

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 18-01

DECISION NO. 329 - MEC

DECISION REGARDING
REQUEST FOR
RECONSIDERATION

TO: AAG David Slown, counsel for Respondent WSF;
AND TO: Dmitri Iglitzin and Judy Krebs, counsel for Complainant IBU.

NATURE OF THE PROCEEDING

Respondent Washington State Ferries brought this matter before the Marine Employees' Commission by filing a Request for Reconsideration of those portions of Marine Employees' Commission Decision 321-MEC which deal with the creation of the OS/TT job classification and the assignment of ticket taker duties to that job classification.

BASIS OF THE REQUEST

Respondent Washington State Ferries bases its request on three arguments:

1. The Commission misconstrued the meaning of a Washington State Ferries letter dated May 9, 2001 (Exhibit 2). Washington State Ferries argues that that letter was actually a complete and correct offer to bargain to which the Union failed to properly respond.
2. Having misconstrued the meaning of the May 9 letter at issue, the Commission failed to give proper weight to the argument that the Union responded improperly, or not at all, to the offer to bargain.

3. As a separate matter, the Commission's determination that the actions taken by Washington State Ferries did not fulfill its duty to bargain in this case is inconsistent with Marine Employees' Commission Decision 317-MEC.

POSITION OF THE COMPLAINANT

Complainant Inlandboatmen's Union of the Pacific filed a Reply Brief that argues as follows:

1. The Washington State Ferries letter at issue was properly interpreted by the Commission as a statement that a decision had been already made and that there would be no bargaining concerning that decision.

2. In any event, the Inlandboatmen's Union of the Pacific never waived its right to bargain regarding the decision at issue.

3. The prior MEC decision and the one at issue are not inconsistent in that the latter deals with the duty to bargain regarding a decision, while the former deals with the duty to bargain regarding the impact and effects of two decisions concerning which there was no duty to bargain.

RECORD BEFORE THE COMMISSION

The Marine Employees' Commission had the following record before it in deciding this matter:

1. The entire hearing record, which is described in Decision 321-MEC.

2. The Decision and Order in this case and the earlier Decision and Order to which reference is made by both parties (317-MEC).

3. Respondent Washington State Ferries Request for Reconsideration.

4. Complainant Inlandboatmen's Union of the Pacific's Reply to Respondent's Request for Reconsideration.

5. The Marine Employees' Commission's Notice of Date MEC Will Act on WSF's Request for Reconsideration.

ANALYSIS

1. **The letter of May 9.** Marine Employees Commission based its decision that Washington State Ferries violated the law in the manner in which it created and implemented the OS/TT position on the determination that the decision is a mandatory subject of bargaining, that the union clearly requested bargaining in writing once the union was made aware of the proposal (Exhibit 6), and that the Washington State Ferries subsequently created the position without bargaining and then announced implementation in a letter which stated the employer's intent to limit bargaining to the impact and effects of the decision that it had already made.

The Request for Reconsideration focuses solely on the letter of May 9 letter (Exhibit 2) and argues that that letter was, in fact, an offer to bargain about the entire matter, including the issue of whether or not any new position was to be created and any duties would be shifted. In fact, that argument is not supported by the letter upon which it is based. The May 9th letter states what "will" happen, not what is proposed for discussion. Insofar as bargaining is concerned, the May 9th letter carefully distinguishes between WSF's "right" to make this and a related decision without prior bargaining, from WSF's duty to discuss the impacts and effects of the decisions it had a right to make unilaterally. The May 9 letter limits WSF's offer to bargain to issues of impact and effects.

Rather than supporting the position taken by the Request for Reconsideration, the May 9 letter supports the Union's argument that the employer refused to bargain about the decision to

create a new position and had, in fact, already made the decision unilaterally and was unlawfully attempting to limit its bargaining obligation to the impact and effects of that decision.

2. **Waiver.** “The ‘waiver by inaction’ defense is apt where a party has given appropriate notice of a proposed change of a mandatory subject of bargaining, ... and the other party does not request bargaining in a timely manner.” *Whatcom County Deputy Sheriffs Guild v. Whatcom County*, 7643-PECB, 7 (2002). The proponent has the burden of proof on this issue.

The Washington State Ferries argues that the Union waived its right to bargain regarding the creation of the new position and the shift of duties to that position. However, Washington State Ferries has not sustained its burden of proof as to this issue because:

a. The Union stated its desire to bargain the matter in writing before the May 9 letter was written. There is no absence of a request to bargain from the Union so the second part of the waiver theory was not established.

b. In addition, the evidence placed in the record by Washington State Ferries during the hearing (transcript 211 – 212) confirms that the employer was aware that the union wanted to bargain all aspects of the matter. Despite this awareness, Washington State Ferries made the decision and announced implementation without bargaining.

c. The notice on which Washington State Ferries relies in the Request for Reconsideration, the letter of May 9, limits an offer to bargain to the impact and effects of the decision that the employer had already made. Such limited notice does not fulfill the requirements of the first part of the waiver theory with respect to bargaining about the decision itself.

d. While the parties genuinely disagree as to who said what to whom in the weeks after May 9, Washington State Ferries did not produce convincing evidence that

the Union abandoned its earlier request to bargain. In fact, the Union did not act inconsistently with its position that it wanted to bargain the whole matter before any decision was made.

The facts do not support the argument that there was Union waiver regarding its right to bargain about the decision at issue in this matter.

3. **Inconsistency with other decisions.** Depending on the specific facts of the case, an employer may have the obligation to bargain about:

- a decision before the matter is decided.
- the impact and effects of a decision that the employer has the right to make unilaterally.
- nothing.

There are different considerations for each of these possibilities.

One of the two issues in this case involved a fact situation which generated the obligation to bargain about a decision the employer wanted to make. The employer's letter of May 9 announcing (a) that the decision had already been made and would be implemented and that (b) the employer was willing to discuss impacts and effects, was and is legally insufficient as a proper offer to bargain.

The other issue (surcharge machine) involved a fact situation which did not generate the obligation to bargain about the decision the employer wanted to make. The employer's letter of May 9 announcing (a) that the decision had already been made and would be implemented and that (b) the employer was willing to discuss impacts and effects making any agreement retroactive to the implementation date was legally sufficient as a proper offer to bargain.

This decision is not inconsistent with those portions of Decision 317-MEC which addressed the web sales and the spring bid. Both of those earlier matters were deemed to be

matters that did not generate the obligation to bargain about the decision. The Marine Employees' Commission's analysis was identical to that applied to the surcharge machine matter in this case.

The different conclusion reached with respect to the OS/TT matter was dictated by the finding that it was a matter which generated the obligation to bargain before the decision was made. There is no inconsistency between the decisions.

With regard to the intemperate language with which Washington State Ferries concluded its argument on this point, the Marine Employees' Commission believes that adherence to the law is likely to be neither counterproductive nor inflammatory. The law at issue, RCW 47.64, balances the rights of all parties and adherence to it is the best way to avoid unnecessary and costly disputes.

ORDER

The Marine Employees Commission hereby denies the Request for Reconsideration.

DATED this 3rd day of August 2002.

MARINE EMPLOYEES COMMISSION

/s/

JOHN BYRNE, Hearing Examiner

/s/

JOHN NELSON, Chairman

/s/

JOHN SULLIVAN, Commissioner