

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

LYNDA WHEELER,)	
)	MEC CASE NO. 7-94
Complainant,)	
)	DECISION NO. 8 - MEC
v.)	
)	
WASHINGTON STATE FERRIES)	PRE-HEARING ORDER
)	DETERMINING JURISDICTION
Respondent.)	
)	
_____)	

Peterson, Bracelin, Young, Putra and Fletcher, by Kelby D. Fletcher, appeared on behalf of grievant.

Kenneth Eikenberry, Attorney General, by Robert McIntosh, , appeared on behalf of the Respondent.

Reaugh and Prescott, by James E. Macpherson, appeared on behalf of the International Organization of Masters, Mates and Pilots.

INTRODUCTION

Lynda Wheeler was employed by Washington State Ferries (WSF) on September 18, 1973 and is still so employed. Ms. Wheeler is a member of the International Organization of Masters, Mates and Pilots (MM&P), which is the recognized representative organization for all WSF deck officers.

On August 8, 1984, Ms. Wheeler filed a grievance with the Marine Employees' Commission (MEC), alleging an incorrect seniority date. She claimed that WSF had recognized her seniority date of January 25,1980; but that WSF had subsequently and improperly changed the date to April 10, 1980, which placed her at No. 87 on the Masters' Seniority List instead of No. 76.

MM&P filed an objection with MEC, saying that MEC lacks jurisdiction to accept an employee grievance without express approval of the employee organization, citing WAC-65-010.

After inviting all parties to submit written briefs on the question of jurisdiction prior to the hearing, Commissioner Louis O. Stewart, as the assigned hearing examiner, held a hearing at WSF Headquarters, Pier 52, Seattle, on December 18, 1984. No evidence was taken on the merits of the original grievance. The parties argued only the jurisdictional question. Additional post-hearing briefs were filed. Commissioner Stewart advised the parties by letter that he wished to review the 1980-1983 WSF/MM&P agreement and its extension. Both parties and MM&P advised Commissioner Stewart that they had no objection to his taking judicial notice of said documents.

Chairman David P. Haworth and Commissioner Donald E. Kokjer were not present at the hearing, but did read the transcript, the parties' briefs, and reviewed the WSF/MM&P agreement and its extension.

The Marine Employees' Commission now establishes the following positions of the parties, findings of facts and conclusions of law, and reaches a decision on the jurisdictional question only.

POSITIONS OF THE PARTIES

Position of Grievant

Grievant Wheeler argues that MEC has jurisdiction in this matter, whether or not her union approves the filing of the grievance. She argues that Chapter 47.64 RCW, from which WAC 313-65-010 was derived, does not apply to this grievance. Instead, this grievance should be processed under the terms of the MM&P/WSF agreement which was in effect

when Chapter 47.64 RCW was enacted and which is still in effect. She argues that Section XXII of said MM&P/WSF agreement does not require MM&P approval of a grievance, but explicitly allows any deck officer to invoke arbitration.

Grievant asserts that the statutory requirement of approval by the union is prospective only and does not apply until a new contract has been negotiated after the effective date of the statute.

Grievant further takes the position that the terms of Chapter 47.64 RCW may not be imposed upon existing contracts, that such imposition would be an unconstitutional impairment of contract under both federal and state constitutions.

Grievant also argues that MM&P had waived any right to object when it failed to respond timely to this grievance.

Position of Respondent

Washington State Ferries takes the position that, because the MM&P/WSF agreement does contain provisions for both MEC and private contract arbitration, and for MEC intercession in a particular dispute, MEC has jurisdiction to determine whether or not approval of the union is prerequisite to MEC arbitration. However, WSF argues that MEC does lack jurisdiction absent approval by MM&P, under WAC 316-65-010, and the lack of MM&P approval deprives MEC of jurisdiction to consider the merits of the grievance.

WSF further argues that the signators of an agreement are best able to reflect the intent of that agreement and “the collectively balanced interests of their members” and that permitting Grievant Wheeler to pursue her grievance could possibly allow her to move ahead of twelve other persons on the masters’ seniority roster. WSF argues that the

collective interests of the members are superior to the vested interest of one grievant, and that the single grievant has other remedies available.

WSF asserted that MM&P has not waived its right to contest jurisdiction.

Position of MM&P

Although not named or joined as a party to this grievance, MM&P became a de facto intervenor. MM&P first raised the question of MEC jurisdiction in this matter under its interpretation of WAC 316-65-010 and of RCW 47.64.150, by letters dated November 15 and 21, 1984. Thereafter, MEC consistently treated MM&P as if it were a party in all steps of the procedures taken to date. Through counsel, MM&P filed a pre-hearing brief, appeared and presented argument at the hearing, and filed a second, post-hearing brief, as did the parties.

MM&P takes the position that both WAC 316-65-010 and RCW 47.64.150 require not just acquiescence but actual affirmative approval from MM&P before MEC can obtain jurisdiction of a grievance. MM&P has not only withheld affirmative approval but has expressly disapproved the filing of this grievance. MM&P asserts that agencies must follow the rules they create, and the MEC's own rule, WAC 316-65-010, clearly and unequivocally prohibits MEC from hearing this case.

MM&P argues that under RCW 47.64.150 all union contracts with WSF must contain a provision that union approval must be obtained before MEC can proceed with an employee grievance; therefore union approval is necessary whether or not MEC had adopted its rule.

MM&P argues that MEC is not the proper forum for determining constitutionality of an alleged impairment of a contract in existence at the time of adoption of Chapter 47.64 RCW. However, even if MEC were to consider constitutionality of imposing union approval

while this contract was in force, WAC 316-65-010 only limits the jurisdiction of MEC, not the contractual rights of the parties.

MM&P argues that even if the legislature may not impair an existing contract, when the MM&P/WSF contract expired on June 30, 1983, MM&P and WSF entered into a “new” contract when they agreed to extend the expired agreement. MM&P contends that the “new” contract automatically included the requirements of RCW 47.64.150, which had been in existence for three months at the time of the MM&P/WSF contract extension.

MM&P rejects grievant’s assertion that MM&P had waived its right to question MEC jurisdiction by failing to respond earlier, claiming that a question of jurisdiction may be raised at any time up to and including a hearing on merit.

Having ascertained the positions of the parties by briefs and in hearing, MEC establishes the following findings of fact.

FINDINGS OF FACT

1. 1. Lynda Wheeler is an employee of WSF. On August 8, 1984, she filed a grievance with MEC alleging that WSF assigned her an incorrect date on the WSF masters’ seniority roster, which had the effect of reducing her from No. 76 to No. 87 on said roster.
2. 2. Grievant Wheeler is a member of MM&P. MM&P is the exclusive representative of all deck officers employed by WSF.
3. 3. By letters dated November 15 21, 1984, MM&P objected to MEC assuming jurisdiction over the Wheeler grievance without MM&P approval and in the face of MM&P’s express disapproval, under the terms of WAC 316-65-010.

4. 4. Chapter 47.64 RCW contains several sections relevant to arbitration of grievances:

A. 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.

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.)

Thus, RCW 47.64.150 establishes two distinct methods of grievance arbitration. The employee may utilize the procedures established in the contract. If there are no procedures established, then the employee may submit the grievance to the MEC.

B. RCW 47.64.280(2) and (3) require MEC to adjust all ferry employee grievances:

47.64.280 Marine employees' commission. . . . (2) The Marine employees' commission shall: (a) Adjust all complaints, grievances, and disputes between labor and management arising out of the operation of the ferry system as provided in RCW 47.64.150; . . .

(3) In adjudicating all complaints, grievances, and disputes, the parties claiming labor disputes shall, in writing, notify the marine employees' commission, which shall make carefully inquiry into the cause thereof and issue an order advising the ferry employee, or the ferry employee organization representing him or her, and the department of transportation, as to the decision of the commission.

5. WAC 316-65-010 states:

WAC 316-65-010 GRIEVANCE ARBITRATION—WHO MAY FILE. Where there is an agreement to arbitrate, a request for appointment of an arbitrator to hear and determine issues arising out of the interpretation or application of a collective bargaining agreement may be filed by the department of transportation, an exclusive representative of employees or their agents, an employee, or by the parties jointly: PROVIDED, That invoking arbitration shall be only with the approval of the employee organization, in accordance with chapter 47.64 RCW. (Emphasis added.)

6. The sole issue before MEC at this time is the jurisdictional question based upon WAC 316.65.010 and Chapter 47.64 RCW.

7. RCW 47.64.170(8) provides for extension of existing agreements:

Any ferry union contract terminating before July 1, 1983, shall, with the agreement of the parties, remain in effect until a contract can be concluded under RCW 47.64.006, 47.654.011, and 47.64.150 through 47.64.280.

...

8. 8. The 1980-1983 WSF/MM&P Agreement expired on June 30, 1983. On that same date WSF and MM&P signed an agreement which continued the terms and conditions of the 1980-1983 agreement for the period of July 1, 1983 through June 30, 1985 unless extended by mutual agreement of the parties, as follows:

Continuation and Retroactivity. During the collective bargaining process and any implementation of these impasse procedures, and until such time as a new collective bargaining agreement is in place as the result of negotiation, mediation, or arbitration, all the terms and provisions of the previous collective bargaining agreement shall remain in full force and effect. ...

Based upon the foregoing Findings of Fact, the Marine Employees' Commission adopted the following Conclusions of Law:

CONCLUSIONS OF LAW

1. RCW 47.64.150 establishes two distinct methods of grievance arbitration available to a WSF employee. The employee must utilize the procedures established in the collective bargaining agreement or, if no grievance procedures are established in the agreement, then the employee may submit his grievance to the Marine Employees' Commission under RCW 47.64.280.
2. 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.
3. The sentence in the first paragraph of RCW 47.64.150 that reads "The procedures shall provide for the invoking of arbitration only with the approval of the employee organization: refers back to the authorization for negotiation of binding arbitration that appears earlier in that paragraph.
4. The requirement of approval of an employee organization for arbitration applies only to "procedures that provide for binding arbitration" that are negotiated as part of the collective bargaining agreement.

When procedures have been negotiated that provide for binding arbitration, that method of settlement of employee grievances may only be invoked with the approval of the employee organization.

5. The language of RCW 47.64.150 does not require that an employee have the permission of the MM&P when the jurisdiction of the MEC is invoked under the statute. It merely requires that when the parties have negotiated procedures that provide for binding arbitration that those procedures require the approval of the employee organization.
6. The language of RCW 47.64.150 requiring employee organization approval is prospective. That is, it does not take effect until new contracts have been negotiated with binding arbitration procedures.
7. The WSF/MM&P contract remained in effect by agreement of the parties under the specific authorization found in RCW 47.64.170. That section does not require that extended contracts include the “mandatory approval” language. The fact that the legislature authorized extension of contracts without the approval requirement until a new contract could be negotiated indicates that the legislature did not intend the “approval by the employee organization” language to be required until the new contract was negotiated. No new binding arbitration procedures were negotiated.
8. WAC 316-65-010 does not require Ms. Wheeler to have the approval of MMYP to pursue a grievance with the MEC. The rule provides:

...that invoking arbitration shall be only with the approval of the employee organization, in accordance with chapter 47.64 RCW. (Emphasis added.)

The limitation on the invocation of arbitration is to be in accordance with chapter 47.64 RCW. Since the application of RCW 47.64.150 is prospective only, the rule must also be read as prospective. Furthermore, to be consistent with chapter 47.64 RCW the phrase requiring approval of the organization in the rule only applies to negotiated procedures, not to arbitration by the MEC pursuant to RCW 47.64.280.

The MEC rule is not intended to impose a “mandatory union approval” requirement that was not imposed by statute.

9. The MEC has jurisdiction of that matter because the mandatory union approval language in RCW 47.64.150 applies only to arbitration procedures contained in collective bargaining agreement negotiated after the extended contract expires between MM&P and WSF and because WAC 316-65-010 applies only to grievances filed under those negotiated procedures.

Based on the foregoing Findings of Fact and Conclusions of Law, the Marine Employees’ Commission adopts the following Order:

ORDER

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NOW, THEREFORE, IT IS HEREBY ORDERED, that the parties to MEC Case No. 8-74 may proceed in accordance with this decision.

DATED at Olympia, Washington, this 18th day of June, 1985.

MARINE EMPLOYEES’ COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ LOUIS O. STEWART, Commissioner

/s/ DONALD E. KOKJER, Commissioner