STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC,	)	MEC Case No. 10-94
	)	DECISION NO. 131 - MEC
Complainant,	)	
v.	)	DECISION AND ORDER
WASHINGTON STATE FERRIES,	)	
Respondent.	)	

Schwerin, Burns, Campbell and French, attorneys, by Cheryl French, 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.

INTRODUCTION AND BACKGROUND

On July 7, 1994, the Inlandboatmen's Union of the Pacific (IBU) charged Washington State Ferries (WSF) with an unfair labor practice within the meaning of RCW 47.64.130(1)(e) by refusing to bargain collectively with IBU. Specifically IBU charged that although WSF, on March 16, 1994, settled a grievance on behalf of Marc Larkin concerning holiday overtime pay, WSF refused to pay other employees, who have subsequently worked overtime on holidays, on the same basis. IBU alleged that WSF has diluted the grievance adjudication process, rendering the union ineffectual in the eyes of its members, and has negatively affected the credibility of Business Agent Dennis Conklin.

IBU sought immediate payments in full for all employees who have been denied holiday overtime pay subsequent to the Larkin settlement, and that WSF be committed to timely payment of future holiday overtime claims.

The Marine Employees' Commission determined that the facts alleged by IBU may constitute an ULP if later found to be true and provable. WAC 316-45-110. Commissioner Louis O. Stewart was appointed to act as hearing examiner pursuant to WAC 316-45-130.

Examiner Stewart scheduled a hearing for August 31, 1994 pursuant to RCW 47.64.130 and .280 and chapter 316-02 and 316-45 WAC. WSF timely filed an answer on August 2, 1994. However, on August 23, 1994 IBU filed a request for a continuance. Due to conflicting schedules a new hearing date could not be established before November 9, 1994 and post-hearing briefs were delayed until December 23, 1994.

POSITIONS OF THE PARTIES

Position of Complainant IBU

IBU alleged that WSF breached its duty to bargain in good faith, and it interfered with the employees' right to be represented by IBU when it failed to abide by its agreement in a grievance settlement concerning the rate of pay for overtime worked on a holiday. On several occasions IBU has filed grievances against WSF, claiming that overtime on holidays should be paid at the holiday rate (base pay plus holiday pay) doubled for overtime, or effectively four times the base rate. In March 1994 a grievance (Larkin) involving this issue was settled to provide pay for holiday overtime worked at triple the base rate-double time for overtime pursuant to Rule 11 in the IBU/WSF Agreement plus additional hour of holiday pay pursuant to Rule 25. That agreement was reached between IBU Business Agent Dennis Conklin

and WSF Director of Marine Operations Armand Tiberio. Four similar grievances were settled in April, 1994, referencing the Larkin agreement. WSF also paid for July 4, 1994 overtime at the triple pay rate.

IBU alleged that WSF subsequently denied that the meeting between Tiberio and Conklin took place, denied that an agreement was made to pay the triple time in the future, and claimed that it made an error when it paid Larkin and the four subsequent grievants at the triple time rate.

IBU compares its case to Pratt & Whitney Aircraft, 310 NLRB 1126, 1129 (1993). In that case the administrative law judge found that the employer had "patently failed to fulfill its obligations [to bargain in good faith] by having led the Union to believe it had wanted and reached an accord to resolve a difficult grievance problem and by proceeding thereafter on a unilateral course of action diametrically opposite to the agreement it had made as to . . .[the grievance resolved]. ...[B]y having reneged on the commitments it made with the Union. . .,[the employer] has failed to bargain collectively with the Union as required by Section 8(d) of the Act." That rationale was adopted by the Board. 310 NLRB at 1126. (NLRA Section 8(a)(5) is analogous to RCW 47.64.130(1)(e).)

IBU argues that if WSF is allowed to repudiate its agreement arrived at through grievance procedure, the grievance procedure would be clogged with repetitious grievances. See United States Postal Service, 309 NLRB No. 3(1992). Repudiation of agreements also indicates a failure to bargain in good faith in the grievance procedure. Once an issue is resolved through the grievance procedure, any changes to an agreed-upon resolution must be made at the bargaining table.

IBU contends that WSF, by repudiating its agreement has undermined the IBU members' faith in their Union and their representatives by interfering with the members' right to representation, a violation of RCW 47.64.130(1)(a).

IBU relies upon Louisiana-Pacific Corporation, 312 NLRB 165, 176 (1993) in arguing that it is no defense for WSF to assert that Tiberio was mistaken as to the WSF obligation at the time of his agreement with Conklin.

IBU also argues that Tiberio's alleged decision to pay "triple-time" for holiday overtime pending legal advice would have been improper. If the payments were higher than required by contract, Tiberio would be giving away WSF funds.

Although IBU had asserted that the contractual rate of pay for holiday overtime is four times the base rate, IBU concluded its brief by asking MEC to order WSF "to pay all employees covered by the IBU agreement at double time, plus holiday pay (triple the base rate) for all overtime worked on holidays after March 17, 1994, and to abide by this agreement in the future."

Position of Respondent WSF

WSF asserts that this case is not an ULP. "[I]t is our position that the evidence will show that this is nothing but a grievance masquerading as an unfair labor practice charge. . . . MEC should . . .dismiss the unfair labor practice charge without getting into the merits of the underlying grievance." In its post-hearing brief WSF asserted that IBU has failed to provide an ULP by a preponderance of evidence. "And even if the failure to pay future holiday overtime in a manner consistent with a previous grievance settlement somehow amounted to a ULP, the only issue before the MEC would be the existence of . . . a binding grievance settlement, not the merits of the interpretation of Rule 25.01."

WSF argues that, because this dispute is really a grievance arbitration case, involving an interpretation of and the alleged violation of Rule 25.01, it should have been referred to arbitration under the grievance provisions of Rule 16.04

WSF also argues that the central issue in this case has already been found and decided upon in IBU v. WSF (Schlief), MEC Case No. 1-92, Decision No. 87-MEC. In that holiday overtime case, MEC held that a grievance settlement between IBU Business Agent Dennis Conklin and WSF Personnel Officer Dave Rice "does not constitute a precedent interpretation of Rules 11, 25 and/or 26 of the IBU/WSF Agreement. Conclusive interpretation of these rules would have to be made at a higher level of authority or by arbitration under the present IBU/WSF Agreement." MEC Decision No. 87-MEC, Conclusion of Law 6.

WSF also contends that the alleged Conklin/Tiberio agreement is so inconsistent with the language of Rule 25.01 "and so in violation of the parties' long-standing past practice, that it amounts to an amendment of the CBA. As such it is required by Rule 6.02 of the CBA to be in writing." Therefore the claimed Conklin/Tiberio contract modification or reinterpretation violates Rule 6.02.

WSF has a twenty-year practice of paying only double-time, not triple-time, for holiday overtime. WSF asserts that it approved the triple-time payment on those four occasions, but with a statement from Tiberio that he was having an attorney "looking into the matter;" therefore those payments do not constitute binding precedents. Tiberio also stated in a letter to Conklin that he, Tiberio, had been mistaken when he approved those payments.

WSF argues that "the language of Rule 25.01 abolishes the CBA principle of overtime for extra hours worked on a holiday. . .. If WSF and IBU had meant to have overtime rates apply for extended holiday shifts, they would have [said so]." Rule 25.01 abolishes

the . . . [agreements'] principle of overtime for extra hours worked on a holiday. But it gives something even better in its place: double time for every hour worked on that holiday." (Emphasis in the original.)

Regarding certain coded entries on time sheets, WSF explains that the coding for holiday hours and overtime hours numbers "is just done to track all hours worked 'above straight time or regular time' for budgetary purposes.

WSF suggests that "even the repudiation of a prior grievance settlement between identical parties could be resolved as a grievance arbitration," citing Alan R. Krebs, In the Matter of Washington State Ferries and Inlandboatmen's Union of the Pacific, FMCS No. 92-02524 (1993).

STATEMENT OF THE ISSUE

No stipulation of issue was agreed to prior to or at the hearing. The following statement was formulated by Examiner Stewart as follows:

I. Did WSF commit an unfair labor practice within the meaning of RCW 47.64.130(1)(e) by failing or refusing to implement its agreed-upon grievance settlements with IBU concerning the payment for hours worked beyond scheduled shifts on contractual holidays?

II. If the answer is "yes", what is/are the remedy/remedies?

Having read and carefully considered the entire record, the Marine Employees' Commission now hereby enters the following findings of fact.

FINDINGS OF FACT

1. Payment for hours worked beyond a scheduled work shift is governed by the 1989-1991 IBU/WSF Agreement Rule 11, as extended by the IBU/WSF Contract Extension and Economic Adjustment Agreement, dated January 15, 1992, as follows:

> 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 minutes or less beyond the regular assigned work day, such time shall be paid at the overtime rate for one quarter (1/4) of an hour. Should work be extended by more than fifteen (15) minutes, the time worked beyond the regular assigned work day 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. Employees required to work more than one (1) shift without a break shall be paid as follows:
>
> The first scheduled shift shall be paid at the straight time rate; the second shift shall be at the overtime rate; the third shift shall be at triple the straight time rate, unless the employee has had a minimum of a six (6) hour break preceding the third shift excluding travel time. Sixteen (16) hours including uncompensated time off between work shifts constitute the first and second shift.
>
> 11.03 Employees called to work prior to commencing their regular scheduled shift receive the overtime rate of pay in increments of one(1) hour for early call-out. Early call-outs shall not be on a daily or regularly scheduled basis.
>
> * * * *
>
> 11.05 Employees called back to work after completing a scheduled shift and released prior to starting their next scheduled shift shall be paid at the overtime rate, with a minimum of eight (8) hours.
>
> * * * *

11.10 Overtime shall be paid to each employee required to work an extended work day as a result of a time changeover from Pacific Daylight Savings Time to Pacific Standard Time.

2. Payment for hours worked on a holiday is governed by the same IBU/WSF Agreement, Rule 25, as follows:

RULE 25 – HOLIDAYS

25.01 New Year's 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 (effective 1989), 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.

25.02 Regular year-round employees who are not scheduled to work on a recognized holiday and who otherwise work their assigned watches immediately preceding and following the holiday (unless absent on paid leave) shall receive one extra day's pay on account of the holiday not worked. This shall also apply to temporary employees, with respect to any recognized holiday which is not worked and which occurs within the duration of a full-time assignment lasting thirty (30) consecutive calendar days or more.

25.03 Employees shall receive double their regular rate of pay when called back to work on a scheduled day off that falls on one of the above listed holidays in addition to compensation provided for under 25.02 above.

3. WSF has a long history of paying employees in the IBU bargaining unit at the double-time rate for all hours worked on a holiday, but only the holiday rate for work performed beyond a scheduled work shift on a holiday, i.e., double-time rate for holiday overtime was deemed to comply with both Rule 11.01 and Rule 25.01. The record is silent as to whether

not disputes over that interpretation occurred prior to 1990, when IBU member Doug Schlief filed a grievance seeking triple- time pay for holiday overtime. WSF agreed to pay for that work at triple-time but stated in the settlement that the payment was made only because of a procedural defect and not to set a precedent. In 1991, Schlief filed a second grievance on the same issue, which WSF rejected on the grounds that the issue had been settled. IBU filed an unfair labor practice with MEC. In Decision No. 87-MEC, IBU v. WSF, Case No. 1-92, MEC held that settlement had been reached, but only at the WSF Personnel Officer level which did not constitute a precedent-setting interpretation.

(NOTE: In that case "Examiner Stewart advised the parties in the hearing notice and again at the beginning of the hearing that the purpose of the hearing was only to determine whether agreement had actually been reached in the aforesaid grievance and not for the purpose of arbitrating said grievance." Decision No. 87-MEC, page 2.)

In 1993, a Marc Larkin filed a claim with WSF, asking for triple-time for overtime worked on Thanksgiving. When WSF rejected his claim, he filed a grievance with IBU, whereupon IBU in turn demanded double-time for overtime (Rule 11) in addition to double-time for the holiday (Rule 25). When Personnel Officer Dave Rice and Director of Terminal Operations Tom Opheim told IBU Business Agent Dennis Conklin they were unable to approve such a payment without approval by WSF Operations Director Armand Tiberio, Conklin met with Tiberio. In that meeting, Tiberio expressed his personal opinion that the proper pay should be double-time for the overtime, plus one hour holiday pay for each hour worked. Conklin said he understood Tiberio's logic "[a]nd so we came to an agreement that's how it would be paid." WSF confirmed

that settlement without its usual disclosure regarding "no precedent," as follows:

> As agreed, WSF will pay Mr. Larkin an additional 4 hours at the straight time rate to compensate for the additional 4 hours overtime worked on Thanksgiving Day, November 25, 1993.
>
> This payment constitutes full settlement of the above-referenced grievance.
>
> Letter, Rice to Conklin, dated March 17, 1994.

In March, 1994, IBU filed a similar grievance on behalf of four members (Pomerlau, Rhude, Smith and Cavanaugh). Testimony is conflicting as to whether during a discussion of that grievance, Tiberio announced he was having the WSF attorney review the situation, and whether WSF would continue to pay at the agreed-upon "triple-time" rate "until they got an answer back from the attorney." But, Tiberio did tell WSF Payroll Manager Sally McClure "to go ahead and pay all overtime as triple-time, pending further investigation."

WSF did pay for all overtime worked on July 4, 1994 at the "triple-time" rate without dispute.

4. Despite Tiberio's disavowal of his alleged agreement with Conklin to settle the Larkin grievance at the "triple-time" rate, the preponderance of evidence is convincing that he and Conklin did reach such agreement, thereby establishing a precedent for the March, 1994 settlements and the July 4, 1994 overtime payment.

    a. Conklin's uncontradicted description of Tiberio's "scenario" concluding that double-time for overtime plus an extra hour holiday pay for each hour worked.

b. Rice's March 17 letter to Conklin, referring to an agreement without the precedent disclaimer.

c. Rice's specific statement in his April 14 letter to Conklin "WSF is in agreement that the additional 3 hours of holiday pay are due [to Rhude, Pomerleau, Smith and Cavanaugh]. This is consistent with the recent IBU/WSF holiday pay agreement.

d. Tiberio's instructions to McClure to pay all holiday overtime at the "triple-time" rate, albeit his statement to her that he was seeking a legal opinion. Tiberio's statement to the payroll staff that he wanted to avoid "having a slew of grievances come in."

5. Whether or not Tiberio and Conklin agreed to the interpretation of their contract, and despite any claims that the contract language is ambiguous, MEC finds that the language is clear and unambiguous. Rule 11.01, supra, at FF1, is simple and clear:

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

Rule 25.01, supra, at FF2, is also simple and clear:

> Rule 25.01 ...All employees required to work on holiday 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.

In neither Rule is there any prohibition against adding overtime pay to holiday pay, i.e. "pyramiding", nor is there an elimination of overtime pay on a holiday, both of

which WSF contends. By the same token there is no provision for doubling the holiday pay for extension of a scheduled work shift, as IBU contends. The so-called "triple-time" interpretation offered by Tiberio is precisely in accordance with the contract, and does not constitute an amendment. The only provision for doubling the holiday rate of pay appears in Rule 25.03, supra at FF2, referring to work in a "call-back" situation. In such an instance "regular pay" is to be doubled, not just straight time.

6. In answer to Examiner Stewart's question regarding any attempt to amend the contractual language at the bargaining table in view of several years' dispute, Conklin's answer was negative, ". . . We just rolled it over."

7. The payroll sheets attached to Exhibit 2 indicate alterations to the employees' time sheets without any initials or other indicia to indicate who made the changes or when. Discussion of the time sheets during the hearing leads MEC to find that reliable audit of holiday overtime facts would be difficult. (NOTE: Alteration of time sheets was not alleged by IBU as an ULP, nor does the foregoing finding of fact suggest such. The fact is entered herein, and referred to below, only to preclude the possibility of conflict in resolving pay claims.)

8. Rule 6.02 was not violated, as alleged by WSF, by not setting forth a modification, change or alteration of the Agreement resulting from the Larkin settlement. No modification, change or alteration of the contract occurred.

Having entered the foregoing findings of fact, the Marine Employees' Commission now hereby enters the following conclusions of law.

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, 47.64.150, and 47.64.280.

2. Past practice, no matter how well established that practice may be, cannot alter the terms and conditions of a contract whose clear and unambiguous terms establish what amounts to negotiated mutual promises by the parties to a contract. Elkouri and Elkouri, How Arbitration Works, 4th Ed. 1985-89 Cumulative Supplement, 85-86.

3. MEC was not obligated to recognize its Decision No. 87-MEC as a binding precedential decision in the instant matter. In that decision, MEC held that an agreement between IBU Business Agent Conklin and Personnel Officer Rice in settling a single grievance did not constitute a precedential settlement. A precedent would have to be reached at the policy making level. Notice had been given that MEC would not arbitrate the grievance. In the present matter, the preponderance of evidence indicates that agreement was reached at the policy determination level, viz., between Conklin and WSF Operations Manager Tiberio.

4. MEC must conclude that WSF "patently failed to fulfill its obligation . . . [to bargain in good faith] by having led…[IBU] to believe it had … reached an accord to resolve…[the holiday overtime] problem and by proceeding thereafter on a unilateral course of action dramatically…[different from] the agreement it had made…[and] by having reneged on the commitments it had made with the Union…". Pratt & Whitney Aircraft, 31 NLRB 1126, 1129 (1993).

5. Repudiation of its agreement arrived at through the collective bargaining procedure undermined collective bargaining and clogged the contractual procedures with repetitive grievances. See United Postal Service, 309 NLRB No. 3 (1993).

6. MEC concludes that the IBU/WSF 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 granted triple time pay for hours worked on holidays unless there is specific language forbidding such an interpretation—which there is not.

Mason County v. Teamsters Union Local 378, 97 LA, 45, 48 (1991).

7. It is no defense for WSF to argue that WSF was mistaken in its understanding of IBU v. WSF (Schlief), Decision No. 78-MEC. See Louisiana-Pacific Corporation, 312 NLRB 165 176 (1993).

8. MEC must conclude on the basis of a preponderance of evidence that WSF by its repudiation of its agreement with IBU has failed to bargain in good faith with IBU, has undercut IBU in the eyes of its members and has committed an unfair labor practice within the meaning of RCW 47.64.130(1)(e).

9. MEC agrees with WSF that "interpreting the language of the CBA is the function of a grievance, not a ULP." Elkouri and Elkouri, How Arbitration Works, 4th Ed. 361-62. However, IBU has proven its charged unfair labor practice by a preponderance of evidence. MEC need not remand the issue to arbitration pursuant to IBU/WSF Rule 16.04. WAC 316.45.410.

requires that MEC "take such affirmative and corrective action as necessary to effectuate the policies of RCW 47.64.005 and 47.64.006…" MEC has found it necessary to interpret the IBU/WSF Agreement, Rules 6, 11 and 25 in order to arrive at immediate affirmative corrective action.

10. Therefore, MEC must order WSF to fulfill its contractual obligations with IBU to pay any member of the IBU bargaining unit for each and every hour worked beyond his/her regularly scheduled shift on any holiday subsequent to March 14, 1994, who has not already been so compensated, at the rate of two times straight time in accordance with Rule 11, plus one hour's pay for each and every hour worked on said holiday in accordance with Rule 25, to each claimant and desist in its unilateral decisions on contractual matters, and to make an affirmative effort to put this long-standing dispute to rest by abiding by the contract to which it is a party.

11. Because the record is silent as to the number of IBU members who have worked overtime on holidays and have not been paid in full, WSF need pay only those IBU members who have already claimed overtime payment. Because some time sheets have been altered, in cases of doubt, WSF shall interpret time sheet entries most advantageous for the employee and shall pay for the higher number of hours on such altered time sheets.

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

ORDER

1. The Inlandboatmen's Union of the Pacific's charge of unfair labor practice against Washington State Ferries filed on July 7, 1994 and docketed as MEC Case No. 10-94, has been proven by a preponderance of evidence and is hereby sustained.

2. Washington State Ferries shall immediately compensate in full all members of the Inlandboatmen's Union bargaining unit who have worked overtime on any holiday subsequent to March 14, 1994, and who have claimed holiday overtime payment, and who have not been paid in full in accordance with IBU/WSF Rules 11 and 25. In cases of doubt where original time sheets have been altered, the higher number of hours in each instance shall be recognized as the actual hours worked. Following the date of entering this decision, WSF shall compensate all members of the IBU/WSF bargaining unit in accordance with the foregoing interpretation of IBU/WSF Rules 11 and 25.

3. Washington State Ferries and the Inlandboatmen's Union of the Pacific shall compose a joint statement of holiday overtime

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pay provisions and shall post at least one such statement in each vessel and terminal or other WSF facility where IBU members work.

DONE this 18th day of January, 1995.

MARINE EMPLOYEES' COMMISSION

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

/s/ LOUIS O. STEWART, Commissioner

/s/ JOHN P. SULLIVAN, Commissioner