denied that, in actual practice, the WSF Personnel Department strikes the last hire date and that a new

hire date is not assigned until the employee returns to work. WSF admitted that Maringer was told by the Personnel Department his hire date would be adjusted if he were unavailable for work; but WSF neither admitted nor denied the charge that Maringer's seniority-hours for two years were taken away by WSF.

WSF disclaimed knowledge of the basis for Maringer's charge that other employees were either kept at work in the shipyard or allowed to ship out to preserve their seniority. Therefore, by Rule, the disclaimer acts as a denial of the assertions.

WSF pointed out in its brief that "by his own admission, if he had stayed with WSF for the winter, he would have worked about thirty days over the winter … Instead, Mr. Maringer chose to sail offshore . . .."

WSF admitted that when Maringer returned to work following his shipping out and an industrial injury, he was given a hire date of July 9, 1989, the day he returned to work.

WSF argues that this case should have been a grievance, not a ULP, and therefore should be dismissed. The WSF position is that the entire issue centers around the interpretation of Rule 21.04 in the WSF/IBU agreement, and therefore properly falls under Rule 16 – DISPUTES in that agreement. WSF argues that Maringer did not use the grievance process specified in that Rule, because the union would not support him. Secondly, at the time Maringer filed his ULP, his grievance would have been untimely. WSF relies upon Morris, The Developing Labor Law, as quoted by the United States Supreme Court (infra at Conclusion of Law No. 5). WSF further pointed out that Rule 16 provides that "No other remedies may be utilized…until the grievance procedures herein have been exhausted," thus barring Maringer from filing a grievance on this matter with MEC, and that MEC should dismiss the entire matter.

WSF also argues that RCW 47.64.006 is a statement of public policy, and "is not one of the 'rights guaranteed by this chapter' (emphasis in original)" In addition to not being a right, RCW 47.64.006 is not enforceable through the ULP progress.

WSF further argues that "the long-standing application of Rule 21.04 does not force…(Maringer) to starve. He is able to get unemployment (compensation (?)) (TR 16-17), which, now that his child support payments are reduced, is sufficient. TR 17" The argument goes on to aver that WSF "and its union have negotiated a contract that allows it to require employees, some of whom will be working almost full time, to remain available for WSF work."

WSF objected to the admission of evidence to establish complainant's competence, on the grounds that his competence was not questioned by WSF. WSF also objected to admission of complainant's assertion that WSF had not called him to work since August 25, 1989, the date of the MEC discussion of the complaint, on the grounds that this "event" occurred subsequent to the filing of the complaint.

Inlandboatmen's Union of the Pacific

IBU did not respond to Maringer's complaint by filing an answer. Nor did IBU attempt to show cause as to why its answer was not filed, per se. The IBU position herein is taken from the testimony of David Freiboth, which is briefly summarized from the hearing transcript, as follows:

David Freiboth, Patrolman/Business Agent for the IBU, took the position that the Union was in the position of having to enforce the provision of a contract that was not fair. He wanted to put the Union in the position of "bystander" to see what would come out of the hearing.

Except for the tacit admission of facts, both by Rule and as stated hereinabove, IBU neither admitted, nor denied, nor claimed to be without knowledge of any of the specific alleged facts in the complaint, nor did IBU file a post-hearing brief in response to Examiner Kokjer's instructions at the close of the hearing.

The Marine Employees' Commission, having reviewed the entire record, now enters the following summary of issues, findings of fact and conclusions of law.

ISSUES

The following summary of issues was compiled from the record (See CL 2.):

1. Did either WSF and/or IBU violate rights guaranteed to Charles N. Maringer as a ferry employee by Chapter 47.64 RCW?

2. Is the present matter before MEC properly an unfair labor practice complaint (ULP), under RCW 47.64.130, or should it have been filed as a grievance under RCW 47.64.150?

3. Does MEC have jurisdiction to hear the complaint if it is held to be a ULP and/or if it is not a ULP, but is held to be a statement of grievance?

4. Is RCW 47.64.006(7) a statement of one of the "rights" guaranteed to ferry employees by chapter 47.64 RCW?

5. Is Rule 21.04 of the WSF/IBU collective bargaining agreement discriminatory toward employees over 40 years of age who have families to support?

6. Can MEC consider the two subjects in the record to which WSF has objected, viz., complainant's competence and complainant's lack of work following August 25, 1989?

7. If the complaint is held to be a ULP, what is the proper remedy?

8. If the complaint is held to be a grievance, what is the proper remedy?

FINDINGS OF FACT

1. Complainant Maringer has been employed in the WSF Deck Department as an Able Boded Seaman in five years, starting in 1964, and is still employed in an "on-call" status. As an "on-call" employee, he has worked full-time during the summer seasons; but less work has been available to him in the fall, winter and spring.

2. Complainant is a member of the Inlandboatmen's Union of the Pacific and IBU is the recognized representative of the employees in the WSF Deck Department.

3. At the conclusion of the first several busy seasons when the amount of work slacked off, he "quit" his job, and shipped out off-shore (TR 9); but after working the summer of 1987, complainant did not "quit". On October 5, 1987, he told the WSF Dispatcher he wanted to be on "lay-off" status so he could ship out, and the Dispatcher told him to "go ahead." (TR 10). However, Personnel Manager Rice later initiated an "Employment Suspension/Termination Advice" form which indicated that complainant was "terminated." The stated reason was, "Shipped off-shore for six months. Work available on-call." (Ex. 9) Upon his

return to work in June 1988, he was re-instated to "on-call" status and allowed to retain the seniority time he had accrued in 1987. (TR 10)

4. After working only eleven days during October and half of November, 1988, he again asked to be put in "lay-off" status so he could ship out again. WSF and Maringer agree that "if he had stayed with WSF for the winter, he would have worked about thirty days over the winter." (WSF brief, p 3)

5. The rate of pay for Able Bodied Seamen, effective 7/1/86, was $14.17 per hour. (Rule 19)

6. On November 25 he was told by WSF Personnel Manager Dave Rice that he would have to quit or sign a slip indicating "non-availability." He did sign the "non-availability" slip.

7. Complainant did ship out off-shore in November, 1988, suffered an industrial injury, was brought back to the States, and was bed-fast for a period of time. After obtaining a "fit for duty" release from his doctor, he asked to be re-instated in his "on-call" status with WSF. WSF Personnel Department agreed that he would be called back, but only after all of the other "on-call" ABs were called to work. He actually returned to work with a new "hire date" as if he were a new employee on July 9, 1989, thereby forfeiting his accumulated straight-time hours of work in 1987 and 1988.

8. The WSF Personnel Department uses an "Employment Suspension/Termination Advice" form for its records of "non-availability" of "on-call" employees. (Ex 2, 8, 9)

9. Maringer ranked No. 353, with a hire date of 06-18-87, out of 396 employees on the WSF 1988 Unlicensed Deck Department Seniority List dated 3/88. (Ex 11)

10. Maringer was not ranked at all among 414 employees on the WSF 1989 Unlicensed Deck Department Seniority List, dated 8/8/89; but his name was added after No. 414 as: Maringer, Charles, date to be adjusted. (Ex 10)

11. Seniority in the WSF Deck Department is governed by Rule 21 of the WSF/IBU Agreement as follows:

RULE 21 - SENIORITY AND ASSIGNMENTS

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

21.02 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 first laid off, or demoted to a lesser classification for job retention. 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.

. . .

21.04 Establishing Seniority:

1. An employee's hire date shall become the employee's seniority date on the date the employee is assigned to year-round employment in a designated department, or on the date on which the employee completes 1044 straight-time hours of work with the Employer, whichever occurs first; provided that, for job bidding purposes, Oilers and ABs shall use the date of their AB or Oiler Endorsement on their U.S. Merchant Mariner's Document, or their date of hire with the employer, whichever is later. The provisions of this paragraph shall not operate to change any seniority date established prior to April 1, 1985. (Emphasis added.)

2. It is understood and agreed that the "date of hire" will be used, prior to an employee attaining seniority as provided in (21.04-1), for all non-year round assignments. Further, it is agreed that the employee's

date of hire may be adjusted from time-to-time resulting from the employee's non-availability to work. Provided the employer substantiates the employee's non-availability by certified U.S. Mail, and the employee does not respond or state he is available for assignments within fifteen (15) calendar days. (Emphasis added.)

. . .

4. Department Seniority: Seniority shall be established by classification(s) within the following departments. For seniority purposes, classification(s) of Terminal Department personnel shall fall into three (3) categories, Deck Department into two (2) categories, and Informational Department into two (2) categories.

Deck Department: Able Seaman,
Vessel Watchman, Matron, Ordinary Seamen

Engine Department: Oiler
Wiper

Terminal Department: Terminal Agent
Auto Ticket Seller, Passenger Ticket Seller
Passenger Ticket Taker, Auto Ticket Taker
Dock Watchman, Terminal Attendant

Informational Department: Informational Supervisor
Informational Agent

Any employee assigned to the Shoregang shall retain their seniority in the classification and department they held prior to their shoregang assignment. (Emphasis added.)

21.05 Seniority Roster. On February 1, of each calendar year, the Employer shall furnish the Union with seniority rosters for each department showing the names of employees assigned to year around jobs, by department, classification, vessel watch or location. The Employer shall also post these rosters in places accessible to employees of that department. These rosters will be subject to correction at any time by either the Employer, Employee or Union Representative, who shall substantiate the employee's correct seniority date, provided that, if said correction is not brought to the attention of the Employer, in writing within sixty (60) calendar days of February 1st, then the Employer will not be required to make any retroactive wage or staffing adjustments resulting from any correction to an employee's seniority date. (Emphasis added.)

21.06 On-call Employee Lists. The Employer shall prepare and maintain supplemental lists in order of dates of hire by department and classification of on-call employees. These lists shall be furnished within ten (10) days when requested by the Union. (Emphasis added.)

. . .

21.10 Termination of Bargaining Unit Seniority. Except as otherwise provided for in this Agreement, seniority shall terminate for an employee who quits, is discharged for cause, is unavailable for work, or who is on continuous lay-off for more than 365 days. (Emphasis added.)

. . .

12. The term "termination" is defined in Rule 1.06 WSF/IBU Agreement, as follows:

Rule 1 – DEFINITIONS

SPECIFIC DEFINITION: Unless the context of a particular section of this Agreement clearly dictates otherwise, the following terms shall have the following meanings:

. . .

1.06 TERMINATION. The term "termination" shall be the ~~act of an employee ending his employment with the employer~~ ending of an employee's employment with the employer. (Strike-out and emphasis in the original.)

13. Both WSF and IBU interpreted the clause "the employee's date of hire may be adjusted from time-to-time resulting from the employee's non-availability to work" to mean that, following non-availability by an on-call employee and upon that employee's return to work, the employee's "date-of-hire" would be the date of return to work as a new employee and past accumulation of straight-time hours eliminated. (Emphasis added.) (TR 48-50).

14. In some instances, on-call employees who had worked only one busy season were allowed to keep their prior straight-time hours toward seniority, but second year employees would have their dates of hire "adjusted" to a zero accumulation.

15. Webster's Third New International Dictionary, Unabridged, 1966 defines the transitive verb adjust as follows:

> adjust . . .1 a (1): to bring to a more satisfactory state: . . . SETTLE, RESOLVE . . . RECTIFY . . . (2): to determine the amount of (a loss) . . . b(1): to make correspondent or conformable: ADAPT . . . (2): to achieve an orientation of . . .: ACCUSTOM . . .: satisfy mental and behavioral needs of (oneself) . . 2: to put in order: reduce to a system: REGULATE . . . 3 a (1): to bring to a true or effective relative position . . . (2): to rearrange the relationship of components of (a watch movement) after complete assembly for improving performance with respect to temperature, positional, or balance-arc variations—distinguished from regulate (b): to change the position of (as for better fit or appearance) . . . 4 a: to change the range and direction of (as an artillery piece) so as to move the center of impact of fire into the target b: to send to (the firing unit) the information necessary to make changes in range and direction . . ." (Emphasis in the original).)

16. Black's Law Dictionary, 5th Ed., 1979, defines the verb adjust as follows:

> **Adjust**. To settle or arrange; to free from differences or discrepancies. To bring to satisfactory state so that parties are agreed, as to adjust amount of loss by fire or controversy regarding property or estate. To bring to proper relations; to settle. To determine and apportion an amount due. Accounts are adjusted when they are settled and a balance is struck. Term is sometimes used in the sense of pay, when used in reference to a liquidated claim. Combined in Oil & Gas Co. v. Brady, Tex. Civ. App., 96 S.W. 2d 415, 416. Determination of amount to be paid to insured by insurer to cover loss or damage sustained.

17. "Unfair labor practice" is defined by RCW 47.64.130 and WAC 316-45-003.

18. "Grievance" is not defined by statute, but is defined by WAC 316-65-005.

19. The record is silent as to whether WSF ever substantiated "the employees non-availability by certified U.S. mail, and the employee does not respond or state he is available for assignments within fifteen calendar days", in accordance with Rule 21.04.02.

20. The record is silent as to whether WSF posted the Deck Department Seniority Lists by February 1st, or whether Maringer or IBU brought the attention of WSF to an incorrect list either in 1987 or 1988, in accordance with Rule 21.05. Said Lists introduced in evidence indicated "3/88" (Ex 11) and "P.10 Corr. 8/8/89" (Ex 10) respectively.

21. The record is silent as to whether WSF prepares and maintains "supplemental lists in order of dates of hire by department and classification of on-call employees." Nor is there any evidence that these supplemental on-call lists were ever furnished to or requested by IBU in accordance with Rule 21.06. Complainant stated "WSF "don't even have a list that they give the Union to police the seniority system. … Mr. Freiboth told me on the phone that it was my job to find out if anybody was working with a lesser seniority than me." (TR 19)

    Dave Rice, WSF Personnel Manager since 1979 (TR 72), testified that IBU representatives participate in drawing up the Seniority Lists and have never protested one of them. (TR 99)

22. WSF introduced one Employment Suspension/Termination Notice (Ex 8) as evidence that Maringer had resigned; but that Notice was dated November 16, 1979, and notes that Maringer had given WSF two weeks notice September 27, 1979.

23. The November 14, 1988 statement of non-availability signed by Maringer on November 14, 1988 was an ECON-O-GRAM. (Ex 2)

Other notations in different handwriting appear on that ECON-O-GRAM. An Employment Suspension/Termination Advice form, dated 11/18/88, not signed by Maringer, is stapled to it, indicating Maringer "will now receive a new 1989 date first day return to employment status."

24. Although Maringer's request for "lay-off" status and the WSF denial thereof are at the center of this case, and although the WSF/IBU Agreement contains three Rules which refer to lay-off of employees, "lay-off" is not defined. Nor is there any criterion for lay-off status.

The Marine Employees' Commission, having reviewed the positions of the parties, the summary of identified issues and the findings of facts, now enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has general jurisdiction over this matter. (Chapter 47.64 RCW; particularly RCW 47.64.280).

2. Because the issues were not stated precisely by the parties, MEC may derive the issues, as stated supra, on the basis of the amended complaint (Court Rule ER 15(a) and (c)), the answer from WSF, the absence of answer from IBU and the stated reason therefore, the hearing transcript, the exhibits, and the parties' briefs. (Elkouri and Elkouri, How Arbitration Works, 4th Ed., p 231 (1988).)

3. If this matter were only limited to interpretation of language in the WSF/IBU collective bargaining agreement, the dispute procedures in said agreement must be utilized and exhausted. (RCW 47.64.150, WAC 316-65-020, and Rule 16, WSF/IBU Agreement) Rule 16 specifically assigns settlement of

contract interpretation impasse to an arbitrator from a list provided by the Federal Mediation and Conciliation Service, thereby removing arbitration of grievances from MEC jurisdiction.

4. Unfair labor practices (i.e., violation of RCW 47.64.130) are not subject to the limitations of RCW 47.64.150.

5. Elements of both contract interpretation and of unfair labor practice are intertwined in this matter. MEC cannot effectively make a judgment on the unfair labor practice complaint without arriving at certain conclusions regarding WSF and IBU interpretations of their agreement. In any event, the existence of an unused grievance procedure is not a bar to the processing of an unfair labor practice charge. The citation by WSF of the U.S. Supreme Court quoting the NLRB "with approval: that the Board was restricted from interpreting contract language (i.e., resolving a grievance) was not complete. Carey v. Westinghouse Elec. Corp, 375 US 261, 55 LRRM 2042 (1964). The Court further held in that decision that "legislative history, precedent, and the interest of efficient administration all led to the conclusion that the Board does not exceed its jurisdiction when it construes a labor agreement when necessary to decide an unfair labor practice case." In several cases the Court "recognized that the Board has jurisdiction over contract disputes to the extent necessary to resolve unfair labor practice cases." (Emphasis added.) (See Morris, Charles, The Developing Labor Law, 2nd Ed., (1983) p. 909, citing Mine Workers v. NLRB, 257 F.2d 211, 214-15; Independent Petroleum Workers v. Esso Standard Oil Co., 235 F.2d 401, 405; NLRB v. Pennwoven, Inc., 194 F.2d 521, 524. See also Modjeska, Lee, NLRB Practice p. 318 (1983), citing 385 U.S. 421, 17 L.Ed.2d 486.)

6. Although past practice is very frequently used to establish the intent of contract provisions which are so ambiguous or so general as to be capable of different interpretations, past practice may not be used to give meaning to a provision which is clear and unambiguous. (Elkouri and Elkouri, How Arbitration Works, 4th Ed., p 454 (1985)) Although both WSF and IBU have consistently interpreted Rule 21.04, para. 2, in such a manner that adjusting a date-of-hire following non-availability actually results in totally canceling a date-of-hire resulting in elimination of all prior work hours accumulated toward the employee's seniority. However, it is clear that none of the definitions of the word adjust can be construed to justify such an interpretation of the word adjust. (See FF, 13, 14) Further, the past failure of Maringer and/or IBU to protest violations of clear contractual language does not bar Maringer and/or IBU, after notice to WSF, from insisting upon compliance with a proper interpretation of the word adjust. (Elkouri, ibid)

7. RCW 47.64.006(7) refers to promoting "just and fair compensation, benefits, and working conditions for ferry system employees as compared with public and private sector employees in states along the west coast of the United States, including Alaska and in British Columbia in directly comparable but not necessarily identical positions. (Emphasis added.) The foregoing provision does not pertain to "just and fair compensation" within the Washington State Ferry System. Complainant did not attempt to show he was deprived of "just and fair compensation" as compared with other ferry systems. Rather than being a statement of "right" for ferry employees, RCW 47.64.006(7) is a statement of policy which is implemented by the statutory directive to MEC to make certain fact-finding surveys under RCW 47.64.220 and 47.64.280(2)(c). MEC must find that neither WSF nor IBU violated RCW 47.64.006(7). Therefore whether or not the statement of public

policy in RCW 47.64.006 is susceptible to enforcement by a ULP complaint can be deferred until such time as it should become a direct issue.

8. Complainant did not show that his age was ever a factor in his need to seek higher paid work during the slack ferry seasons, nor in the application of the WSF/IBU Agreement or in the Agreement itself. Therefore MEC must hold that neither WSF or IBU discriminated against complainant on the basis of his age, as alleged.

9. Rule 21.04 permits on-call ABs to retain seniority while assigned to shoregang work. Absent showing to the contrary, MEC can presume proper application of that Rule when WSF assigned ABs to the shipyard in the slack season; and complainant did not make any showing that such assignments were made for "on-call" ABs with fewer work-hours than Maringer's. Complainant could have subpoenaed Messrs. Jeff Stewart and Ron Taomasso (ABs) and/or WSF payroll records, but did not. MEC must find such assignments were not violations of Maringer's rights, nor violations of Rule 21.04.

10. WSF and Maringer agree (See FF3) that he could have worked thirty days (presumably thirty more days) if he had not shipped out and become unavailable for on-call work. From mid-November 1988 to June 9, 1989 he would have earned (8 hours x $14.17 per hour x 30 days) $3400.80 in 34 weeks or approximately $100 per week, gross wages before deductions. "On-call employees who have no families to support could reasonably be expected to sustain themselves on $100 per week gross income. I.e., the "on-call employee can sustain himself on $100 per week gross income, while keeping himself available for work. However, MEC must conclude that an employee who must support five children could not. The "on-call" employee who must support five children must seek

additional income. Nor can MEC recognize any validity to the WSF asserts that unemployment compensation is available to an "on-call" employee who is not laid off or conclude that such consideration was included in drafting the WSF/IBU Agreement. MEC must conclude that Rule 21.04, para. 2, and/or the WSF application of it to "on-call" employees is discriminatory and is unfair labor practice under RCW 47.64.130.

11. Rule 21.04, para. 1 is fair in form but is unfair in operation. Rule 21.04-1 appears to permit an "on-call" employee to achieve seniority status by accumulating 1044 straight-time work hours. However, the insistence of WSF and IBU upon the practice of canceling dates-of-hire with the consequential elimination of acquired straight-time hours creates an employment situation wherein an on-call employee with a large family to support could never accumulate the 1044 straight-time hours required, under Rule 21.04, para. 1, and consequently could never achieve seniority status.

12. Because no showing was made to indicate whether or not complainant would have achieved seniority status by accumulating 1044 straight-time hours (Rule 21.04, para 1) if he had retained full credit for his work in 1987, 1988 and 1989, Rule 21.10 may or may not apply to the instant case. However, MEC should take notice of Rule 21.10 – Termination of Bargaining Unit Seniority. If Rule 21.04-1 is discriminatory against "on-call" employees who must seek additional employment before achieving seniority, Rule 21.10 would also be discriminatory against those "on-call" employees after achieving seniority, and therefore unfair.

13. MEC must conclude that WSF did coerce complainant Maringer in the exercise of his rights as guaranteed by Chapter 47.64 RCW.

14. The failure of IBU to answer Maringer's complaint is tacitly an admission that the alleged facts are true. (WAC 316-45-210) IBU was properly notified of this rule. MEC must conclude that the failure of IBU to respond to the alleged facts in the complaint and/or to show cause either before the assigned due date, or even during the hearing, was neither default or oversight. The testimony of IBU Patrolman/Business Agent Freiboth indicated a considered decision that the WSF/IBU practice was wrong, and that IBU decided to assume a role of by-stander. MEC must further conclude that the role of by-stander is not available to the union representing a collective bargaining unit of ferry employees. (RCW 47.64.011 et passim)

15. Even though the validity of IBU's past practice in interpreting Rule 21.04 and the Rule itself had been in doubt, as indicated by Patrolman Freiboth's testimony that it is wrong, no evidence was presented to show that IBU has attempted in past renewals of the Agreement to correct the language by making it more fair or that IBU made any attempt to represent complainant Maringer in getting a different interpretation. (See CL 6, supra.) The designation of IBU as sole representative of employees in the Deck Department connotes an obligation to represent all of such employees. (See Modjeska, NLRB Practice, ibid., p. 411, discussion of the U.S. Supreme Court's reasoning in 323 U.S. 202). MEC must conclude that IBU abetted WSF in its coercion against Maringer, and that IBU also restrained or coerced complainant Maringer in the exercise of his rights guaranteed by chapter 47.64 RCW.

16. In determining remedies to the ULP herein under WAC 316-45-410, MEC may not include an order for compensatory back pay. The only evidence of possibly improper lost time took place,

if at all, during a short period in late June to July 8, 1989. The evidence is mixed and not clear.

17. The statements that Maringer had not been called to work after MEC discussed his complaint on August 25, 1989, and to which WSF objected, were properly admitted in evidence. (Court Rules, ER 401) Maringer's evidence was probative and relevant. It was not contradicted even, though the WSF Personnel Manager was present. However, MEC must acknowledge that the WSF objection was valid insofar as this testimony included the basis for anew and additional complaint. MEC should allow a period of time during which Maringer may file a specific complaint, without prejudice, if he so desires, and to allow WSF opportunity to prepare a defense.

18. Although the resolution of a ULP under RCW 47.64.130 does not have the statutory restrictions of RCW 47.64.150 (Grievance Procedures), absent a judicial determination, MEC should recognize the principle that MEC should not alter the collective bargaining agreement between WSF and IBU. Such a decision would undermine the policy that parties to the agreement must have reasonable assurances that their contract will be honored. Therefore MEC should only rectify the instant complaint, and direct WSF and IBU to take contractual steps to prevent recurrence in other instances. (See discussion of W.R. Grace Co., v. Rubber Workers Local 759, 103 S.Ct. 2177, 113 LRRM 2641, 2647 (1983).)

19. Although the decisions made by WSF and IBU in agreeing to the language of Rule 21.04 were deliberated, there is not the slightest evidence that there was any premeditated, malicious or evil intention. MEC has consistently declined to award attorney's fees when there was no such willfulness. Therefore MEC should deny complainant's request for an award of attorney's fees.

MEC should deny complainant's request for an award of attorney's fees.

The Marine Employees' Commission, having read the complaint, the answer, the positions of the parties, the issues, the findings of fact and conclusions of law, now hereby enters the following decision and order:

DECISION AND ORDER

1. The unfair labor practice complaint (ULP), filed by Charles N. Maringer on August 8, 1989 and amended August 21, 1989 is hereby upheld.

2. Washington State Ferries (WSF) and Personnel Manager David Rice and Dispatcher Gerhard Wack are each hereby found to be in violation of RCW 47.64.130(1)(a) by violating rights guaranteed to Charles N. Maringer by Chapter 47.64 RCW by coercing him to forfeit his work hours being accumulated toward achieving seniority status, and each is hereby ordered to cease and desist in that practice.

3. The Inlandboatmen's Union of the Pacific (IBU) and Patrolman/Business Agent David Freiboth are each found to have violated RCW47.64.130(2)(a) by abetting WSF in the foregoing unfair labor practice, thereby coercing Charles N. Maringer to forfeit his work hours being accumulated toward seniority status, and each is hereby ordered to cease and desist in that practice.

4. WSF Personnel Manager David Rice shall immediately recomputed combine and credit Maringer's work record with the total straight-time hours worked by Charles N. Maringer, starting with his first day of employment in 1987 through August 25, 1989. David Rice shall also correct the WSF 1989 Unlicensed

Deck Department Seniority List, dated 8/8/89, and the 1990 Seniority List in accordance with the foregoing recomputation, "adjusting" Maringer's "date-of-hire" to reflect only the time he was actually unavailable for work, and shall submit said corrected Seniority List to IBU and to Maringer for review and approval.

5. In computing the WSF 1990 Unlicensed Deck Department Seniority Lists Charles N. Maringer's "date-of-hire" shall be "adjusted" only to the extent that Maringer's unavailability for "on-call" work has been verified.

6. WSF and Personnel Manager David Rice shall display prominently on the Employment Suspension/Termination Advice form, dated 11/18/88, and the corresponding 1987 form if any, that Maringer was not terminated, but was on lay-off status because of insufficient availability of "on-call" work.

7. WSF and IBU shall immediately negotiate an interpretation of Rule 21.04, including but not limited to a method of adjusting the "date-of-hire," if/and as necessary, in such a manner as to preserve earned credit for hours worked and in such a manner that employees with families to support are treated equally with employees who do not support families while they are achieving and retaining work hours. WSF and IBU shall also negotiate a definition of "lay-off", including a threshold for eligibility for "lay-off status" based upon sufficient availability of work and not on availability of the worker, but which will continue to enable WSF to maintain its work force. If WSF and IBU are unable to reach agreement on these items within ninety days from the date this decision and order is entered, they shall jointly invoke Rule 16.04, Step III – Arbitration in the WSF/IBU Agreement.

7. Charles N. Maringer is hereby granted the right to file, without prejudice, an additional and separate complaint, no later than ninety days after the date this decision and order is entered, is he believes he was unfairly discriminated against subsequent to August 25, 1989, subject to his allegations being found to be true and provable. Such complaint shall be filed and served on the designated respondent(s) in accordance with chapters 316-02 and 316-45 WAC as a new complaint.

Dated this 8th day of February, 1990.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner