

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION)	MEC Case No. 4-94
OF THE PACIFIC,)	
)	DECISION NO. 123 - MEC
Complainant,)	
)	
v.)	DECISION AND ORDER
)	
)	
WASHINGTON STATE FERRIES,)	
)	
Respondent.)	
)	

Schwerin, Burns, Campbell and French, attorneys, by Elizabeth Ford, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by Robert McIntosh, Assistant Attorney General, for and on behalf of Washington State Ferries.

THIS matter came before the Marine Employees' Commission (MEC) on April 28, 1994, when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice complaint (ULP) against the Washington State Ferries (WSF). It was amended May 11 and May 13, 1994 by the charging party. The complaint was discussed by the MEC at its April 29, 1994 MEC meeting. In executive session on May 13, 1994, the Commission determined that the facts, as amended, alleged by IBU may constitute an unfair labor practice if later found to be true and provable.

IBU complained that WSF had engaged in unfair labor practices within the meaning of RCW 47.64.130 and WAC 316-45-003. Specifically, IBU alleged that WSF representative Armand Tiberio met with the IBU at which time he and the union reached agreement on the application of the contract's seniority clause with regard

to the contractual bidding procedures for year-round assignments. Thereafter, Tiberio denied the existence of an agreement.

The WSF filed a timely answer.

A hearing was held by Hearing Examiner Henry L. Chiles, Jr. on June 13, 1994.

Post hearing briefs were timely filed by the parties and have been carefully considered by the MEC.

THE ISSUE

- I. Did the Washington State Ferries commit an unfair labor practice by failing to bargain in good faith when it refused to honor an agreement with IBU, after an alleged meeting of the minds, changing the job bidding process for able-bodied seamen (ABs)?
- II. If so, what is/are the appropriate remedies?

POSITION OF THE PARTIES

Position of Complainant IBU

IBU contends that its representatives, Dennis Conklin and Scott Braymer, and the WSF representatives, Armand Tiberio, Dave Rice and Dave Remagen, did discuss the AB job bidding process and did agree on certain changes after give-and-take bargaining. When WSF raised potential problems, IBU adjusted its proposal until there was an agreement including an effective date, and Conklin and Braymer would rewrite their proposal accordingly. IBU further contends that twice more they met with Tiberio and agreed to spell out the terms of their agreement by amending their Letter of Understanding.

At no time did Tiberio say he was not in agreement, nor did he say that he lacked authority to sign his agreements.

On the question of whether or not the parties did reach agreement at their January meeting, IBU insists that they did. IBU asserts that WSF should be required to sign the written memorialization of their agreement to change the AB job bidding process, retroactive to March 29, 1994.

Position of WSF

It is the position of WSF that a binding contractual agreement was never reached and never existed. The IBU and the WSF did not have an agreement, they had a concept. It was a concept that was proposed by the Union and as a concept was not disagreed with by management.

WSF did not commit an unfair labor practice, because WSF had no duty to bargain or to agree with IBU during the term of the existing agreement. The subject of job-bidding procedures was already covered in the collective bargaining agreement. Relying on Seattle First National Bank v. NLRB, 444 F.2d 30, 32 (1971), WSF had "a continuing duty to bargain only for 'mandatory' subjects that have not been discussed and agreed upon in the collective bargaining agreement."

The Marine Employees' Commission, having read and carefully considered the entire record, including but not limited to the complaint the respondent's answer, the testimony and other evidence, and the post-hearing briefs, now hereby enters the following findings of fact.

FINDINGS OF FACT

1. The parties and the AB job-bidding practices in the Washington State Ferry System are governed by the 1989-91 Collective Bargaining Agreement between WSF and IBU (hereafter WSF/IBU Agreement, or Agreement), as extended by the Contract Extension and Economic Adjustment Agreement, entered into on January 15, 1992.
2. The IBU became aware of a problem in bidding from OS to AB positions among members of the union. They had received a petition from a large group of members asking for a change. Many of them did not want to were unable to bid on so-called "undesirable" jobs. The IBU negotiating committee discussed and resolved their concerns about the AB/OS bidding process. They decided that a person could bid with a state AB/OS hiring date. This would resolve many of the bidding problems.
3. Dennis Conklin of the IBU contacted Armand Tiberio of the WSF and organized a meeting for January 24, 1994. On or about that day, Dennis Conklin and Scott Braymer met with Armand Tiberio, Dave Rice and Dave Remagen. The IBU representatives presented a proposal to change the bidding procedure to WSF management persons. All the parties recognized the problem.
4. Dennis Conklin testified that the present bidding procedure hurts minorities and families. It is public knowledge that the Washington State Ferry System had an extensive diversity program under way. An agreement by both parties would help these affected groups and widen the pool of AB candidates available for bidding. Dennis Conklin of the IBU indicated that an agreement was reached. Mr. Tiberio indicated that no agreement was reached.

Mr. Braymer of the IBU was the only other person present at the meeting that was offered as a witness. He testified that an agreement was reached on the issue of bidding and that they reached agreement on the effective date.

Mr. Braymer impressed the hearing examiner as a candid and truthful witness. The Examiner was not unmindful of his interest in the outcome of the case. However, he was found to be a believable witness. The overall circumstances of the case, as well as the documentation presented at hearing support his testimony. The Hearing Examiner credits his testimony that agreement was reached on the bidding proposal and an effective date to put the agreement into effect was reached. This was the main issue and the preponderance of evidence indicates that it was resolved satisfactorily between the parties. It is reasonable to expect that the parties could put their agreement into a letter of understanding which they would be able to sign.

5. The WSF expressed concern that new hires with AB documents could bid immediately on desirable AB jobs. The IBU responded that it would agree to require 2,080 hours of work at WSF before allowing an employee to bid on a permanent AB job. The WSF expressed concern about the IBU's proposed implementation date of mid-February as too early. The parties bargained and March 20, 1994 was agreed upon as the effective date. This was thought to be the date of the spring schedule change. The WSF also wanted to know what contractual rules would be affected. IBU indicated that they would address these issues in a new Letter of Understanding which they would draft. The parties are both long experienced in working with the contracts and knew what rules were involved. They just needed to express it in one document. This they were able to do.

6. The second meeting was held in February, 1994. Present were Dennis Conklin and Scott Braymer for the IBU and Armand Tiberio for WSF. The WSF concerns were discussed. IBU agreed to return with another draft of the Letter of Understanding in an attempt to address the WSF concerns. The IBU stated they needed to have their position approved by IBU President Dave Freiboth.
7. A third meeting was held during the first two weeks of March, 1994. All three parties continued to work on the issues. The IBU presented a revised Letter of Understanding that outlined job posting and bidding procedures. The affected rules were identified. The Employer had a question about the interdepartmental transfers and the Union replied that they were not affected.
8. Several WSF managers had expressed concern about the 2,080 hour eligibility requirements. The IBU agreed to return to the 1,040-hour standard for eligibility. Mr. Tiberio stated there were some concerns from Captain Mecham, Dave Remagen and Dave Rice and he would talk to them to see if the bidding procedure was acceptable.

Mr. Tiberio never previously indicated that he had to check with anyone about the agreement. We conclude that as Operations Manager, he had the authority to bargain and conclude an agreement with the Union.

In March, 1994, the IBU dropped off at Mr. Tiberio's office another revised copy of the Letter of Understanding. On March 29, 1994, Mr. Conklin called Mr. Tiberio and was advised that there was no agreement.

The Commission having entered the foregoing findings of fact now hereby enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and the subject matter involved in this case. RCW 47.64.130 and 47.64.280.
2. The MEC concludes that there was a "meeting of the minds" at the January 24, 1994 meeting and agreement was reached on the bidding process. United Furniture Workers of America, 281 NLRB No. 166.
3. Regarding the question, "Was there a meeting of the minds?" at the January 24, 1994 meeting, MEC relies heavily on the NLRB. For example, the oft-quoted language

The expression "meeting of the minds" does not require that both parties have identical subjective understandings on the meaning of material terms of the contract. ... Rather, subjective understandings or misunderstandings as to the mean of terms which have been assented to are irrelevant, provided that the terms themselves are unambiguous judged by a reasonable standard

Diplomat Envelope Corp., 263 NLRB 525, 535 (1982).

In Vallejo Retail Trade Bureau, 243 NLRB 762, 767 (1979), the administrative law judge, as affirmed by the Board, stated:

It is therefore tempting to rely uncritically on the hoary maxim of the law of contracts that, absent a "meeting of the minds," there is no mutually binding agreement. The temptation is avoided, however because the expression, "meeting of the minds" in contract law does not literally require that both parties have identical subjective understanding "or misunderstanding" as to the meaning of terms which have been assented to

are irrelevant, provided that the terms themselves are unambiguous "judged by a reasonable standard." See also Luther Manor Nursing Home, 270 NLRB 949 (1984).

In Electrical Workers IBEW Local 398 (Appalachian Power Co.), 200 NLRB 850 (1972), the administrative law judge, as affirmed by the Board, stated:

What the parties may in fact have agreed upon must be determined from what they said and did during their negotiations. If the words and acts of one of the parties have but one reasonable meaning, to which the other party has assented, a contract will be deemed concluded on that basis, for as stated in Clark on Contracts, 4th ed., Sect. 3, p. 4:

The law . . . judges an agreement between two persons exclusively from those expressions of their intentions which are communicated between them.

4. WSF was relieved of any duty to bargain over matters already in the Agreement, except for the requirement of the WSF/IBU Extension and Economic Adjustment Agreement, paragraph 4.b:

b) The parties agree to meet and discuss issues of mutual interest during the 1991-1993 biennium. Such issues may be specific contractual issues such as language items or related issues. If such discussions lead to agreements between the parties, the agreements will be reduced to writing and placed into effect for the term of the 1991-1993 Contract with a "Sunset clause" to insure that continuation or modification of same will be subject to the parties' 1993-1995 negotiations. (Emphasis added).

5. WSF having reached agreement had a duty to assist in reducing the agreement to writing and signing it. Kennebec Beverage Co., Inc., 248 NLRB 176.
6. When WSF failed and refused to execute a written document embodying the terms and conditions of the oral agreement reached with IBU on January 24, 1994, and by refusing to apply

said agreement, WSF through Armand Tiberio has engaged in an unfair labor practice as defined in RCW 47.64.130(1)(c) and (e).

7. Having found and concluded that WSF has committed an unfair labor practice, MEC must order WSF and its Operations Manager to cease and desist and that a responsible representative of WSF forthwith sign a document embodying the changes in the AB job-bidding procedure agreed to on January 24, 1994, and as further clarified by the subsequent written statements requested by Operations Manager Tiberio and delivered by IBU in February and March, that the changes be effective March 20, 1994, and that employees be made whole for any losses which they have suffered because of the failure of WSF to follow through with the agreed upon change of bidding procedure.

Having entered the foregoing findings of fact and conclusions of law, the Commission hereby enters the following order.

DECISION AND ORDER

1. The unfair labor practice complaint (ULP), filed by IBU on April 28, 1994 and amended on May 11 and 13, 1994 is hereby upheld.
2. Washington State Ferries and its Operations Manager Armand Tiberio are hereby found to be in violation of RCW 47.64.130[©] and (e) and WAC 316-45-003(c) and (e) by refusing to bargain in good faith with the IBU.
3. WSF shall forthwith sign a letter of understanding specifying changes in the AB job-bidding process as agreed upon with IBU on January 24, 1994 as refined by the language WSF requested

And IBU agreed to at their subsequent meetings with IBU on this matter.

4. Upon the execution of said letter of understanding the WSF shall give retroactive effect to the provisions thereof and make its employees whole for any losses they may have suffered by reason of WSF's failure to sign the letter of understanding.

DONE this 28th day of September 1994.

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR., Chairman

/s/ JOHN P. SULLIVAN, Commissioner

/s/ LOUIS O. STEWART, Commissioner