STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

ROBERT S. REYNOLDS,	)	MEC Case No. 8-91
	)	
Grievant,	)	DECISION NO. 79 - MEC
	)	
v.	)	
	)	ORDER OF DISMISSAL
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
	)	

Kevin Peck, Attorney at Law, appearing for and on behalf of grievant Robert Reynolds.

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

INTRODUCTION AND BACKGROUND

THIS MATTER came on regularly for consideration of a request for arbitration of a grievance filed by Robert Reynolds against Washington State Ferries (WSF). Grievant Reynolds has been employed variously by Washington State Ferries as an Ordinary Seaman (OS), an Able-Bodied Seaman (AB), and as a licensed Mate for several years with interruptions of service. Although he had prior employment at the higher levels and although he had U.S. Coast Guard licensure as a Mate, his most recent employment started on June 17, 1988 as an Ordinary Seaman. HE immediately presented his Mate's license and Pilotage Endorsements both to WSF and the International Organization of Masters, Mates and Pilots (MM&P), and requested placement at the bottom of the WSF/MM&P Mates' Seniority Roster based upon his prior employment.

Grievant Reynolds has been a member of MM&P during his employment as a Mate, and a member of the Inlandboatmen's Union of the Pacific (IBU) during his employment as a deckhand (OS and AB).

WSF and MM&P delayed Reynolds' placement on the Mates' Seniority Roster, first on the grounds that six months' current employment with WSF was required and second because of a newly added requirement of an additional pilotage endorsement (Spieden Channel). Grievant Reynolds made several intermittent attempts to use the grievance procedure specified in the MM&P/WSF collective bargaining agreement.

Upon presenting his Spieden Channel pilotage endorsement, Reynolds was given a seniority date of August 13, 1990 and was placed on the Mates' Roster accordingly. Reynolds requested WSF and MM&P provide him with legal representation and a "legal interpretation" of the MM&P/WSF contract provisions governing Mates' seniority. Reynolds simultaneously filed a request for grievance arbitration; MEC advised him that he must exhaust his contractual remedies. When MM&P and WSF failed to agree to a June, 1988 seniority date, Reynolds filed a grievance against WSF with the MEC.

MEC Chairman Dan Boyd was appointed arbitrator pursuant to WAC 316-65-070. Arbitrator Boyd held hearings on the case on October 22 and November 8, 1991.

ISSUE(S)

Because this decision is based in its entirety on certain affirmative defenses raised by WSF, and on rebuttal to those defenses, this Commission believes it unnecessary to make a precise statement of the substantive issue(s) and positions of the parties.

AFFIRMATIVE DEFENSES BY RESPONDENT WSF

In addition to several substantive defenses against Reynolds' grievances, WSF listed four affirmative defenses, as follows:

1. The grievance was not filed with the consent of MM&P, alleged to be required by Chapter 47.64 RCW.

2. MEC did not have jurisdiction in this matter under MM&P/WSF Rule 22.05

3. The processing of the grievance had not complied with the procedures set forth in the MM&P/WSF Agreement.

    a. The second step of the procedure in Rule 22 did not occur.

    b. The grievance had not been filed in compliance with Rule 20.08

4. The grievance was not filed within 60 days as required for a "normal grievance" under Rule 22.02, nor within 90 days for a "seniority grievance" under Rule 20.08.

REBUTTAL OF GRIEVANT TO WSF AFFIRMATIVE DEFENSES

Grievant Reynolds challenged the WSF and MM&P interpretations of MM&P/WSF Rules pertaining to credit for current and/or prior employment in meeting the Mates' seniority requirements and petitioned MEC to interpret said Rules, to give Reynolds credit for prior work experiences, establish a seniority date of June 17,1988 instead of August 13, 1990, order back pay differential and payment of legal expenses, and to retain jurisdiction until such orders were implemented.

The record contains only one effort on the part of Grievant Reynolds to offset the WSF defense that Reynolds must obtain MM&P approval of his filing a grievance and/or that MEC lacks jurisdiction to hear the matter pursuant to Rule XXII, DISPUTES. That rebuttal is found in Grievant's Post-Hearing Brief, pp 17 ff, as follows:

> Mr. Reynolds also respectfully asks that the Marine Employees Commission take note of the fact that under WAC 316/65/090 (sic) that "an employee" may file a grievance with the Marine Employees Commission. Mr. Reynolds had no alternative but to come to the Marine Employees Commission for help in correcting his proper Mate seniority date. It is expected the Washington State Ferry System will argue that Mr. Reynolds must file a grievance elsewhere before filing this grievance with the Marine Employees Commission. Based on WAC 316-65-010 we would also respectfully point out that "an employee" does has a right to file a grievance with the Marine Employees Commission. …
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> … The State will attempt to argue that Mr. Reynolds can only bring his grievance to the Marine Employees Commission with the consent of his union. The State will attempt to cite RCW 47.64.150 in that regard. But a careful reading of RCW 47.64.150 shows that if there is no provisions (sic) in a Collective Bargaining Agreement to handle a grievance dispute such an employee shall submit grievances to the Marine Employees Commission as provided in RCW 47.64.280. Indeed, Mr. Reynolds had no procedures to turn to after the delegate committee of the Masters, Mates and Pilots union because of the fact that he was not a member of the Masters, Mates and Pilots union at the time he was attempting to be placed back on the Mates' Seniority Roster. When Mr. Reynolds returned to work for the Washington State Ferry System on June 17, 1988 he began working as a Seaman and was therefore a member of the Inland Boatmen's union. Therefore he did not, and still does not have a procedure under the Masters, Mates Pilots contract to have a legitimate and appropriate avenue to correct his Mate seniority date under the Masters, Mates and Pilots Collective Bargaining Agreement. On the other hand Mr. Reynolds does have the right under RCW 47.64.150 and RCW 47.64.280 as an employee to have the Marine Employees Commission take testimony and arbitrate his mate seniority dispute. That is how and why this matter sits before this tribunal today. …

In addition to the foregoing post-hearing rebuttal to the first two WSF affirmative defenses, counsel devoted a substantial portion of his prosecution of his case that Reynolds did "everything humanly possible" to achieve seniority standing, but was prevented from doing so at least in part by lack of representation by MM&P. As noted in Findings of Fact and Conclusions of Law, infra, MEC

examined those veiled references to a breach of the MM&P duty of fair representation as possible rebuttals to WSF Affirmative Defenses No. 1 and 2.

Having read and carefully considered the entire record, the Marine Employees' Commission deems it permissible only to consider and enter findings of fact and conclusions of law for the first two affirmative defenses, as follows:

FINDINGS OF FACT

1. The matter at issue and the parties and the vessels involved herein are governed by the 1989-1991 MM&P/WSF collective bargaining agreement, as follows:

> The terms and provisions herein contained constitute an Agreement by and between the WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, an agency of the State of Washington operating the Washington State Ferries, hereinafter referred to as the "EMPLOYER", and the INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, PACIFIC MARITIME REGION, hereinafter referred to as the "UNION"; which agreement governs wages, hours, and various other conditions of employment on the property and vessels of the Employer as hereinafter provided.
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> I. SCOPE AND INTERPRETATION
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> 1.01 SCOPE OF AGREEMENT. The terms and provisions of this Agreement shall govern the Union, the Employer and all Deck Officers in its employ, and shall apply to all vessels of the Employer, whether now owned or hereafter acquired, and which are engaged in Puget Sound and connecting inland waters, on the Straits of Juan De Fuca, to the San Juan Islands, or to the ports of British Columbia. (Emphasis added.)

2. Disputes between Deck Officers, WSF and/or MM&P are governed by Rule XXII, DISPUTES, as follows:

XXII. DISPUTES

22.01 EXCLUSIVE REMEDY. It is understood and agreed that all disputes which may arise with regard to the interpretation or application of the terms and provisions of this Agreement shall be adjudicated in the manner herein provided. Unless the requirements of this rule are waived or modified with regard to a specific grievance by the parties, the failure to process a grievance or a defense to a grievance shall be considered as an abandonment of the grievance or the right to defend against the grievance. (Emphasis added.)

22.02 CONFERENCE. In the event of a controversy, dispute or disagreement arising either out of the interpretation of this Agreement or because the Union or a Deck Officer involved feels aggrieved by treatment of the Employer, the aggrieved party may, in writing, within sixty (60) calendar days after the facts and circumstances actually become known or, in the exercise of reasonable care should have become known, request a conference to be attended by the aggrieved Deck Officer and by one (1) or more representatives of each party, with full authority to settle the dispute or controversy.

22.03. DELEGATE COMMITTEES. In the event that such a dispute or controversy is not settled or resolved at such a conference, or within ten (10) days thereafter, the aggrieved party shall, within thirty (30) working days of the date of such conference, request in writing, a hearing before the Union Delegate Committee, and such a hearing shall be promptly held in accordance with the rules of the Committee, which shall render its written adjudication subsequent to the hearing. A copy of such adjudication shall be mailed to all parties involved. Representatives of the Washington State Ferry System shall be furnished notice of and be entitled to attend the meetings of the Delegate Committee which involve disputes or

Disagreements concerning interpretation of the Agreement. A copy of such adjudication shall be Mailed to all parties involved upon rendition.

22.04. ARBITRATION. In the event that the Employer or the Union feels aggrieved by the adjudication of the Delegate Committee, the aggrieved party shall, within thirty (30) calendar days of such adjudication, notify all parties of its intent to refer the matter to arbitration.

22.05. IMPANELING ARBITRATORS. Within ten (10) working days of any such Notice of intent to Arbitrate, the parties shall attempt to reach agreement on an impartial arbitrator to hear the matter. In the event that the parties are unable to agree on an arbitrator within ten (10) working days, either party may thereafter request a list of five qualified arbitrators from the Federal Mediation and Conciliation Service. The parties shall thereafter alternately strike names from the list until only one arbitrator remains, who shall hear and decide the issues presented. A hearing date shall be established at which time the controversy or dispute shall be tried, de novo, before the arbitrator selected, and without consideration being given to any prior adjudications in the case. (Emphasis added.)

22.06 HEARING AND DECISION. The arbitrator shall issue his decision not later than thirty (30) calendar days from the date of the closing of the hearings, or if oral hearings have been waived, then from the date of transmitting the final statements and proofs to the arbitrator. The decision shall be in writing and shall set forth the arbitrator's opinion, conclusions and decision on the issues submitted.

22.07 FINALITY OF AWARD. The adjudication of the arbitrator shall constitute an award; and shall be final and binding upon all parties represented at the hearing, as stated in RULE 22.06.

22.08. PAYMENT OF ARBITRATORS. All costs, fees and expenses charged by the arbitrator

> will be shared equally by the parties. All other costs incurred by a party resulting from an arbitration hearing will be paid by the party incurring them.

3. The record is silent as to whether or not the parties in the instant dispute attempted to reach agreement on an impartial arbitrator or requested a panel of arbitrators from the Federal Mediation and Conciliation Service.

4. RCW 47.64.150 distinguishes between grievance arbitration procedures to be included in a collective bargaining agreement (first paragraph) and the procedure to be followed when no procedures have been negotiated (second paragraph).

> 47.64.150 Grievance procedures. An agreement with a ferry employee organization that is the exclusive representative of ferry employees in an appropriate unit may provide procedures for the consideration of ferry employee grievances and of disputes over the interpretation and application of agreements. Negotiated procedures may provide for binding arbitration of ferry employee grievances and of disputes over the interpretation and application of existing agreements. An arbitrator's decision shall not change or amend the terms, conditions, or applications of the collective bargaining agreement. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The costs of arbitrators shall be shared equally by the parties.
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> Ferry system employees shall follow either the grievance procedures provided in a collective bargaining agreement, or if no such procedures are so provided, shall submit the grievances to the marine employees' commission as provided in RCW 47.64.280 (Emphasis added.)

5. Grievant Reynolds filed the instant request for grievance arbitration only against WSF and not also against MM&P as a de

Facto "co-determiner" of seniority status and, therefore, as possible co-respondent.

6. The record contains no evidence that Reynolds' effort to achieve standing on the Mates' Seniority Roster was rejected because he was not yet a member of MM&P. On the contrary, MM&P Vice President Dave Boyle advised Reynolds that six months' current employment was required and, later, additional pilotage endorsement was also required. The record is silent concerning any requirement of union membership. The record is clear that Reynolds have previously been promoted by WSF to a Mate position, indicating that lack of prior MM&P membership was not a bar to employment as a Mate.

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

CONCLUSIONS OF LAW

1. MEC has general jurisdiction over the labor-management relations between and among the employee, employer, labor union, and subject matter involved in this case. Chapter 47.64 RCW; especially RCW 47.64.280.

2. MEC may not change or amend the terms, conditions, or applications of the MM&P/WSF collective bargaining agreement. RCW 47.64.150.

3. MEC must interpret MM&P/WSF Rule 1.01 SCOPE OF AGREEMENT to include all positions of Mate on WSF vessels and all applicants for appointment or seniority therein, whether or not they are/were members of MM&P at the time a dispute arises. See Finding of Fact 6.

4. MEC heard, considered and decided upon the WSF defense that Reynolds' grievance must be denied by MEC, on the grounds that the union had no approved filing the grievance in an earlier case involving the same union and employer in Linda Wheeler v. Washington State Ferries, Decision No. 8-MEC (1985). RCW 47.64.150 authorizes WSF and an exclusive representative of ferry employees to negotiate procedures that provide for binding arbitration of ferry employee grievances and disputes over the interpretation and application of existing agreements. The procedures shall provide for the invoking of arbitration only with the approval of the employee organization. The procedures for selection of an arbitrator are found in MM&P/WSF Rules 22.04 and 22.05; and they clearly specify two alternative selections of an arbitrator, neither of which is the MEC. Under the restrictions cited in Conclusion of Law 2, MEC may not alter Rule 22.04 and 22.05 to provide for some other selection process.

5. As cited in Finding of Fact 4, RCW 47.64.150 established two distinct methods of grievance arbitration. Reynolds may utilize the procedures established in the contract. Only if there are no procedures established, he may submit the grievance to the MEC.

6. WAC 316-65-010, based upon RCW 47.64.150, is not intended to impose a mandatory union approval requirement that was not imposed by statute.

7. Because the MM&P/WSF Agreement, Rule XXII, does contain a grievance procedure including selection of an impartial arbitrator (Finding of Fact 3), and because the selection of MEC as impartial arbitrator was neither a joint selection by the parties nor from a panel provided by F.M.C.S. pursuant to Rule XXII, MEC must conclude that this matter should have been heard by a different arbitrator, selected in accordance with

Rule XXII. Pursuant to Rule 22.02 (Finding of Fact 2), MEC must conclude that Reynolds' choice of a different arbitrator (viz., MEC) to be "an abandonment of the grievance." MEC must conclude that WSF Affirmative Defense 2 is well-taken, and that this case should be dismissed for lack of MEC jurisdiction.

8. Regarding counsel's tacit implication of lack of fair union representation, MEC believes it necessary to examine that aspect carefully. An arbitration decision by this Commission is reviewable and vulnerable if tainted by a breach of duty on the part of a labor union. If it seriously undermines the integrity of the arbitral process, a union's breach would remove the bar of the finality provisions of the governing agreement.

   Grievance procedure cannot be expected to be error free. Finality provisions of a grievance procedure have sufficient force to surmount occasional instances of mistake; however, it is quite another matter to suggest that an erroneous arbitration decision must stand even though the employee's representation by his union has been dishonest, in bad faith, or discriminatory. Therefore, if a breach of union's duty of fair representation were to occur, that breach could relieve Reynolds of the contractual requirement that disputes be settled through grievance procedures in Rule XXII. See Hines v. Anchor Motor Freight, Inc., 96 C. Ct. 1048, 1058, 1059 (1976).

9. An individual employee may be relieved of the requirement that disputes be settled through contractual grievance procedures in Rule XXII if there is a breach of the union's duty of fair representation. Hines v. Anchor Motor Freight, ibid; Republic Steel Corp. v. Maddox, 370 U.S. 650 (1965); Vaca v. Sipes, 386

U.S. 171 (1967). In Vaca, the Supreme Court held that "the collective bargaining system…subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit. [I]n [Republic] Steel, this Court recognized that the congressional grant of power to a union to act as exclusive collective bargaining representative…would raise grave constitutional problems if unions were free to exercise…power to further discriminate. The duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." 386 U.S. 182.

10. Because Reynolds' failure to achieve the seniority standing he desired is alleged to be based upon violation of the collective bargaining agreement, as indicated in Conclusions of Law 5,6 and 7 he is bound by the terms of that agreement which govern the manner in which contractual rights may be enforced. However, this Commission may recognize that, because contractual remedies are controlled by the union and the employer, they may prove unworkable by the individual grievant. When the conduct of the employer amounts to a repudiation of those contractual procedures, the employer is estopped by his own conduct to rely on the unexhausted grievance and arbitration procedures as a defense to the employee's case. 386 U.S. at 185.

Reynolds may not sidestep the grievance procedures established in the MM&P/WSF collective bargaining agreement. Unless he attempted to utilize the contractual procedures for settling a dispute with WSF, his independent grievance against WSF must be dismissed. However, a distinction would be recognized if the union refused to press or only perfunctorily presses the employee's claim. Hines, 96 S.Ct. at 1058.

11. However, Reynolds must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement. Republic Steel Corp. v. Maddox, 379 U.S. at 652. There was no evidence that either WSF or MM&P attempted to dissuade or prevent Reynolds from the selection of the proper arbitrator pursuant to MM&P/WSF Rule 22.05 (See Finding of Fact 2, supra.), nor to show cause why selection of an arbitrator under Rule 22.05 would have jeopardized his rights.

12. The elements needed to prove breach of duty of fair representation are:

    a. Arbitrary or bad faith conduct on the part of the union. Vaca v. Sipes, ibid.

    b. Substantial evidence of fraud, deceitful action or dishonest conduct. Humphrey v. Moore, 375 U.S. 335, 348 (1975).

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

13. In order for Reynolds to seek a remedy before MEC in the face of the WSF defense, based upon failure to exhaust the remedies in Rule XXII, Reynolds must prove, not just allege or imply, that MM&P breached its duty of fair representation. See Vaca v. Sipes, 386 U.S. at 186.

14. Because Grievant Reynolds failed to present any substantial evidence of fraud, deceitful action or dishonest conduct on the part of MM&P, this Commission must conclude that there was no breach of its duty to represent Reynolds. Therefore, MEC must conclude that Reynolds may not sidestep the selection of

an arbitrator pursuant to Rule 22.05. Therefore, even after an extraordinary extension of examination of the possibility of Reynolds being damaged by a breach of MM&P's duty of fair representation, MEC must again decline jurisdiction in this specific matter.

15. Under CR 12(h)(3) where MEC determines that it is without jurisdiction, either pursuant to the WSF affirmative defense not overcome by an inferred breach of duty of fair representation, it should dismiss the complaint on that ground and proceed no further. Vorachek v. United States, 337 F.2d 797 (8th Cir. 1964).

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

ORDER

The request for grievance arbitration filed by Robert S. Reynolds against Washington State Ferries on August 13, 1991 is hereby dismissed.

DONE this 24th of April 1992.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman
/s/ DONALD E. KOKJER, Commissioner
/s/ LOUIS O. STEWART, Commissioner