

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE)	MEC CASE NO. 1-98
PACIFIC,)	
)	
Complainant,)	Decision No. 200- MEC
)	
v.)	
)	
WASHINGTON STATE FERRIES,)	DECISION AND ORDER
)	
Respondent.)	
)	

Schwerin, Campbell and Barnard, Attorneys, by Elizabeth Ford, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by David Slown, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

INTRODUCTION AND BACKGROUND

This matter came on regularly before the Marine Employees' Commission on February 17, 1998, when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice complaint against the Washington State Ferries (WSF). IBU's complaint charged WSF with engaging in unfair labor practices within the meaning of RCW 47.64.130(1)(a) and (e), to wit: restraining or coercing employees in exercise of rights and refusing to bargain collectively with representatives of employees. IBU alleged that within the previous six months, WSF failed to pay a full hours' holiday pay to employees who work a portion of an hour of overtime on a holiday. IBU further alleged that previously, WSF paid all employees who worked beyond their shifts on a holiday in increments of one hour. This practice complied with settlement agreements and Decision No. 131 - MEC issued on January 18, 1995.

Pursuant to a request by the Commission, on March 3, 1998, the IBU filed an amended complaint. The amended complaint provided specific dates on which WSF unlicensed deck employees were not properly paid for time worked in excess of their normal holiday work shift, in violation of settlement agreements and Decision No. 131 – MEC. IBU alleged that by its actions, WSF failed and refused to bargain in good faith.

The Marine Employees' Commission determined that the facts alleged by IBU may constitute an unfair labor practice (ULP) if later found to be true and provable. Commissioner John P. Sullivan was appointed to act as hearing examiner.

On April 2, 1998, Commissioner David E. Williams conducted a settlement conference in this matter. WSF timely filed an answer to the complaint on May 4, 1998. A prehearing conference was held on May 11, 1998 before Commissioner John P. Sullivan. A hearing was held June 11, 1998. Post-hearing briefs were mailed on September 11, 1998.

POSITIONS OF THE PARTIES

Position of the Inlandboatmen's Union of the Pacific

Consistent with contractual language governing holiday pay, Washington State Ferries employees historically have been paid in increments of one hour for time worked beyond their scheduled shift on a holiday. In 1994, the MEC ruled in MEC Case NO. 10-94 that the ferry system must abide by its negotiated agreement to pay both overtime in accordance with Rule 11, and holiday pay in accordance with Rule 25 of the collective bargaining agreement between WSF and IBU.

After the issuance of Decision 131 – MEC in Case 10-94, WSF paid holiday pay in addition to overtime pay. The overtime paid was in increments of one hour, whether it was more or less than 15 minutes. However, in November 1997, WSF changed its pay

practices and no longer paid holiday pay in one-hour increments. WSF required employees to include their beginning time and ending time on their time sheets, and then paid only one-quarter hours' pay to employees who worked less than 15 minutes. On November 8, 1996, WSF sent notices of this change on the time sheets to vessel and terminal personnel. However, no notice of change was sent to the IBU prior to the implementation. The union learned of the change when IBU members contacted Dennis Conklin to complain that overtime worked on the 1997 Thanksgiving holiday had been incorrectly paid. As a result, grievances were filed with the WSF. WSF continued to refuse to pay holiday pay in increments of one full hour, thus IBU filed this unfair labor practice.

The practice of paying employees who work less than 15 minutes for one-quarter hours' pay and all others for a full hour is inconsistent with the contract, and therefore a change in the employees' terms and conditions of employment. There is no justification for payment of one-quarter hour increments found in Rule 25 of the collective bargaining agreement. Rule 25 contains no language that distinguishes between employees who work less or more than one-quarter hour. WSF argues that pursuant to Decision No. 131 – MEC, Rules 11 and 25 of the CBA must be read together. However, Decision No. 131 – MEC only addresses the rates of compensation, not how hours should be calculated. The decision states that the amount of holiday pay should be calculated in accordance with Rule 25's own prescriptions, not those in Rule 11. Past practice is consistent with the contract language.

WSF may not unilaterally change pay practices without bargaining with the union. Changes relating to the payment of holiday pay affect wages and are mandatory subjects of bargaining. Changes in the manner of reporting holiday pay which affect the amount employees are paid for such work are likewise mandatory subjects of bargaining. By refusing to pay employees who worked less than fifteen minutes for a full hour of overtime, WSF changed its past practice and changed the terms and conditions of the contract, in violation of RCW 47.64.130(1)(a) and (e).

Position of Washington State Ferries

WSF has no argument with IBU's position regarding the payment of holiday pay for overtime 16 minutes past the regular scheduled holiday shift. WSF's practice is in accordance with Rules 11 and 25 of the collective bargaining agreement and Decision No. 131 – MEC, which requires that Rules 11 and 25 must be read together. The ferry system correctly pays holiday overtime to IBU employees after their regular scheduled holiday shift, from one minute up to and including fifteen minutes, at one-quarter hour of the holiday overtime rate.

A "hole in the [management of overtime claims] system" identified by the State Auditor's Office in a 1995 audit finding, was corrected by the ferry system with the institution of new time sheets in 1996. A memorandum initiating the use of new time sheets, which contained the vessel's "ring off" time, was mailed to all vessel and terminal personnel in early November 1996. The use of the new forms was made mandatory as of January 1, 1997. This change was implemented without objection from any union.

The new time sheets required employees to note the "ring off time" for all overtime entries, which made it possible to tell how many minutes of overtime an employee had worked. Although mistakes were made by the WSF payroll office and other management personnel in their review of those time sheets, or by the employee entering the data on the time sheet, the employees were not entitled to a full hour of overtime. There was never an approved policy or procedure to pay a full hour of holiday for a fractional hour worked. At hearing, WSF's Manager of Marine Operations, Dave Black, admitted that he was not an expert on payroll matters and was wrong when he spoke off-the-cuff to IBU Patrolman Dennis Conklin about the December 1997 grievances that gave rise to this dispute. No evidence was produced by the union that proved WSF's practice of paying holiday overtime to its employees in the manner in which Dennis Conklin testified. By contrast, WSF produced numerous examples of time

sheets whose entries were made in accordance with WSF's November 1996 memorandum.

There was never a practice in place at WSF of paying a full hour of holiday overtime when the employee worked 15 minutes or less on a holiday. WSF made no unilateral change in practices in late 1997 and therefore the complaint must be dismissed.

STATEMENT OF THE ISSUE

1. Did Washington State Ferries commit an Unfair Labor Practice when it paid employees who worked fifteen (15) minutes or less over their scheduled shift on a holiday one-quarter hour of holiday overtime pay, but refused to pay an additional base hour of straight time?
2. If so, what is the remedy?

FINDINGS OF FACT

1. Overtime is paid pursuant to Rule 11 of the WSF and IBU 1995-1997 collective bargaining agreement (CBA).

RULE 11 – MINIMUM MONTHLY PAY AND OVERTIME

11.01 The overtime rate of pay for employees shall be at the rate of two (2) times the straight-time rate in each classification.

11.02 When work is extended fifteen (15) minutes or less beyond the regular assigned workday, such time shall be paid at the overtime rate for one-quarter ($\frac{1}{4}$) of an hour. Should work be extended by more than fifteen (15) minutes, the time worked beyond the regular assigned workday shall be paid at the overtime rate in increments of one (1) hour. Such extended work shifts shall not be scheduled on a daily or regular basis.

. . . .

2. Holidays are paid pursuant to Rule 25 of the 1995-1997 IBU/WSF collective bargaining agreement.

RULE 25 – HOLIDAYS

25.01 New Years' Day (January 1), Martin Luther King's Birthday (January 15), Lincoln's Birthday (February 12), Washington's Birthday (February 22), Memorial Day (May 30), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (October 12), Veteran's Day (November 11), Thanksgiving Day (fourth Thursday in November), day after Thanksgiving and Christmas Day (December 25) shall be recognized holidays. All employees required to work on holidays shall be paid at the straight time rate of pay, with an additional one (1) hour's pay for each hour worked during the period from midnight to midnight of the holiday.

3. On January 18, 1995, the Marine Employees' Commission issued Decision No. 131 - MEC. At issue in that case was an agreement negotiated between Armand Tiberio, Director of Marine Operations for Washington State Ferries and Dennis Conklin, Patrolman/Business Agent for Inlandboatmen's Union of the Pacific. As a result of that agreement, overtime became a subject for work beyond the holiday scheduled regular assigned workday for the first time.
4. The agreement at issue in Decision No. 131 - MEC established for the first time that after an employee completed a scheduled holiday work day shift, each and every hour would be overtime. The employee would be compensated at the rate of two times straight time plus one hour of straight time, called "holiday hour," for each and every hour of overtime. The overtime rate would be paid at triple the straight time rate.
5. Although the first 15 minutes or less after the completion of the holiday schedule regular assigned workday was not specifically addressed in Decision No. 131 – MEC, the Marine Employees' Commission ruled therein that Rules 11 and 25 must be read together.

Rule 11.02 defined the first 15 minutes or less worked beyond the regular assigned workday as one-quarter of an hour. Work extended by more than 15 minutes beyond the regular assigned workday was defined in Rule 11.02 as one hour.

6. After Decision No. 131 – MEC was issued on January 18, 1995, pursuant to Rule 11, the Washington State Ferries began paying WSF employees covered by the IBU/WSF collective bargaining agreement for one-quarter hour at the “holiday overtime rate” when work was extended 15 minutes or less beyond the regular assigned workday, on a holiday. Employees whose regular assigned workday on a holiday was extended 16 minutes or more, were paid for one hour at the triple time rate.

It was the responsibility of the WSF payroll office to determine if a claim entered on the time sheet for overtime of one hour was for fifteen minutes or less, or was for sixteen minutes or over. Sometimes this was difficult to determine from the entries on the time sheets. Generally, WSF’s policy was that if an hour was claimed and approved by the Mate, the employee’s word was taken and an hour of holiday overtime was paid.

7. In February 1995, the Washington State Auditor’s Office (SAO) issued an audit finding that Washington State Ferries lacked a mechanism to determine the accuracy of overtime claims. To correct the audit finding and comply with state regulations, WSF revised the time sheets. Employees were now required to include their beginning and ending times on the time sheets. The new time sheets accurately reflected any work performed beyond the holiday work assignment, so the employee could receive the proper overtime pay for the work performed. The revised time sheets made it possible for payroll personnel to determine how many minutes of overtime had been worked. Even with the new time sheets, WSF occasionally paid for the first 15 minutes of holiday overtime by paying an additional hour instead of one-quarter hour of overtime in error.

8. On November 8, 1996, the new time sheets were mailed with a memorandum from WSF Operations Director Joseph Nortz, to all terminal and vessel personnel; supplies of the revised time sheets were provided to all vessels and terminals.
9. The Inlandboatmen's Union never received copies of the November 1996 memorandum and revised time sheets. The record is silent as to whether any union representing ferry employees protested the November 1996 alteration of time sheets.
10. A full year later, after the 1997 Thanksgiving holiday, a number of IBU employees notified Dennis Conklin that WSF had changed its practice with respect to holiday overtime pay. They felt that they had mistakenly been paid for one-quarter hour of holiday overtime, instead of a full hour of holiday pay. Dennis Conklin notified Human Resources Director Gary Baldwin, who referred him to WSF Operations Manager Dave Black. Mr. Black indicated that the grievances had merit and that IBU members should resubmit their time sheets to payroll for correction. Upon further discussion with payroll personnel, Black communicated to Conklin that his original statement was in error and that the quarter-hour of holiday overtime pay was correct.
11. The employees' time sheets submitted as evidence of past practice by WSF to pay IBU members one hour of holiday pay for the first 15 minutes or less of overtime beyond the holiday scheduled work assignment were not conclusive evidence of a change in past practice. Rather they were evidence that some employees' do incorrectly put in for one hours' holiday overtime pay when they have worked 15 minutes or less on a holiday. The incidences of WSF employees submitting incorrectly filled out time sheets has diminished over time since the revised time sheets were sent to WSF employees in November 1996.

CONCLUSIONS OF LAW

1. MEC has jurisdiction over the subject matter and the parties involved in this case. Chapter 47.64 RCW, especially RCW 47.64.130 and 47.64.280.
2. Washington State Ferries and the Inlandboatmen's Union negotiated an agreement that provided overtime for employees who worked one hour or more beyond their holiday work assignment schedule. In addition, they agreed that the overtime hourly rate shall be three times the basic straight time hourly rate. This agreement between the parties was at issue in MEC Case No. 10-94, Decision 131 – MEC.
3. In Decision No. 131 – MEC, Conclusion of Law # 6, MEC concluded that:

. . . IBU/WSF [CBA] Rule 11 and Rule 25 must be read together. In a recent case, most closely analogous to the instant matter:

As is frequently repeated by labor arbitrators, collective bargaining agreements must be read in totality, with each section a part of, and interpreted within, the whole. Moreover, to expressly include certain exceptions indicates that there are not other exceptions. The contract articles concerning premium pay and holidays must be read as cumulative, and thus as granting triple time pay for hours worked on holidays unless there is specific language forbidding such interpretation – which there is not.

Mason County v. Teamsters Union Local 378, 97 LA 45, 48.

3. Pursuant to Decision No. 131- MEC, the Commission must read Rule 25 and Rule 11.02 together. Rule 11.02 spells out how the first 15 minutes of holiday overtime is to be calculated and paid. Common sense and logic require that Rule 11.02 must be applied using the negotiated overtime hourly rate between IBU and WSF. Elkouri and Elkouri, How Arbitration Works, 480 (5th Ed. 1996).

4. Dennis Conklin, IBU Patrolman/Business Agent, and Armand Tiberio, Director of Marine Operations for Washington State Ferries, negotiated the issues of overtime and overtime pay on a holiday. After the issuance of Decision No. 131 – MEC on January 18, 1995, in which the aforementioned agreement was at issue, WSF complied with the terms of their agreement, Rules 11 and 25 of the WSF/IBU contract and Decision No. 131 – MEC by paying deck department employees at the triple time rate for one-quarter hour if they worked 15 minutes or less beyond their regular assigned work day, and for one hour if they worked more than 15 minutes beyond their regular assigned work day. The revision in the time sheets to correct an audit finding did not change or alter that pay practice.

5. The revision of the time sheets in November 1996 by the ferry system without notice to the IBU did not constitute a refusal to bargain. The IBU argues that such a revision is a mandatory subject of bargaining, and by its lack of notice and presentation of the time sheets to employees as a “fait accompli,” the ferry system has refused to bargain.

In Clover Park School District, Dec. 6072-A (EDUC, 1998), PERC found that the school district was required to bargain a change in policy which affected the rate of employees' wages. In Lewis County, Dec. 2957 (PECB, 1988), PERC ruled that a change in payday was a mandatory subject of bargaining because when a worker is paid is closely related to how much a worker is paid. WSF's revision of time sheets to correct an audit finding required employees to state a beginning and ending time on time sheets to allow the employer pay the correct amount of overtime. The revision did not affect when or how much an employee was paid, and therefore did not “affect wages” in the manner described in Clover Park or Lewis County.

Perhaps WSF's change in the time sheets in 1996 can be more accurately compared to the installation of time clocks. In Rust Craft Broadcasting, 225 NLRB 327, 92 LRRM 1576 (1976) the NLRB ruled that the installation of time

- clocks without bargaining was not a refusal to bargain. The NLRB reasoned that the time clocks were merely a more dependable method of enforcing the employees' longstanding requirement that they correctly record their time at work, and therefore, bargaining was not required over this procedural change.
6. WSF's revision of time sheets in November 1996 did not signal an alteration of how overtime on a holiday was to be paid pursuant to Rules 11 and 25 or Decision No. 131 – MEC. Rather, it made it possible for the payroll department to correctly apply Rules 11 and 25 of the contract.
 7. Errors made by the WSF payroll office after time sheets were revised in November 1996 in the payment of holiday overtime did not establish a binding past practice. Crown Zellerbach Gaylord, 76 LA 603, 606 (1981). The union did not become aware of the November 1996 revision to the time sheets until approached by IBU members in November 1997. Had WSF's time sheet revision altered holiday overtime pay practices, it is likely that IBU members' protests would have been heard in less than twelve months.
 8. The Inlandboatmen's Union of the Pacific has failed to prove by a preponderance of the evidence that by paying employees who work 15 minutes or less over their scheduled shift on a holiday one-quarter hour of holiday overtime pay, but refusing to pay an additional base hour of straight time, the Washington State Ferries has committed an unfair labor practice in violation of RCW 47.64.130(a) and (e).

Having read the entire record including but not limited to the complaint, the hearing transcripts, the exhibits and post-hearing briefs, the Marine Employees' Commission now enters the following order.

ORDER

1. The Inlandboatmen's Union's charge of unfair labor practice, docketed as MEC Case No. 1-98, filed February 17, 1998, as amended on March 31, 1998, has not been proven by a preponderance of evidence and is hereby dismissed. The request for lost wages and attorney costs is hereby denied.

DATED this _____ day of October, 1998.

John P. Sullivan

David E. Williams