

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 23-06

DECISION NO. 511 - MEC

DECISION AND ORDER

APPEARANCES

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

Rob McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries.

NATURE OF THE PROCEEDINGS

On April 10, 2006, the Inlandboatmen's Union ("IBU") filed with the Marine Employees' Commission a Complaint Charging Unfair Labor Practices containing three counts. Count I alleged that on February 9, 2006, "Washington State Ferries unilaterally issued new and vastly expanded Bos'n Duties and Responsibilities . . . [and] announced that the designation of bos'n is discretionary with the Master rather than by seniority." In Count II, the IBU alleged "[i]n or about December 2005 WSF unilaterally changes, without notice to or bargaining with the union, the long established practice whereby employees selected their duty assignments by seniority within their run and classification." On November 21, 2006, the Washington State Ferries ("WSF") filed its answer denying that it had engaged in any unilateral changes. On December 5, 2006, a hearing was held before the Commissioner Elizabeth Ford.

RECORD BEFORE THE COMMISSION

The Hearing Examiner considered the following in deciding this issue:

1. The IBU's April 10 Complaint Charging Unfair Labor Practices;
2. The WSF's November 21 Answer to the IBU's Complaint;
3. The official transcript and 15 exhibits accepted into evidence; and
4. The post-hearing briefs of the parties.

ISSUES

Did the WSF commit an unfair labor practice by unilaterally changing the duties assigned to the bos'n position?

Did the WSF commit an unfair labor practice by unilaterally changing the manner in which the bos'n duties are assigned?

Did the WSF commit an unfair labor practice by unilaterally changing the manner of duty assignments among ordinary seamen?

FINDINGS OF FACT

1. The Bos'n position is akin to a "lead" or "foreman" to whom the ferry's mate delegates certain responsibilities. Primarily, the Bos'n coordinates the loading and unloading of the vessel and otherwise "[makes] sure work got done on the car deck that was assigned by the mate [and] . . . [makes] sure work got done in the cabin that was assigned by the mate." (Tr. 21 – Ramsey)

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2. On March 24, 2006, the WSF amended its Safety and Training Manual to include, for the first time, a description of Bos'n duties. The description of those duties is largely consistent with the duties formerly performed by the Bos'n.¹

3. The Bos'n is not a position that is "bid" into in the normal course; rather, it is assigned by the Mate.

4. Appearances to the contrary, there is little evidence of a dispute as to the practice in designating the Bos'n: where qualification and ability are equal, seniority governs the Master's selection. (Tr. 81 – Conlkin, Tr. 96 – Pelland, Tr. 118 Sugden, Tr. 129 – O'Connor, Tr. 151 – Saffle) This is so because, as Mr. Ramsey credibly testified:

[T]he bosun's job is a hard position because you have to know how to load the vessel without making mistakes because if you're making mistakes you shouldn't be loading the vessel is how I look at it. That's how the fleet generally looks at it. You know, you want the job to be done correctly. We're professionals.

(Tr. 21)

5. Margaret Pelland, Passenger Industry Business Agent for the IBU, testified that, at some point prior to the filing of this charge, she came to know that the WSF had issued a "Quick Notice" to the fleet regarding the selection of the Bos'n position. (Tr. 100) The notice itself was not offered by either party; instead, a draft, undated Quick Notice was offered. (Ex. 15) There

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¹ The distinctions identified by the union's witness were generally that the particular function was normally referred back to the Mate for approval. For example, as to inspection of vehicles, manifests, and hazardous material documentation, the union's witness testified that this function would normally be referred back to the Mate for approval. (Tr. 38)

was no stipulation to the effect that this notice was the same notice sent to the fleet. Captain Pete Williams, the notice's purported author, professed a lack of clear memory of having written it.

(Tr. 147) That draft Quick Notice provided in relevant part:

As the result of implementation of the new IBU contract all Masters on Issaquah, Evergreen State, Steel Electric class vessels and the Rhododendron shall designate a Bos'n for their crew. The designation is at the Masters [sic] discretion and should be awarded to the AB who the Master feels will be best able to perform the responsibilities and not automatically to the AB with the most seniority.

(IBU Ex. 15)

6. There was no evidence presented that any AB has been wrongfully deprived of a Bos'n position.

ANALYSIS

RCW 47.64.130(1)(e) makes it an unfair labor practice for the employer "to refuse to bargain collectively with the representatives of its employees." Unilateral changes in mandatory subjects of bargaining are generally considered *per se* violations of this provision. *IBU v. WSF*, Dec. 429-MEC (2004). However, "a party contending that a change has been made has the burden to show the existence of a practice and then show[] the alteration." *Id.* at 5; see also *IBU v. WSF*, Dec No 484-MEC, 6 (2006) ("We have repeatedly held that the party asserting a unilateral change has the burden to show either a contractual provision or 'a clear and consistent practice.'"). Thus, to meet this threshold requirement, the charging party must show two things: the existence of a practice or contractual requirement and a change in that practice. Here, I do not find evidence of a change in practice or a departure from a contractual requirement as to either of the two Counts.

The existence of the new document describing existing Bos'n duties does not demonstrate a unilateral change in those duties. Robin Ramsey, a 30-year WSF employee and

Chair of the Puget Sound Region of the IBU, was an entirely straight forward and credible witness. He testified that the Bos'n duties listed in Exhibit 3 were largely consistent with the duties he performed in that position. Where there were differences those differences related to instances in which the Bos'n would refer a situation back to the Mate for approval or assistance. There is no reason to suspect that the Bos'n duties as described in Exhibit 3 signifies a change in that practice. Had the WSF issued a new, expanded set of duties for the Bos'n – particularly if the change occurred in the context of implementation of an arbitrator's award – that would have presented a change. However, that is not the circumstance here.

While the parties appeared at times to disagree as to the contractual requirement for the appointment of a Bos'n, there is simply no evidence that there has been any change in the manner in which a Bos'n is selected. First, there is no dispute that the Master is responsible for making the selection. Mr. Ramsey testified, "the captain is the captain, he designates the position." (Tr. 44; see also Tr. 53 – MacKensie; Tr. 59 – Shenaman) This is fully consistent with the collective bargaining agreement which provides, "[o]ne member of each crew on all auto carrying vessels shall be designated by the Master as a working Able Seaman Bos'n." (Ex. 2 § 7.07)

Second, there was no change to the manner in which the Mate makes that designation. The testimony was consistent that where "all things are equal, seniority controls." (Tr. 81 – Conlkin, Tr. 96 – Pelland, Tr. 118 Sugden, Tr. 129 – O'Connor, Tr. 151 – Saffle) Thus, where the competing candidates both have the qualifications and skill, then seniority controls the selection. For example, when the union was presented with a grievance alleging that an AB deckhand had been wrongfully denied the position, the union agreed that she should not have been awarded the position:

All things being equal, she had the seniority, but we didn't get there because all things were not equal. I think it was established, to my satisfaction that she did not have the leadership and interpersonal skills to be acting as a lead.

(Tr. 96)

This practice is fully consistent with the contract language. The contract sets out the AB Bos'n as a "rate of pay" distinct from the AB rate. (Ex. 2, § 17.01) Section 1.09 defines a promotion as "the act of raising employees in rank from their present classification or pay rate to a higher classification or pay rate." Finally, as to promotions, the contract provides as follows:

In the application of seniority under this Rule, if an employee has the necessary qualifications and ability to perform in accordance with the job requirements, seniority by classification shall prevail.

(Ex. 2, § 19.01)²

There is no evidence that this practice has changed. To the extent that the IBU is arguing that the Quick Notice was evidence of a change, that Quick Notice was not in evidence. Even relying on the draft Quick Notice, while it could have been worded in a clearer and perhaps less provocative fashion, the language there does not indicate a change in the practice.³

As to any change in the assignment of OS functions. There was simply no evidence of any change. The draft Quick Notice does not address these functions. Witnesses testified that generally the OS employees select among themselves which functions they will perform and the Mate gets involved where there is an issue that needs to be resolved. There was no evidence of a change and I find no contractual requirement that these designations be made in all instances by seniority.

² Given the clear practice of considering seniority when "all things are equal", section 19.07B. should be read to exempt the Bos'n selection from the bidding process but not from the considerations of 19.01.

³ This decision does not address any particular decision made by any particular Master. The evidence here indicated that there had been no instances of AB deckhands having been improperly passed over for the Bos'n position.

CONCLUSIONS OF LAW

On the basis of the record before her, the findings of fact and analysis, the Hearing Examiner makes the following conclusions of law:

1. The Marine Employees' Commission has jurisdiction over the parties and the subject matter pursuant to RCW 47.64.280 and 47.64.130.
2. It is an unfair labor practice for the Ferry System "to refuse to bargain collectively with the representatives of its employees." RCW 47.64.130(1)(e). This prohibits the employer from making unilateral changes in mandatory subjects of bargaining without bargaining with the representative of the affected employees.
3. The March 24, 2006 change to the Safety and Training Manual did not amount to a unilateral change in the duties assigned to the Bos'n position.
4. The WSF did not unilaterally change the manner in which the AB Bos'n is selected.
5. The WSF did not unilaterally change the manner of duty assignments among ordinary seamen.

ORDER

The charge filed by the Inlandboatmen's Union, Case No. 23-06, is dismissed.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration with the Commission within ten days from the date this final order is mailed. Any petition for reconsideration must state the specific grounds for the relief requested. Petitions that merely restate the party's previous arguments are discouraged. A petition for reconsideration does not stay the effectiveness of the Commission's order. If no action is taken by the Commission on the petition for reconsideration within twenty days from the date the petition is

filed, the petition is deemed to be denied, without further notice by the Commission. A petition for reconsideration is not a prerequisite for seeking judicial review.

DATED this 25th day of April 2007.

MARINE EMPLOYEES' COMMISSION

/s/ ELIZABETH FORD, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ JOHN SULLIVAN, Commissioner