

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

HAROLD SAXTON, et al.,)	MEC Case No. 23-97
)	
Grievant,)	DECISION NO. 192 - MEC
)	
v.)	
)	DECISION AND ORDER
WASHINGTON STATE FERRIES,)	
)	
Respondent.)	
_____)	

Harold Saxton, appearing for and on behalf of himself and others.

Christine Gregoire, Attorney General, by Ann MacMurray, Assistant Attorney General, for and on behalf of the Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on July 10, 1997, when Harold Saxton, a member of District No. 1 Marine Engineers Beneficial Association (MEBA), filed a grievance on behalf of himself and other crew members of the ferry NISQUALLY. Saxton's grievance arbitration request alleged that Washington State Ferries (WSF) has denied travel time to engineers and oilers assigned to the NISQUALLY while in lay-up status at the Lake Union Dry Dock, in violation of the licensed and unlicensed labor agreements between MEBA and WSF.

Background

Mr. Saxton certified that the grievance procedures in the MEBA/WSF collective bargaining agreements (CBA) were utilized and exhausted.

A settlement conference was scheduled for October 14, 1997 and a hearing for November 25, 1997, pursuant to RCW 47.64.150 and 47.64.280 and chapter 316-02 and 316-65 WAC. Chairman Henry L. Chiles, Jr. was assigned as arbitrator.

On September 26, 1997, WSF filed a motion to dismiss the grievance. The motion contended that MEC lacked jurisdiction to arbitrate the grievance because the collective bargaining agreements provide for grievance procedures that had not been followed. WSF further contended that Harold Saxton failed to timely file a request for grievance arbitration.

A settlement conference was held on October 14, 1997. The parties were not able to reach an agreement.

A Prehearing Order was issued November 7, 1997 in which the arbitrator stated that evidence and argument on the motion to dismiss, along with the state's case, would be heard at the conclusion of the grievants' case-in-chief. MEC would enter a decision on the state's motion to dismiss, based on the findings of fact in the record, and conclusions of law. If the state's motion was denied, MEC's decision and order would be entered on the merits of the case. The order clarified that the grievant had the burden of proving the violations alleged. The order further notified that WSF had the burden of proving the affirmative defenses alleged in its motion to dismiss, and that the grievant had the burden of coming forward to offset evidence presented by the state in its motion to dismiss.

On November 25, 1997 Arbitrator Chiles convened a hearing. All parties had an opportunity to be heard. The parties submitted exhibits that included formal papers, copies of the two contracts, copies of correspondence and copies of the pay order that had been denied. Harold Saxton testified on his behalf. Ben Davis, Senior Port Engineer and John Christensen, Port Engineer, testified on behalf of WSF. Jim Herdeck, Steward for MEBA, was called to testify for WSF.

POSITIONS OF THE PARTIES

Position of Harold Saxton

Harold Saxton, on behalf of himself and others, believes that the two MEBA contracts provided for time and mileage for the engine room crews while they were in the Lake Union Dry Dock in early 1997. They were paid according to the contract for several pay periods and then told not to submit any more requests for travel time. They were told to travel during their 12-hour shift. When the crews continued to try and follow the contract language they were denied travel pay and were issued letters of reprimand. The action by WSF was in violation of sections 9 and 12 of the Licensed MEBA/WSF agreement and sections 10 and 12 of the Unlicensed MEBA/WSF agreement.

Saxton requested that the letter of reprimand be removed from the grievants' personnel files and they be made whole for the travel time that they were not paid.

As to the state's motion to dismiss, Saxton alleged that although they tried to file a grievance pursuant to the MEBA/WSF contracts, the crew of the NISQUALLY was totally ignored by their union and by Human Resources Director Jim Yearby. Their phone calls were not returned and they received no written response to their inquiries

On this issue. The union refused to accept a certified letter sent by Mr. Saxton. After talking to MEC staff in Olympia, Mr. Saxton determined that he had exhausted all contractual provisions, and therefore filed a request for grievance arbitration directly with the Commission.

Position of Washington State Ferries

WSF believes that the MEC does not have jurisdiction to hear this case because the collective bargaining agreements provide grievance procedures that have not been followed. WSF further contends that MEC lacks jurisdiction because Mr. Saxton failed to timely file the grievance.

If both arguments fail, then WSF contends that the Management Rights clause permits them to manage the crews aboard the ferry and set the hours of work depending upon the work available and the need for the crew.

STATEMENT OF THE ISSUES

The arbitrator frames the substantive issue herein as follows:

Did the Washington State Ferries violate MEBA/WSF contracts by refusing to pay travel time and by requiring employees to travel during their 12-hour work shift while the vessel was in lay-up status?

The arbitrator frames the affirmative defenses by respondent as follows:

Does the MEC have jurisdiction to hear this matter pursuant to RCW 47.64.150?

Was the grievance timely filed?

Having read and carefully considered the entire record, including the request for grievance arbitration, hearing transcript and exhibits, and the post-hearing briefs, this Commission now hereby enters the following Findings of Fact.

FINDINGS OF FACT

1. Harold Saxton is and at all material times was an employee of WSF, serving as a Chief Engineer on the "A" week aboard the ferry NISQUALLY.
2. As WSF engineroom employees, Mr. Saxton and the other licensed engineer grievants were covered by the collective bargaining agreement between WSF and MEBA for licensed engineer officers.

Grievant/WSF employees serving as oilers aboard the NISQUALLY were represented in a collective bargaining agreement for unlicensed engineroom employees between WSF and MEBA.

3. The NISQUALLY entered Lake Union Dry Dock on December 8, 1996. A work schedule was made out by the Staff Chief Engineer and approved by Senior Port Engineer Ben Davis. In accordance with the contracts, the engineroom employees requested travel time and mileage. They were paid at this pay rate for about three pay periods.
4. On January 17, 1997, Port Engineer John Christensen sent an interdepartmental

memo to the Staff Chief of the NISQUALLY, telling him to arrange the work schedule so that travel time fell within the 12-hour work shift. The engines were shrink-wrapped and it was concluded by WSF that there was not enough work for the crew to keep busy for twelve hours. Crews were authorized to travel during the twelve-hour period. The staff chief engineer did not seek to change that authorization.

5. The engineroom crew felt that their contract was being violated. They continued to file for the travel time. On February 21, 1997 all crewmembers were given a written reprimand Senior Port Engineer Ben Davis.
6. On February 24, 1997, Harold Saxton sent a letter to MEBA informing the union of the reprimand he had received for submitting a request for travel time. A grievance was filed the same day. MEBA never responded directly to Mr. Saxton.
7. Jim Herdeck has served as a part time shop steward for MEBA since February 1997. In February 1997, he was assigned to investigate the NISQUALLY grievance. He started a file. He visited the NISQUALLY twice and spoke to at least five members of the crew, including all of the "B" week crew. Mr. Herdeck spoke to the MEBA attorney about the grievance. Thereafter, it was decided that MEBA would not challenge the WSF decision to continue paying travel time in addition to a full shift of work. MEBA accepted the decision of the Senior Port Engineer that the crew did not have enough work to continue paying travel time outside the twelve-hour shift. Mr. Herdeck attempted to negotiate with WSF for additional time for part of a pay period because the crew contended they were not notified of the change in a timely fashion. Mr. Herdeck and the MEBA attorney spoke to the Senior Port Engineer about resolving this part of the grievance. However, when the crew continued to fill out pay sheets requesting

travel time outside of their twelve-hour shifts, the settlement negotiations blew up. Mr. Herdeck spoke to several of the “B” week crew and told them that he was not able to pursue the grievance for them. He did not, however, contact Harold Saxton, because he, like Mr. Herdeck, worked on an “A” week shift on another vessel. Mr. Saxton was aware that the union was trying to obtain a settlement of the travel time issue.

8. Mr. Saxton sought the advice of the MEC and was told to file the grievance with his union and employer. Saxton tried to do so by facsimile and telephone without success. On May 2, 1997, Saxton sent letters to MEBA and WSF. MEBA refused to accept this letter. On May 19, 1997, Jim Yearby, Director of Human Resources for WSF, wrote Saxton that he should process his grievance through MEBA.
9. Mr. Saxton felt abandoned by his union and employer. Having exhausted all attempts to resolve his grievance, he filed a grievance with the MEC on July 10, 1997.

Mr. Saxton felt that his union contract was clear and unambiguous. He believed that licensed engineer contract, Section 9, paragraph (j) was violated by WSF, Along with Section 12, paragraph (a), (c) and (g). He likewise believed that unlicensed engineer contract Rule 10A.06 was violated.

11. RCW 47.64.150 states:

47.64.150 Grievance procedures. . . . Negotiated procedures may provide for binding arbitration of ferry employee grievances and of 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.

12. WAC 316-65-020 and WAC 316-650-010 state as follows:

WAC 316-65-010 Grievance—Who may file. A statement of grievance may be filed by the department of transportation, an exclusive representative of employees or their agents, an employee, or by the parties jointly, pursuant to RCW 47.64.150.

WAC 316-65-020 Grievances—Arbitration request—Limitations. Unless another purpose is stated by the party filing a statement of grievance, it shall be construed as a request for grievance arbitration by the commission in accordance with RCW 47.64.150. The commission shall consider such a request for arbitration valid only after applicable dispute remedies in the pertinent collective bargaining agreement have been exhausted, and within the time limits specified in such agreement. If the collective bargaining agreement does not contain a remedial procedure for disputes, or upon showing good cause for not exhausting prearbitration remedies, a party may file the original request for arbitration directly with the commission. Unless otherwise specified in the agreement, a request for grievance arbitration must be filed not more than ninety days after the party filing such grievance knew or should have known of the alleged injury, injustice or violation. (Emphasis added.)

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

CONCLUSIONS OF LAW

1. MEC has general jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW; specifically RCW 47.64.150 and 47.64.280.

2. MEC may not change or amend the terms or applications of the collective bargaining agreement by and between the WSF and MEBA. RCW. 47.64.150
3. Mr. Saxton alleged that because both his union and WSF abandoned him, he could go no further with his contractual dispute remedies and therefore filed a request for grievance arbitration directly with the MEC. WSF, however, argues that Saxton's allegations that MEBA failed to respond to his grievance should have been filed as a breach of the duty of fair representation (RCW 47.64.130(2)(a)). Although Harold Saxton and the other grievants herein have only alleged a violation of their contracts, MEC has an obligation to examine any allegation of a breach of the duty of fair representation very carefully. If a breach of a union's duty of fair representation were to occur, that breach could relieve Saxton of the contractual requirement that disputes be settled through grievance procedures. Individual employees may be relieved of the requirement that disputes be settled through contractual grievance procedures if there is a breach of the union's duty of fair representation. Hines v. Anchor Motor Freight, Inc., 96 S. Ct. 1048, 1058, 1059 (1976); Republic Steel Corp. v. Maddox, 370 U.S. 650 (1965); Vaca v. Sipes, 386 U.S. 171 (1967). See discussion in MEC Decision No. 79, MEC Case 8-91, at page 11.
4. The crew was disciplined for continuing to file for time and mileage after being ordered not to do so. Mr. Saxton filed a grievance with MEBA. MEBA assigned the grievance to the part-time shop steward, Jim Herdeck. Herdeck visited the NISQUALLY twice to investigate the grievance. He consulted the MEBA attorney about the grievance. Based on the investigation conducted by Mr. Herdeck, MEBA was satisfied with WSF's position that if there was not enough work available, it could require crew members to travel during their twelve-hour shift. Mr. Herdeck attempted to adjust the amount of travel time paid for an additional pay period. The settlement efforts failed because the crew continued

to file for travel time outside the twelve-hour shift, in spite of an order to cease this activity. Mr. Herdeck conveyed to some members of the NISQUALLY crew the fact that he could not help them further. Had the union, after investigating and deciding not to pursue the grievance, clearly communicated that fact to Mr. Saxton and the other grievants herein, the grievants may not have felt compelled to file this matter with the MEC.

MEBA had a duty to investigate the grievance and it did so. See, Graphic Communications Local 4, 249 NLRB 88 (1980); Teamsters Local 307, 238 NLRB 1450 (1978).

5. MEC concludes that MEBA properly investigated the dispute herein, and made reasonable efforts to verbally convey its decision not to pursue the grievance any further to some of the grievants. Having concluded that the union fairly represented its member in this grievance, MEC must further conclude that the grievants did not provide they had good cause for by passing their contractual grievance procedures. See WAC 316-65-020. Therefore, MEC must decline jurisdiction in this specific matter and will not rule on the merits of the substantive issue herein.

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

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ORDER

The request for grievance arbitration filed by Harold W. Saxton on July 10, 1997 is hereby dismissed.

DATED this 20th day of February, 1998.

MARINE EMPLOYEES' COMMISSION

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

/s/ JOHN P. SULLIVAN, Commissioner