

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before Commissioner John Byrne

INLANDBOATMEN'S UNION
OF THE PACIFIC on behalf of
RICHARD LOSER,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 38-02

DECISION NO. 347 - MEC

DECISION AND AWARD

APPEARANCES

Schwerin, Campbell and Barnard, attorneys, by *Robert Lavitt*, appearing for and on behalf of the Inlandboatmen's Union of the Pacific and Richard Loser.

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

NATURE OF THE PROCEEDING

The Inlandboatmen's Union of the Pacific brought this matter before the Marine Employees Commission to decide a grievance relating to the proper manning of a ferry when it was operated after its regular schedule with a fuel truck and driver aboard. The union argues that the ferry Kaleeten should have been manned in compliance with the contractual minimum manning schedule. The employer argues that it staffed the vessel in accordance with the terms of the Certificate of Inspection issued by the Coast Guard and that the contract's minimum manning requirements cited by the union do not apply to the event at issue.

RECORD BEFORE THE COMMISSION

The Marine Employees Commission has the following record before it:

1. The Request for Grievance Arbitration.
2. The Notice of Settlement Conference and Notice of Hearing.
3. The Parties' Collective Bargaining Agreement for the period July 1, 1999 through June 30, 2001, in the small booklet format.
4. Transcript of hearing (133 pages).
5. Five exhibits accepted into evidence during the course of the hearing.

FINDINGS OF FACT

On the basis of the record before it, the Marine Employees' Commission makes the following Findings of Fact:

The Incident At Issue

1. Sometime prior to December 15, 2001, Washington State Ferries assigned the vessel Kaleetan to provide ferry service between Anacortes and various terminals in the San Juan Islands.
2. On December 15, 2001, Washington State Ferries manned the Kaleetan for its scheduled runs with the contractually-required crew of 4 ABs and 4 OSs, including one OS – watchman.
3. The contract requires a crew larger than that specified by the vessel's Certificate of Inspection, which is issued by the United States Coast Guard. The Certificate of Inspection sets the minimum manning at 4 ABs and 2 OSs, including one OS-watchman, unless the vessel is repositioning at a terminal and has no passengers aboard. In that circumstance, the Certificate of Inspection requires a Master and two ABs.

4. On December 15, the Kaleetan completed its last scheduled run at the Anacortes loading/unloading slip at about 9:25 p.m.

5. The scheduled work shift for the Kaleetan's deck crew ended at 9:45 that night.

6. The Kaleetan's Master caused the vessel to be backed out of the loading/unloading slip at about 9:29 p.m. and returned the vessel to the same slip at about 9:48 p.m. Neither party provided any testimony regarding the reason for that maneuver.

7. The union does not allege that that maneuver violated the contract in any way.

8. The Kaleetan's Master caused the vessel's engines to be turned off at about 9:53 p.m. The Master then released 2 ABs and 3 OSs from duty and sent them off the vessel. The grievant was among those released. Two ABs and 1 OS were held over on overtime.

9. Sometime prior to these events, Washington State Ferries scheduled a re-fueling of the Kaleetan for later that night. The Master and the crewmembers were aware of this scheduled refueling at the time when the Master released the 2 ABs and 3 OSs from duty.

10. The fuel truck's normal procedure at Anacortes was to board the vessel and pump the fuel directly into the vessel's fuel tanks with the assistance of the vessel's crew.

11. From time to time, the fuel truck drivers could not back the tank truck off the vessel after the fueling was completed. In those instances, the vessel's crew would back the ferry out of the slip, turn it around, and then redock the ferry so that the tank truck could drive off without backing up.

12. A crew that matched at least the Certificate of Inspection's requirements for a full crew was always aboard when this turn-around maneuver was done. No evidence was presented to indicate that the turn-around maneuver was ever done with a skeleton, repositioning crew.

13. During December 2001, Washington State Ferries was engaged in a major construction project at the Anacortes Terminal.

14. The construction project caused the temporary closure of one of the two loading/unloading slips normally available at the Anacortes Terminal.

15. Washington State Ferries scheduled the December 15 refueling of the Kaleetan for a time that coincided with the scheduled arrival of another ferry providing service to the San Juan Islands.

16. The fuel truck arrived at the Anacortes Terminal at about 11:22 p.m. to begin the refueling. The Kaleetan's Master ordered that the vessel's engines be turned on to push the ferry forward to hold it tight to the slip while the fuel truck boarded.

17. The fuel truck was aboard the Kaleetan when the last regularly scheduled ferry arrived with cars and passengers at the Anacortes Terminal.

18. The Kaleetan's Master backed the Kaleetan out of the loading/unloading slip at about 12:18 a.m. (December 16) to enable the other ferry to dock and unload its passengers and vehicles.

19. The fuel truck and driver remained on the Kaleetan the entire time the Kaleetan was held away from the terminal.

20. At about 12:52 a.m., the Kaleetan's Master returned the vessel to the loading/unloading slip. The fuel truck and driver left the vessel sometime after that. The Master then caused the Kaleetan's engines to be turned off at 12:56 a.m.

21. The ship's log reports the weather that night as stormy: 40 – 60 knot winds, 4 – 8 foot swells in Guemes Channel, with rain showers.

Contract Language

22. Contract Rule 7 sets out the language at issue in this case as follows:

7.02 Except in cases of emergency and for movements within the vicinity of Eagle Harbor, each vessel, while in service, shall have a minimum manning as follows:

...

7.03 The Employer and the Union agree that every effort will be made to man the vessels of the Employer, while in service, with the standard complement of crew personnel in accordance with the above minimum manning schedules.

7.04 Except in cases of emergency and for movements within the vicinity of Eagle Harbor, when any vessel is not manned in accordance with the minimum manning schedules . . . wages of the position(s) shall be divided equally among the employees performing the work of the unfilled position(s). . . .

23. The contract's mention of Eagle Harbor refers to the employer's repair facility where workers in the shoregang sometimes move a vessel during the course of maintenance or repair.

PARTIES' POSITIONS

The union argues that the vessel was "in service" and was not covered by either of the exceptions to the minimum manning requirements when it was backed out of the loading/unloading slip with the tank truck and driver aboard. As a consequence, the union argues, a full crew was required for that maneuver.

The employer argues that the vessel was not "in service" during the maneuver and that the Certificate of Inspection specifically anticipates a reduced crew for "repositioning movements from one berth to another at the same terminal [when] ... no passengers are on board." The employer argues that the tank truck driver was not a "passenger". As a consequence, the employer argues, the ferry was properly staffed during the maneuver at issue in this case.

ISSUE

The issue before the arbitrator is whether or not the contract's minimum manning schedule applied when the vessel was backed out of the slip with a tank truck and driver aboard and stayed out in Guemes Channel to enable another vessel to unload.

ANALYSIS OF RELEVANT CONTRACT LANGUAGE AND PAST PRACTICE UNDER THAT LANGUAGE

The Contract's Definition section, Rule 1, does not define the word "service" nor does it define the term "in service." As a consequence, that word and that term fall under the general statement at the end of Rule 1:

Unless the context of a particular section in question indicates otherwise, all other words and terms used in this agreement shall be given their common and ordinary meaning.

The reference to the context appears to incorporate the accepted rule of contract construction that words are to be construed in their settings and are not to be isolated from their settings. "The meaning of words may be controlled by those [words] with which they are associated." Elkouri & Elkouri, *How Arbitration Works*, 492, 499 (5th ed.).

The task before the Commission is to determine the scope of the term "in service" as that term is used in the context of the contract and parties' practices under the contract.

The contract itself uses the term "in service" only in the sections at issue.

However, the parties chose to use the word "service" four times in the general rules portion of the contract:

1. Rule 7.08 grants Able Seamen with "ten . . . or more years of service . . ." certain rights to change jobs.
2. Rule 18.01 defines "Maritime Emergency Service" as collisions, breakdowns, stranding, rendering aid to another vessel and similar activities.

3. Rule 23.01 grants certain sick leave “for each completed month of service”.
4. Rule 24.01 grants severance pay in certain circumstances “for each year of service.”

In these contract sections, the parties used the word “service” in a broad rather than a narrow fashion. That tendency affects the phrase at issue in this case.

When the parties wanted to be specific and narrow, they chose a more explicitly narrow word or term. In Rule 8.05, for example, the employer is only liable when an unprovoked assault “occurred during the course of (the victim’s) work.” (Elsewhere in that section, the term chosen is “while on duty.”) Similarly, Rule 28.02 requires wearing the uniform “while on duty”, a phrase that appears more narrow than the word “service” which would include travel time, sick leave, vacation and other non-duty compensated times. Rule 29.03 is similarly specific in that it bans painting “while vessels are under way” and bars certain maintenance activities “while propellers are turning.”

Turning to the section directly at issue in this case, the overall wording and sentence structure chosen by the parties points to a broad interpretation. Two of the three uses of the term “in service” (Rules 7.02 and 7.04) contain a specific exclusion for “cases of emergency and for movements within the vicinity of Eagle Harbor.” The fact that the parties felt it necessary to carve exceptions out of the term “in service” means that they believed that those items were encompassed by the term “in service” until the exception was crafted. In other words, the meaning of “in service” is affected by those items that the parties felt should be carved out of that term. In this instance, the statement of the exceptions means that the parties both understood that movements in the vicinity of Eagle Harbor and emergencies were encompassed by the term “in service” until they agreed upon the exceptions. Had the parties believed at the start that

Eagle Harbor and emergencies were not within the scope of the term “in service”; they would not have bothered to create the exceptions that then limited the scope of the term.

The importance for our case lies in the fact that this analysis precludes the employer’s argument that the term “in service” is limited to those times when the vessel is bearing revenue passengers. Vessels do not carry revenue passengers at the repair facility at Eagle Harbor and it is unlikely they carry revenue passengers every time they respond to emergencies. Had the parties believed that the term “in service” meant only when carrying revenue passengers, there would have been no need for the exceptions to the term “in service” that they agreed upon.

The parties’ past practices support the analysis that the term is to be understood in a broad rather than restrictive way. The parties agree that the vessels are fully manned when they move between terminals in order to take up new assignments. In addition, the vessels are fully manned when they go to fuel docks in the central part of Puget Sound. The vessels would not be carrying revenue passengers in either instance. This practice implicitly endorses a broad interpretation of the term “in service.”

The relevant dictionary definition of the word “service” appears to take a similarly broad, inclusive approach. *Webster’s Ninth New Collegiate Dictionary* defines the word with a four-part definition that reads as follows:

- A: the work performed by one that serves
- B: HELP, USE, BENEFIT [the use of capitals is not explained]
- C: contribution to the welfare of others
- D: disposal for use

The “disposal” (D) subsection of this definition requires consideration of whether or not the vessel is available for use. The “Contribution to the welfare of others” (C) subsection requires consideration of whether or not the vessel’s activities assist other vessels and/or passengers

and/or the system as a whole. Both elements of the definition apply to the circumstances at issue here.

In addition, the parties' specific past practice of fueling at Anacortes is that the full crew would be used whenever the fueling required the vessel to be turned around for the convenience of the fuel truck driver. From time to time, the Master would release one or two OSs prior to the maneuver, but the Master never reduced the crew below the Coast Guard minimums for passenger service in those circumstances. In addition, the employer presented no evidence that it had ever previously moved a vessel with the truck and driver aboard with the skeleton crew as was used in this case.

APPLICABLE LEGAL DECISIONS

Neither party submitted any court or arbitrator decisions to support their view of the meaning and/or application of the "in service" language that triggers the minimum manning requirement at issue in this case. At the same time, the Commission's own legal research did not turn up any relevant decisions.

There is, however, a Washington Court of Appeals decision in *Burgdorf v. State*, 61 Wn. App. 918 (1991), *review denied* 117 Wn.2d 1028 that bears directly upon the employer's position that the movement of the ferry was a repositioning with no passengers aboard so as to fit within the Certificate of Inspection's sanction of a skeleton crew. (Although the Certificate of Inspection does not override the contract where the contract calls for more than minimum Coast Guard manning, the language in that Certificate appears relevant to the determination of the parties' intentions as to the scope of minimum manning language.)

Burgdorf v. State, 61 Wn. App. 918, turns on the issue of when a person becomes a "passenger" of a ferry. The slip-and-fall inside a terminal that gave rise to that case differs from

our facts but the legal test applied by the Court is directly relevant to the employer's argument here that the truck driver aboard the ferry cannot be considered to be a "passenger".

At pages 920 – 921 of the cited decision, the Court lays out a five element test for determining whether a person is a "passenger" at the time of an incident:

1. place (a place under the control of the carrier and provided for the use of persons who are about to enter [the] carrier's conveyance)
2. time (a reasonable time before the time to enter the conveyance)
3. intention (a genuine intention to take passage upon [the] carrier's conveyance)
4. control (a submission to the directions, express or implied, of the carrier)
5. knowledge (a notice to carrier either that the person is actually prepared to take passage or that person awaiting passage may reasonably be expected at the time and place)

In this matter, the truck driver was on the vessel (1) at the time (2) set for him/her to be there. The driver was under the control (4) of the Master and crew members assisting in the fuel delivery and the carrier was aware (5) of his/her presence. The facts clearly fulfill four of the five test elements.

There is no direct evidence about the driver's intention (3) to be on the vessel when the vessel left the slip but that intention can be inferred by the fact that previous fuelings had resulted in movements of the vessel and that intention can also be inferred by the absence of any evidence that the driver sought to leave the vessel before it pulled away from the

loading/unloading slip. The five point test would appear to include the driver within Washington's definition of who is a "passenger."

Earlier Washington cases concluded that a worker was a "passenger" when riding on his employer's conveyance to get from job to job *Harris v. Puget Sound Elec. R.*, 52 Wash. 289 (1909), while a policeman was a "passenger" even though he should not have been on board because the pass that had been issued for his use was illegal *Bradburn v. Whatcom County R & L Co.*, 45 Wash. 582 (1907). The Court did not give any weight to the fact that neither person paid for his passage. The crucial element in the cited cases was the fact that the people were on board with the knowledge of the operator, irrespective of how they got there. That rationale fits the facts of the matter at issue here.

The presence of a passenger on the vessel *Kaleetan* precludes the application of the proviso in the Certificate of Inspection regarding "repositioning movements . . . provided no passengers are on board."

CONCLUSIONS OF LAW

On the basis of the Record before it, the Findings of Fact and the contractual and legal analysis, the Marine Employees' Commission makes the following Conclusions of Law:

1. The parties' 1999-2001 contract remains in full force and effect past its stated expiration date by operation of law (RCW 47.64.170).
2. The Marine Employees' Commission has jurisdiction over the parties and the dispute (RCW 47.64.280). This case is properly before the Marine Employees' Commission for decision.

3. The master of the vessel Kaleetan placed the vessel “in service” as that term is used in Rule 7 of the contract when he left the Anacortes loading/unloading slip in the early hours of December 16, 2001 with a fuel truck and driver aboard the vessel.

4. The contract’s minimum manning language applies to the maneuver at issue in this case.

5. The Certificate of Inspection’s proviso regarding a skeleton crew does not apply to the maneuver at issue because the truck driver had the legal status of a passenger.

6. The circumstance at issue does not fit within either of the exceptions to the manning requirements while a vessel is in service because the fueling was scheduled in advance and was therefore not an emergency and because the movement of the vessel did not occur in the vicinity of Eagle Harbor.

7. The employer violated the contract by permitting the operation of the Kaleetan with a crew less than the contract’s minimum manning while there was a fuel truck and driver aboard in the early morning hours of December 16, 2001.

DECISION AND REMEDIAL ORDER

The Marine Employees’ Commission hereby determines that the Washington State Ferries violated the contract when it allowed the operation of the vessel Kaleetan with a fuel truck and driver aboard in the morning hours of December 16, 2001 when that vessel was crewed by less than the crew required by the contract.

Contract Rule 7.04 mandates the remedy as the division of the wages of the unfilled positions among those who performed the work at issue. In this case, the crew was short 2 Abs and 3 OSs. The time involved is less than an hour but the contract awards an hour’s pay for extra work of more than 15 minutes. As a consequence, the Marine Employees’ Commission

hereby Orders that Washington State Ferries distribute the equivalent of 2 hours AB pay (straight-time) and 3 hours of OS pay (straight-time) to the 2 ABs and the 1 OS who were aboard the Kaleetan when it was moved out of the loading/unloading slip in Anacortes in the morning hours of December 16, 2001.

DATED this ____ day of November 2002.

MARINE EMPLOYEES' COMMISSION

JOHN BYRNE, Arbitrator

Approved By:

JOHN NELSON, Chairman

JOHN SULLIVAN, Commissioner