

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC Case No. 48-03

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 49-03

DECISION NO. 391 - MEC

DECISION AND AWARD

Schwerin, Campbell and Barnard, by *Robert Lavitt*, Attorney, appearing for the Inlandboatmen's Union of the Pacific.

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

NATURE OF THE PROCEEDING

On May 23, 2003, the Inlandboatmen's Union of the Pacific, Puget Sound Region (IBU) brought this matter before the Marine Employees' Commission (MEC) by filing two requests for grievance arbitration, MEC Case No. 48-03 and MEC Case No. 49-03.

The MEC consolidated the two cases for purposes of holding a combined or consolidated hearing. Neither counsel objected to consolidation.

MEC Case 48-03 concerns moving the ferry KITSAP on September 10 and 12, 2002 from one slip to another slip at the Clinton Dock because of dock construction, with only the Master and two ABs. The IBU asserts that Washington State Ferries (WSF) denied the short-crew pay, in violation of Rule 7.03 and 7.04 of the IBU/WSF Collective Bargaining Agreement (CBA).

MEC Case 49-03 concerns IBU's claim that WSF denied "F" Watch and "G" Watch crewmembers' claim for early call-out pay, after WSF changed the hours of their watches resulting in being called-out earlier than their normal scheduled watch on March 1 and 2, 8 and 9, 2002, on the Clinton/Mukilteo route of the ferry KITSAP. IBU alleges that F Watch and G Watch were denied early call-out, pursuant to Rules 11.03 and 29.05 of the IBU/WSF CBA, while WSF asserts that Appendix A, Deck Department Personnel, Rule 1.04 is applicable for these crews.

IBU has certified that the grievance procedures in the IBU/WSF CBA were utilized and exhausted. IBU also certified that the Arbitrator's decision shall not change or amend the terms, conditions or applications of said collective bargaining agreement; and that the Arbitrator's award shall be final and binding.

John P. Sullivan, a Commissioner of the Marine Employees' Commission, conducted a hearing in this matter on September 22, 2003, pursuant to RCW 47.64.150 and 47.64.280, chapters 316-02 and 316-65 WAC. Counsel chose to present oral argument at the conclusion of the hearing instead of filing briefs.

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

The Hearing Examiner considered the following record in making the Findings of Fact and Conclusions of Law and Decision and Award in these consolidated cases:

1. The Notice of Scheduled Settlement Conference and Hearing issued by the Marine Employees' Commission on June 13, 2003, which includes a copy of request for grievance arbitration, Case 48-03.

2. The Notice of Scheduled Settlement Conference and Hearing issued by the Marine Employees' Commission on June 13, 2003, which includes a copy of request for grievance arbitration, Case 49-03.

3. IBU's request to change the hearing date in Case 48-03.

4. WSF's response to IBU's request to change hearing date.

5. The Notice of Reassigned Hearing Dates issued by the Marine Employees' Commission on September 10, 2003 in Case 48-03.

6. The Order Consolidating Cases for Hearing issued by the Marine Employees' Commission on September 19, 2003, in Cases 48-03 and 49-03.

7. The official hearing transcript and eight exhibits accepted into evidence.

THE ISSUE—MEC CASE 48-03

Did the movement of the vessel from the north slip to the south slip require payment of short crew pay under the contract?

CONTRACT LANGUAGE—MEC CASE 48-03

The normal Deck Department complement on the KITSAP is three (3) ABs and three (3) OSs. The applicable IBU/WSF contract rules in this matter are the following:

RULE 7 – CREW REQUIREMENTS

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 of unlicensed personnel in the Deck Department, the wages of the position(s) shall be divided equally among the employees performing the work of the unfilled position(s). If a crew shortage occurs on a holiday, the holiday rate of pay shall apply.

11.03 Employees called to work prior to commencing their regular scheduled shift shall 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 regular scheduled basis.

In addition to the above rules, consideration must be given to the Department of Transportation, United States Coast Guard Certificate of Inspection of the ferry KITSAP, page 2, paragraph 5 which reads:

When making repositioning movements from one berth to another at the same terminal, provided no passengers are on board, the deck manning may be reduced to one Master and two Able Seamen.

FINDINGS OF FACT – MEC CASE 48-03

1. There was major dock construction in progress at Clinton during the month of September 2002.
2. The ferry KITSAP, tied for the night along the north slip at Clinton on September 9, 2002.
3. There was a letter in the No. 1 wheelhouse from either Capt. Tim Saffle, the H.R. Port Captain or Bob Wheeler, Crew Resources Manager, stating that there was an early call-out for the KITSAP on September 10 and 12, 2002 for two ABs and the ship's Master to move the vessel from the north slip to the south slip.
4. The normal shift start for the F Watch was 4:50 a.m.; the early call-out was for 4:30 a.m.

5. The ferry boat in the south slip was scheduled to depart at 4:40 a.m.
6. The KITSAP was scheduled to start to move to the south slip at 4:30 where the cars and passengers would board the ferry for the first morning run.
7. The move of the KITSAP from the north slip to the south slip took between 8 to 10 minutes.
8. On September 10, 2002, the two ABs who made the early call-out shift were AB Workman and AB Ankney.
9. On September 12, 2002, the two ABs who made the early call-out shift were AB Workman and AB Bikki.
10. ABs Workman, Ankney and Bikki were paid one hour of overtime, pursuant to the CBA, Rule 11.03.
11. The two ABs making the shift on September 10 and 12, 2002, were the only ones on duty and working. The other crewmembers, the other AB and the three Ordinary Seamen (OS) were not working or on duty; some were sleeping, others were getting coffee or getting ready to begin work after the KITSAP was secured to the south slip.
12. Both AB Workman and OS Caulkins testified that the two ABs working on the move from the north to the south slip on the morning of September 10 and 12 were the only members of the IBU deck force working.
13. After the vessel was tied up and secured to the slip, those non-working persons would turn to and start to work “on the clock” and assist in loading cars and passengers for the first trip of the morning to Mukilteo.
14. The KITSAP was “in service” when she left the north slip going to the south slip with passengers to load cars and passengers.

15. The cook on the KITSAP arrives at the ferry around 4:00-4:15 a.m., makes coffee and something for the crew, and then starts getting ready to serve the passengers who will be boarding the ferry, after the shift to the south slip, for the first departure of the KITSAP.

16. The full time cook on the KITSAP not only serves the crew, but also has a major role in the service of the passengers.

ANALYSIS – MEC CASE 48-03

The Ship's Cook

Each automobile ferry in the WSF fleet, including the KITSAP, have a Stewards Department, including the ship's cook, a Deck Department and an Engine Department. The US Coast Guard requires each person in the Stewards Department to have a merchant mariners document or Z-card issued by the Coast Guard after the person qualifies, which would be endorsed for the following positions as "Ordinary Seaman, Wiper, Stewards Department, Food Handler." This is set out in *Inlandboatmen's Union of the Pacific v. Washington State Ferries*, 103 Wn. App. 575 (2000).

The cook qualifies as a member of the crew based on the definition in the *International Maritime Dictionary* (2d ed.) on page 184, which states:

Crew. The company of seamen or seafaring men who man a ship, vessel, or boat. In a broad sense it includes all the officers and men on board . . . In a more restricted sense it is applied to the men only, to the exclusion of officers. Also called ship's crew.

The cook is a member of the crew as stated in Volume IV of *The Oxford English Dictionary* 15 (2d ed.1989): "Crew. b. naut. The whole of the men belonging to and manning a ship, boat or other vessel afloat."

An early description of the word “crew” is found in *United States v. Winn*, 28 F. Case 733, 3 Sumn. 209, Number 16,740 (1838 CC Mass.) There, Circuit Justice Story said:

The word crew is ordinarily used as an equivalent to ships company, and . . . whenever it is not intended to embrace the officers, the context manifestly excludes them, by enumerating them as contradistinguished from the rest of the crew.

In a USDC Northern District of Illinois (Eastern Division), *Susan Wiora v. Harrah's*, 2000 AMC 2259, 2264 (1999), the court stated the following regarding Susan Wiora:

Her connection with vessel (M/V Northern Star) was substantial in both duration and nature. Wiora was a full time employee on Harrah's riverboat casino and she played an integral role in the service to customers on the boat.

The court went on to hold that Susan Wiora was a full time waitress employed on the vessel M/V Northern Star, a vessel in navigation, and a Jones Act seaman.

Wiora v. Harrah's was cited with approval in *Susan Lara v. Harveys Iowa Management Co., Inc.*, 2001 AMC 393 (2000). Susan Lara, a cocktail server and bartender was a Jones Act seaman on the M/V Kanesville Queen, a vessel in navigation.

Baby-Sitting Crews

All the witnesses who testified with the exception of Pete Jones, were familiar with the term “baby-sitting crew” which is a crew made up of a Master and two ABs. This crew of three would work according to the USCG Certificate of Inspection in repositioning a vessel from one slip to another slip with no passengers aboard when construction is in progress at one of the docks.

Captain Jim Malde, a Port Captain, testified he worked on a baby-sitting crew starting in the late 1970's. Captain Tim Saffle also worked on a baby-sitting crew as a Master in the mid 1980's. AB Workman, a deck veteran of 22 years, was familiar with baby-sitting crews moving a ferry from slip to slip during construction at a dock.

Dennis Conklin was employed on deck on WSF vessels starting in 1979 and worked on the ferries in the Deck Department until he became the business agent for the IBU on February 15, 1991, a position he still holds. He negotiated baby-sitting crews in Bremerton during construction at the dock beginning May 27, 1998 that was to last 6-8 months. Kathleen Flynn Mahaffey, a Human Resource Consultant for eight years with WSF, issued the bid for the baby-sitting crew during construction of the Bremerton dock in 1998. She also was the WSF representative in the Mukilteo-Clinton baby-sitting crew from October 9, 1998 to June 10, 1999.

Pete Jones testified he was not familiar with the term baby-sitting crew. He testified that when a ferry was tied to the dock and there was foul weather such as a storm with heavy winds and big seas and swells, WSF would send a “dock watch crew” of a Master and two ABs to be ready to operate the ferry, if necessary, to protect it from damage, as well as the dock.

The ferry KITSAP would be “in service” if it was moving from the north slip to the south slip with passengers aboard, on September 10 and 12, 2002. This would call into operation the CBA, Rule 7.03 and 7.04.

Practice

The use of a baby-sitting crew made up of a Master and two ABs has been a practice by WSF for over 30 years at docks where construction has been ongoing. The major requirement is such crews must not have any passengers aboard. Any passengers aboard, paying or not, would cause the vessel, in this case the KITSAP, to be “in service.”

Fire Fighting

There was some testimony regarding fire fighting if a fire developed on board the KITSAP.

On September 10 and 12, 2002 at Clinton on the early move from the north slip to the south slip with two ABs and a Master on the KITSAP, the move was at 4:30 a.m. One of those ABs on both days was AB Don Workman.

AB Workman had been with the Whidbey Island Fire District 3 for five years as a fire fighter lieutenant, and then 15 years as battalion chief and he has been with the WSF as a deck member of the IBU for 22 years.

AB Workman, as a member of the Whidbey Island Fire District, had extensive training in fighting all types of fires. As a deck employee of WSF and a member of IBU, he had training at the special shipboard firefighting school in North Bend covering all types of fire that actually would pertain to a vessel. All the IBU members have been at the North Bend fire fighting school and have been trained in fighting shipboard fires.

AB Workman with his experience and training could act as the incident commander and if there was a fire onboard the KITSAP on either September 10 and 12, 2002, he could evaluate the situation and risks.

The shoreside firemen at their station when the alarm goes off signaling a fire in their district have to wake up, get dressed, and travel to the fire and when they arrive, evaluate the situation and risk and then start to fight the fire.

Had there been a fire on the KITSAP on September 10 or 12, 2002, the shipboard alarm would have gone off, the four crewmembers not working that morning—the AB and three OSs—could have responded. Those IBU members, some up and about, some sleeping, could have been called, dressed and reported to the fire. They were all trained at the North Bend fire fighting school. They would not have to travel to the scene of the fire, as it would be only one or two levels below their quarters.

The fire could have been fought using the two firefighters in the fire area and two firefighters out in a standby status and aware of the firefighters in the hazardous fire area.

There is no doubt that if there had been a fire on the KITSAP on September 10 or 12, 2002, during the 8 to 10 minutes while repositioning from the north slip to the south slip, any fire could have been adequately and successfully fought by the well trained IBU deck crew.

WSF and the IBU agreed to adopt the “two-in/two-out” rule, which was the Union’s proposal No. 7. This is set out on page 11 of the award of the Interest Arbitrator, Michael H. Beck, in his Opinion and Award issued April 8, 2002 (also known as the Respirator Mask Policy).

APPLICABLE LEGAL DECISIONS

The Washington Court of Appeals in *Burgdorf v. State*, 61 Wn. App. 918 (1991), *review denied*, 117 Wn.2d 1028, is a Washington case on a test for determining who is a passenger on a carrier’s conveyance and includes a five part test. Here the carrier is WSF and the conveyance is the ferry KITSAP. This case was cited in determining MEC Case 38-02, Decision No. 347-MEC issued on November 14, 2001, *IBU v. WSF (Richard Loser)*.

In *Burgdorf*, 61 Wn. App. at 920-921, the court lays out a five-element test for determining whether a person is a passenger.

1. place (a place under the control of the carrier and provided for the use of persons who are about to enter carrier’s conveyance)
2. time (a reasonable time before the time to enter the conveyance)
3. intention (a genuine intention to take passage upon carrier’s conveyance)
4. control (a submission to the directions, express or implied)

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)

The four non-working persons, the AB and the three OSs were on the KITSAP on September 10 and 12, 2002 (1), at the time the vessel was shifting from the north slip to the south slip (2), their intention was to travel on the vessel to the south slip where they would start work by loading cars and passengers (3), the four non-working persons were under the direction and control of the vessels Master (4), the Master was aware of their presence aboard the vessel (5). The facts clearly fulfill all of the five test elements that make the four non-working persons passengers aboard the vessel KITSAP on the moves from the north slip to the south slip.

Earlier Washington cases concluded that a worker was a passenger when riding on his employer's conveyance to get from job to job. *Bradburn v. Watcom R & L Co.*, 45 Wash. 582 (1907). Where 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. *Harris v. Puget Sound Elec. R.*, 52 Wash. 289 (1909). Harris was a foreman whose duty was to keep in repair the electric connections between the rails of the track. He was being transported from Kent to Tacoma to do a job on a company pass. The courts in both above cases did not give any weight to the fact that neither Bradburn nor Harris paid for his passage.

The crucial elements in the above cases, Bradburn and Harris, is the fact that both 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 passengers on the vessel KITSAP precludes the application of the paragraph in the USCG Certificate of Inspection regarding "repositioning . . . provided no passengers are on board."

Webster's New World Dictionary and Thesaurus, 451 (1996) has a simple definition of a passenger: "Passenger, a person traveling in a train, boat, car, etc."

ISSUES—MEC CASE 49-03

On March 8 and 9, 2003, was F Watch on the KITSAP entitled to be paid for early call-out for each day?

On March 1 and 2, 8 and 9, 2003, was G Watch on the KITSAP entitled to be paid for early call-out for each day?

CONTRACT LANGUAGE—MEC CASE 49-03

Agreement by and between Washington State Ferries and the Inlandboatmen's Union of the Pacific, July 1, 1999 through June 30, 2001:

11.03 Employees called to work prior to commencing their regular scheduled shift shall 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 regular scheduled basis.

29.05 Before the employer changes any vessel running schedules, the employer will meet with the Union, if requested to do so, to advise and discuss the changes with the Union.

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APPENDIX A **DECK DEPARTMENT PERSONNEL**

The following rules are in addition to Rule 1 through Rule 36 and apply to Deck Department and Shoregang employees.

RULE 1 – HOURS OF EMPLOYMENT, OVERTIME AND ASSIGNMENT

1.04 Vessel Shift Changes. When any vessel watch schedule is changed by three (3) hours or more and/or the employees' days off assigned to said vessel are changed by at least one (1) day or the vessel's home terminal is changed, all assignments will be subject to bid by seniority on the run. Only the most senior year around employees assigned to that run may bid on the assignment.

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FINDINGS OF FACT – CASE 49-03

1. On February 28, 2003, Bob Wheeler, Crew Resource Manager, sent a “Quick Note” to the KITSAP indicating a change in schedules on the weekends of March 1 and 2, 8 and 9, 2003 on the Mukilteo/Clinton route for the F and G Watches.

2. The Change, per the Quick Notice, in the schedules was the result of weekend dock construction progress on the Mukilteo/Clinton route.

3. The F Watch was normally 0650—1450; F Watch was changed, per the Quick Notice, for the weekend to start at 0630 and end at 1430. The watch started 20 minutes earlier and ended 20 minutes sooner on Saturday and Sunday March 8 and 9, 2003, a regular 8-hour shift.

4. G Watch was normally on Saturday a 1450—2250 watch. On Saturday, March 1 and 8, 2003, it was changed to 1430—2230. The watch started 20 minutes earlier and ended 20 minutes sooner, still a regular 8-hour shift.

5. On Sunday, March 2 and 9, 2003, G Watch was normally from 1350—2150, it was changed per the Quick Notice to 1430—2230. This watch started 40 minutes later and ended 40 minutes later, still a regular 8-hour shift.

6. None of the schedule changes amounted to a change of three (3) hours.

ANALYSIS

On February 28, 2003, Crew Resource Manager Bob Wheeler issued the Quick Notice to the KITSAP on the Mukilteo/Clinton route that due to dock construction on the weekends of March 1 and 2, 8 and 9, 2003 there would be some changes in the schedules for watches F and G.

These changes in the two watches, F and G, for two weekends was the result of major construction at the dock on the towers, a critical piece of the dock. As noted in Rule 11.03, “Early call-outs shall not be on a daily or regular scheduled basis.” The changes at issue here were the result of major construction, which happens very infrequently. The changes in the watches were, at most, 40 minutes and the majority of the changes were 20 minutes. These figures are well below the three (3) hour change in watch schedules as indicated in Rule 1.04, Appendix A of the parties’ 1999-2001 CBA. The 1999-2001 contract remains in full force and effect past its stated expiration date by operation of law (RCW 47.64.170).

There was no testimony that the IBU requested to meet with WSF about any changes in the running schedules, pursuant to Rule 29.05 of the IBU/WSF CBA.

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 regarding both MEC Case 48-03 and Case 49-03.

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). The two cases are properly before the Marine Employees' Commission for decision.

Case 48-03

3. The Master of the KITSAP placed the vessel “in service” as the term is used in Rule 7.03 of the CBA when he left the Clinton north slip on both September 10 and 12, 2002 with non-working persons, an AB and three OSs aboard the vessel, who qualified as passengers.

4. The CBA minimum manning schedule applies to the movement from the north slip to the south slip on September 10 and 12, 2002, three ABs and three OSs.

5. The USCG Certificate of Inspection paragraph regarding repositioning with a skeleton crew or a baby-sitting crew does not apply to the vessel's movement on the early hours on September 10 and 12, 2002 because the four non-working, AB and three OSs on both days had the legal status of passengers.

6. The circumstances at issue do not fit within either of the exceptions to the manning requirements of CBA Rule 7.04, while a vessel is in service. The early morning movements on September 10 and 12, 2002 were previously scheduled in advance with a Master and two ABs to be the working crew and therefore, there was no emergency, and the movement of the vessel did not occur in the vicinity of Eagle Harbor.

7. WSF violated the CBA by permitting the operation of the KITSAP with a crew less than the CBA's minimum manning while there were passengers aboard in the early morning hours of September 10 and 12, 2002.

Case 49-03

8. On March 8 and 9, 2003, all of the changes resulting in early call-out for the F Watch, as well as the changes resulting in early call-out for the G Watch on March 1 and 2, 8 and 9, 2003 were the result of dock construction on the Clinton/Mukilteo route.

9. None of the changes were more than three (3) hours and therefore there was no violation of Rule 1.04 of Appendix A of the WSF/IBU, CBA.

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DECISION AND REMEDIAL ORDER

The Marine Employees' Commission hereby determines the following:

Regarding MEC Case 48-03

1. Washington State Ferries violated the CBA on September 10 and 12, 2002, when it allowed the operation of the vessel KITSAP with passengers aboard, but manned by less than the crew required by the CBA.

2. CBA 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 one AB and three OSs.

3. The Marine Employees' Commission hereby orders that Washington State Ferries distribute the equivalent of one hour AB pay (straight time) and three hours OS pay (straight time) to be divided equally between AB Workman and AB Ankney for work on September 10 and the same amount to be divided equally between AB Workman and AB Bikki for work on September 12, 2002, for the early morning movement of the KITSAP from the north slip to the south slip on those dates.

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Regarding MEC Case 49-03

4. The request for grievance arbitration, MEC Case 49-03, is hereby denied.

DATED this _____ day of December 2003.

MARINE EMPLOYEES' COMMISSION

JOHN SULLIVAN, Arbitrator

Approved by:

JOHN SWANSON, Chairman

JOHN BYRNE, Commissioner