

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration  
Before Commissioner John P. Sullivan

INLANDBOATMEN'S UNION OF	)	MEC Case No. 6-99
THE PACIFIC on behalf of DARYL	)	
ALLISON and JOHN STEC,	)	
	)	DECISION NO. 216-MEC
Grievants,	)	
	)	DECISION AND ORDER
v.	)	
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	
_____	)	

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

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

This matter came on regularly before John P. Sullivan of the Marine Employees' Commission (MEC) on June 7, 1999, when the Inlandboatmen's Union of the Pacific (IBU) filed a grievance arbitration request on behalf of John Stec and Daryl Allison, both deck employees of WSF. Commissioner Sullivan, with agreement of IBU and WSF, was assigned to act as arbitrator, to hear and decide the dispute between the parties.

IBU has certified that the grievance procedures in the IBU/WSF collective bargaining agreements have been utilized and exhausted. IBU has also certified that the arbitrator's decision shall not change or amend the terms, conditions, or application of said collective bargaining agreement, and that the arbitrator's award shall be final and binding.

The arbitrator conducted a hearing in this matter on August 18, 1999.

## THE ISSUES

The parties did not stipulate to a statement of the issues, but they may be stated as follows:

Did WSF violate the collective bargaining agreement (CBA) by failing to pay Grievant Stec penalty time for transferring gas containers from the vessel to the dock, and failing to pay Grievant Allison penalty time for transferring containers of biohazardous material on and off the vessel at different locations?

## POSITION OF THE PARTIES

### Position of IBU

The IBU/WSF contract requires WSF to pay penalty pay to employees who manually transfer hazardous labeled containers on or off a vessel, pursuant to Rule 30.04.

John Stec, as part of his duties, in accordance with U.S. Coast Guard regulations and WSF hazardous policy which prohibits gas cans from being carried on the ferries, at times is required to carry gas cans, whether empty or full, off the ferry and place in the flammable storage locker on the dock.

Daryl Allison, as part of his duties, is required to transfer biohazardous labeled containers (which would contain human organs or blood) from the dock and carry them on to the ferry where he stores them in a safe place. Upon the ferry's arrival at the next dock, Mr. Allison waits until the cars are off-loaded, then carries the biohazardous labeled container off the ferry and delivers it to a WSF terminal employee.

Both John Stec and Daryl Allison have a right to penalty pay at one half (½) hour minimum for performing the duties of transferring hazardous containers.

## Position of WSF

The position of WSF is that the language of the CBA between IBU/WSF is not clear and definite enough to say that Rule 30.04 was intended by the parties to cover gas cans and biohazard containers which were clearly the types of containers carried by the grievants. WSF contends they have rarely paid claims for carrying gas cans or containers off the ferry and have never paid for the carrying on and off of biohazardous containers. WSF further contends that human blood and organs in containers have been shipped on WSF vessels (between various medical facilities in Seattle and Harrison Hospital in Bremerton) since 1970 and gas cans for at least that long.

Rule 30.04 reads as follows:

“Rule 30.04. Manually transferring drums, and/or caustic and hazardous labeled container on or off the vessel, at any location. One half (1/2) hour minimum.”

The parties, IBU and WSF, inserted this rule in the CBA in the mid 1980's, but the penalty pay as designated was rarely paid for carrying off gas cans, and never for carrying on and off biohazardous containers; this was the custom and practice of the WSF regarding Rule 30.04.

## DISCUSSION

There was uniform testimony presented at the hearing that on occasion deck personnel, including John Stec, were required to carry gasoline containers off WSF vessels and see that the containers were placed in a shore side secured hazardous locker.

There was uniform testimony presented that human blood and organs in sealed containers were carried as paid freight aboard WSF vessel and that the containers were marked as “biohazardous”.

When “biohazardous” containers were carried on WSF vessels, after being received by a dock terminal person, a vessel deck person, including Daryl Allison, would receive the “biohazardous” container on the dock from the terminal person and carry it aboard the WSF

vessel. Upon arrival at the next port, usually Bremerton, the deck person would deliver the “biohazardous” container to a terminal person after the cars were unloaded.

Mr. Wayne Casper, industrial hygienist for the WSF for 9 years, is a highly qualified expert in the area by education and practical experience, as is Mr. Rick Nisco, WSF Safety Officer. Both stated that WSF’s own policy, U.S. Coast Guard regulations, and the Code of Federal Regulations (CFR) prevent WSF vessels from transporting gasoline containers on passenger carrying vessels. The dock terminal personnel are to look for gasoline containers in vehicles and remove them prior to boarding the ferry. If gas cans are missed by the dock personnel, the deck personnel on the vessel are to remove them from the vessel and carry them ashore to the dock terminal secured storage area, because they are hazardous.

These two experts testified that the gasoline containers are red in color and labeled as gasoline by having that identification stamped on the container, or in the case of plastic containers, printed in raised letters. Both experts stated that gasoline is susceptible to the possibility of a very large fire or explosion if carried on the ferry and for this reason both experts stated gasoline containers are hazardous.

Both WSF experts, Mr. Casper and Mr. Nisco, stated that all containers of human blood and organs are required to be labeled “biohazardous,” so if the container is damaged or compromised, it is identified as being hazardous and containing living tissue or fluid. When crewmembers come in and dispose and clean up they know what they are dealing with.

The container used to transport human blood and organs are usually in one package consisting of multiple containers and labeled “biohazardous”. This packaging and labeling is done for the protection of people transporting such containers, according to the two WSF experts in safety matters concerning hazardous and biohazardous materials.

Mr. Bob Wheeler has been a Terminal Supervisor with WSF since 1982 and at the present time is assigned on a special project for the Safety Management System for the WSF

Mr. Wheeler testified that in Seattle a taxi driver will pull up to Pier 52 and say he has a blood shipment. Terminal personnel fill out the proper freight form, **and charge a proper fare for transporting the biohazardous container.** When the next ferryboat arrives, usually a deck hand transports the biohazardous container from the dock on to the ferryboat for delivery to the next dock or terminal. This practice has been followed since at least October 1, 1970 when Mr. Black, now Manager, Marine Operations, joined WSF.

The Applicable Contract

The contract between WSF and IBU, Exhibit #6, is for 1997-1999 and includes the following:

**RULE 6-SCOPE**

...

**6.02** Agreement constitute the complete agreement between the parties, provided that, any prior understanding executed by the parties and contained in a letter of memorandum of understanding will be continued during the duration of the Agreement unless the subject matter contained in the letter or memorandum of understanding has been subsequently amended, modified, changed or altered in any way by a term or provision of the Agreement. Also, it is expressly understood and agreed upon that no term or provision of this Agreement may be amended, modified, changed, or altered except by a written agreement executed by the parties. This clause does not constitute a waiver by either party of its duty to bargain pursuant to RCW 47.64

...

**RULE 30-PENALTY PAY (GENERAL)**

**30.01** Penalty pay shall be at the straight-time rate of pay and shall be paid in addition to whatever rate of pay (straight-time or overtime) is being paid when penalty work is performed. Except for the items specified below, penalty time shall be paid for time actually worked with the minimum payment of one-half (1/2) hour and in one-half (1/2) hour increments thereafter.

**30.02** Opening, entering, and working in sewage holding tanks. Two hour minimum.

**30.03** Cleaning up any leakage or spillage of sewage from tanks, piping or pumps, or if employee comes in physical contact with sewage while exercising due care in the performance of their duties. Two (2) hour minimum.

**30.04** Manually transferring drums, and/or caustic and hazardous labeled container on or off the vessel, at any location. One-half (1/2) hour minimum.

**30.05** When required to clean-up excrement, and/or vomit as well as blood: One-half (1/2) hour minimum. The clean-up of blood does not include the emptying of sanicans in the women's rest rooms but requires that employees actually must clean or remove blood spillage or bloody items that are otherwise not in lined containers and where there is actual physical contact with the spillage or bloody items.

Rule-30.01 states that when penalty work is performed in addition to straight time for this type of work a penalty pay shall be added to the straight time.

Rule-30.02 covers the opening, entering and working in sewage tanks which require a two(2) hour minimum of penalty pay.

Rule-30.03 and Rule-30.05 refer to the clean up of different types of spillage and what amount of minimum payments shall be paid for this type of work.

Rule-30.04 does not include language related to entering vessels' sewage tanks or doing any type of clean up. It pertains to manually transferring caustic and hazardous labeled containers on or off the vessel, requiring payment of penalty pay for a minimum of one half (1/2) hour.

A comparison of the terms of Rule 30.04 stated in the CBA, which govern Mr. Stec and Mr. Allison's work, which is the subject of this grievance, reveals the following:

**“Manually”** Both used their hands: Mr. Stec to take the gasoline cans ashore; Mr. Allison to transfer the biohazardous containers from the dock to the vessel and from the vessel to the dock.

**“Transferring”** Mr. Stec was carrying gasoline containers from the vessel to the dock while Mr. Allison was moving biohazardous containers from the dock to the vessel and then to a dock.

**“Caustic”** means “to burn, that can burn tissue by chemical action”, Webster’s New World Dictionary and Thesaurus, (1996), pg. 93. WSF’s well-qualified industrial hygienist, Mr. Casper, testified gasoline can cause chemical burns if spilled on the skin. In addition, he testified, “Gasoline can be hazardous if it’s inhaled, if it’s ingested, can cause chemical burns if spilled on the skin, and is obviously very flammable.” Mr. Stec was transferring gasoline containers from the vessel to the dock.

**“Hazardous”** refers to what is risky or dangerous. In this case, to notify the handler of the container that the contents pose an extreme risk. Both WSF experts Mr. Casper and Mr. Nisco testified that gasoline was hazardous, and because of this condition, WSF has a written policy (Joint Ex. #7) of banning gasoline containers from its passenger vessels, inline with the U.S. Coast Guard Regulations and the Code of Federal Regulations (CFR). The same WSF written policy identifies as potentially hazardous waste not only “gas cans” but “medical or biological waste,” which would include “biohazardous” containers.

**“Labeled”.**

- The containers of gasoline had the container stamped with the word “gasoline” or plastic identified with raised letters stating “gasoline”.
- The “biohazardous” containers had the label on the container that indicated to the handler that human blood or organs were contained therein.

**“Container”.**

- This would be the metal or plastic holder or jug containing the gasoline that Mr. Stec carried.

- It would be what the biohazardous material, human blood and organs that were packaged in so the biohazardous material could be transported on the WSF vessel; this is what Mr. Allison was handling.

**“On or Off the Vessel”.**

Mr. Stec was carrying gasoline containers off the vessel. Mr. Allison was carrying biohazardous material on and off the vessel.

The language of Rule 30.04 is clear, plain, and unambiguous. The work that Mr. Stec and Mr. Allison perform, and the subject of this grievance, is what the Rule is intended to cover.

Mr. Black, Manager of Marine Operations, has been employed by WSF since 1970. He testified he was familiar with the prohibition of gasoline containers on the vessels and the carrying of biohazardous material—human blood and organs—since he joined WSF and that it was not the practice to pay penalty time to deck personnel for manually handling gas cans off the vessel and biohazardous containers on and off the vessel. Mr. Black also testified that he has been involved with contract negotiations since joining WSF and Rule 30.04 was not in the contract until the mid-1980’s.

If a custom or practice not to pay for the transfer of hazardous material between the vessel and the dock existed in the past, this was changed when the parties, IBU and WSF, expended great energy and time in negotiating the details of their contract when including Rule 30.04 in the contract in the mid-1980’s. The parties specifically spelled out what would happen when the IBU deck employees were required to manually transfer hazardous material.

WSF, by not making payments pursuant to Rule 30.04, are violating a right of the employees that was agreed upon by the parties through negotiations that resulted in the Collective Bargaining Agreement for 1997-1999.

Mr. Black testified there was nothing in Rule 30.04 that referred to transferring:

- (1) Improperly packaged containers on or off the vessels;



- (2) Improperly handled containers on or off the vessels;
- (3) Leaking containers.

He also testified that Rule 30.04 does not require spillage in order to be paid.

That there have been few claims for penalty pay for the type of work Mr. Stec was doing regarding the gasoline cans, and Mr. Allison regarding the biohazardous containers, does not mean they have given up the right for penalty pay in the written contract for 1997-1999.

Mr. Black testified there was no time requirement or expiration date on the contract provision, Rule 30.04, that provides for penalty pay carrying hazardous material on and off the vessel, and Rule 30.04 was within the terms of the agreement and would be valid as long as the agreement is valid.

The failure over a long period of time to exercise a right, here seeking penalty pay for work performed under Rule 30.04 is not a surrender of that right and does not waive that right.

In Esso Standard Oil Co., 16 LA 73, 74 (1951) a right by the company had not been used in 15 years and under 15 contracts. The Arbitrator held, "Mere non-use of a right does not entail a loss of it." Esso Standard Oil Co., *supra* was cited with approval in Red River Army Depot, 80 LA 267, 269 (1983). In City of Auburn Police Department, 78 LA 537, 540 (1982) regarding a contract right that had not been used frequently, "the mere non-use of such a right does not negate the right to make use of it".

While Rule 30.04 was negotiated by the parties and became part of the written contract in the mid-1980's, there were few claims made and paid prior to the claims of Mr. Stec and Mr. Allison, but that does not mean that there were no valid claims. The right remained, when the work was done, pursuant to Rule 30.04, for penalty pay.

In Penberthy Injector Co., 15 LA 713 (1950) the arbitrator granted vacation pay to the grievant and it was noted:

It acknowledges that in previous years some laid off employees who were entitled to vacations failed to file grievances when they were denied them but states that such failure to assert their claim does not estop a current employee from demanding his rights under the contract nor does such previous failure to assert a claim constitute an admission or an adjudication that the employee has no valid claim.

Having read and considered the entire record, the Marine Employees' Commission now enters the following conclusions of law.

#### CONCLUSIONS OF LAW

1. The Marine Employees' Commission, has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW, especially RCW 47.64.150 and 47.64.280.
2. Past practice was superseded by the adoption of a new Collective Bargaining Agreement, in mid-1980's, when Rule 30.04 was included in the written contract between IBU/WSF in the mid-1980's and is still constituted part of the 1997-1999 contract between the parties. Any past practice of not paying for the type of work performed by Mr. Stec and Mr. Allison was excluded as a result of the parties enacting Rule 30.04. The MEC may not change or amend terms, conditions or applications of the IBU/WSF Collective Bargaining Agreement. RCW 47.64.150.
3. After considering the evidence submitted, we find that Rule 30.04 is clear and unambiguous and should be enforced as written. Elkouri and Elkouri, How Arbitration Works 651 (5<sup>th</sup> ed. 1997).
4. MEC finds that the work Mr. Stec performed in removing gas cans from the vessels and the work Mr. Allison did in transferring biohazardous containers from the dock to the vessel and then to the next dock was the type of work explicitly covered by Rule 30.04. The rule is clear. The employer, WSF, is to pay overtime for the type of work performed by Mr. Stec and Mr. Allison as stated in their grievance. No alternative interpretation can be given to Rule 30.04.

5. IBU has shown by a preponderance of the evidence presented that Rule 30.04 has not been correctly interpreted by WSF; therefore, the contract has been violated.

## ORDER

1. Rule 30.04 applies to John Stec's work, manually transferring gas cans, and Daryl Allison's work, manually transferring biohazardous containers, in performing their duties aboard WSF vessels.
2. WSF is ordered to make John Stec and Daryl Allison whole by paying the penalty pay they applied for and were denied since May 15 and May 10, 1998, respectively, to the present time. WSF is also ordered to reimburse the IBU employees who since June 1998 requested, but were denied penalty pay pursuant to Rule 30.04 for the same type of work performed by Messrs. Stec and Allison.
3. WSF is ordered to give effect to Rule 30.04 from the date of this decision, to IBU bargaining unit members, by paying to those requesting, penalty pay for performing the same type of work which is the subject of this grievance.

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4. The question concerning penalty pay pursuant to Rule 30.04, raised by IBU in its request for grievance, filed on behalf of John Stec, Daryl Allison, and other bargaining unit members on June 7, 1999 and docketed MEC Case No. 6-99 is hereby sustained.

DATED this \_\_\_\_ day of November 1999.

MARINE EMPLOYEES' COMMISSION

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JOHN P. SULLIVAN, Arbitrator

Approved By:

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HENRY L. CHILES, JR., Chairman