

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 45-05

DECISION NO. 465 - MEC

DECISION AND ORDER

APPEARANCES

Jay Ubelhart, Business Agent, appearing for the Inlandboatmen's Union of the Pacific (IBU).

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

NATURE OF THE PROCEEDING

On May 24, 2005 the Inlandboatmen's Union of the Pacific brought this matter before the Marine Employees' Commission (MEC) by filing a complaint charging unfair labor practices, MEC Case 45-05. The IBU charges Washington State Ferries with unfair labor practices within the meaning of RCW 47.64.130(1) by interfering with, restraining or coercing employees in the exercise of rights; encouraging or discouraging membership in an employee organization by discrimination in regard to: hiring, tenure, any term or condition of employment; and refusing to bargain collectively with representatives of employees and refusing to bargain collectively with representatives of employees.

Specifically, IBU alleges that WSF has committed an unfair labor practice, beginning April 19, 2005, by unilaterally implementing a new policy concerning penalty pay for sewage spills, in violation of the settlement agreement in MEC Case 40-02.

Captain Mark McElwaine, North Region Port Captain, brought this question of penalty pay regarding sewage in his August 18, 2004 memorandum to all chief mates on the Mukilteo-Clinton route and again in a fleet advisory, FA002105A, dated March 29, 2005. Both documents stated in detail the requirements for penalty pay for sewage spills, vomit and feces cleanup. Inspection and preapproval were required by a licensed deck officer, who must go to the site and actually view any spillage of material that would require cleanup.

John P. Sullivan, a commissioner of the Marine Employees' Commission, conducted a hearing in this matter on August 24, 2005.

ISSUES

Did WSF commit an unfair labor practice and violate the settlement agreement in MEC Case 40-02 by unilaterally implementing a new policy covering authorization and payment of penalty pay.

POSITIONS OF THE PARTIES

IBU

The present policy concerning penalty pay for cleanup of sewage spills and other foul material violates the settlement reached in MEC Case #40-02 in July 2002. That case also concerned the Mukilteo-Clinton ferry route. In addition, there was no bargaining with IBU regarding this drastic change in penalty pay; WSF unlawfully and unilaterally implemented the changes.

WSF

Nothing in WSF's Fleet Advisory violates a previous settlement agreement, or changes terms and conditions of employment. It does not change the entitlement of IBU members to

penalty pay. Preapproval and verification provide the supervision WSF needs to ensure claims are valid.

WSF has the right to monitor the performance of its employees. WSF has a responsibility to the people of the state of Washington to see that wages paid to IBU deck crew members are accurate and fair for both the deck crew members as well as the citizens of Washington State.

WSF's management rights are stated in the WSF/IBU Collective Bargaining Agreement (CBA), Rule 4 – Management Rights section. In addition, WSF as a public employer has the right to direct the work of its public employees and determine and implement methods, means, assignment and personnel by which the public employer's operations are conducted.

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

The Hearing Examiner considered the following records in deciding the issue:

1. IBU's complaint charging unfair labor practices, filed May 24, 2005.
2. WSF's Answer to the complaint, filed on August 9, 2005.
3. The official hearing transcript and eighteen (18) exhibits accepted into evidence (including pictures, video and diagram).
4. Post-hearing brief of Complainant IBU.
5. Post-hearing brief of Respondent WSF.
6. Administrative and/or judicial notice is taken of the collective bargaining agreement of June 1, 1999 through June 30, 2001, which remains in force to the present pursuant to RCW 47.64.170.

APPLICABLE CONTRACT RULES

RULE 4 – MANAGEMENT RIGHTS

4.01 Subject to the specific terms and conditions of this Agreement, the Employer retains the right and duty to manage its business, including but not

limited to the following: the right to adopt regulations regarding the appearance, dress, conduct of its employees, and to direct the work force consistent with work procedures as are necessary to maintain safety, efficiency, quality of service, and the confidence of the traveling public. The Union reserves the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Rule 16. The existence of this clause shall not preclude the resolution of any such grievance on its merits.

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.

30.06 Work by shore maintenance personnel below the main vessel deck: One-half (1/2) hour minimum.

FINDINGS OF FACT

1. On April 29, 2002, the Inlandboatmen's Union of the Pacific filed a request for grievance arbitration, MEC Case No. 40-02, with the Marine Employees' Commission. In its grievance request, IBU asserted that WSF denied "D" watch penalty pay following a sewage leak in violation of Rule 30.03 of the collective bargaining agreement. MEC Case No. 40-02 was

eventually settled for 50 percent of the claim because no master or mate had verified that there was a spill and preapproved it penalty pay.

2. Mr. Manning testified that in Case 40-02 there was a full crew aboard the vessel, but the mates or captain did not observe the sewage leakage. There was no verification that there was leakage that required cleanup and penalty pay. It was the viewing and preapproval inspection that was missing. Just notifying the master and the mate was not enough; an actual viewing was required of the site of the sewage spill. Mr. Manning testified that he settled MEC Case 40-02 because there was no verification of the sewage spills by the master or mate.

3. Dennis Conklin's July 2002 letter to Mike Manning, written to confirm IBU's understanding of the settlement, states that a mate or captain would have to be notified if an employee was going to submit for penalty pay. Mike Manning testified at hearing that with the above language, he expected the master or mate would view the site of a spillage and preapprove for penalty pay.

4. North Region Port Captain Mark McElwaine's memorandum, dated August 18, 2004, spelled out the following to chief mates on the Mukilteo-Clinton route:

The New Reporting Requirements are as follows:

1. Each employees request for penalty pay for sewage contact shall be recorded on a separate time sheet (multiple requests in the same pay period may be submitted on the same time sheet)
2. The times of the pumping operation when sewage contact occurred
3. An estimation of the amount of sewage spilled
4. Duration of clean-up operation and materials used
5. The reasons for spill or leak e.g. leaky valve or bust pipe*
6. A detailed explanation any time more than one crew member is involved in any clean up operation using an attached econ-o-gram

**Where faulty equipment or bad design is recorded as reason for penalty pay it shall be the responsibility of the Mate to ensure a work order has been submitted for the repair or modification to the ships equipment.*

It should be noted that the above requirements still did not directly call for the mate or master to go to the site of a sewage spill, verify that a spill occurred, that the cleanup qualified for penalty pay and fill out the documentation of the spill for WSF.

5. Fleet advisory, amended document FA002105A, dated March 29, 2005, was sent to all licensed and unlicensed deck crews by Capt. Williams, South Region Port Captain and Capt. McElwaine. The amendment spelled out that the master and mates are responsible for preapproval of the spillage prior to cleanup to qualify for a penalty pay claim along with additional details of reporting.

6. An April 19, 2005 e-mail from Capt. McElwaine to Capt. Ron Lines and other masters and mates reads in part as follows:

For whatever reason on your route sewage penalty pay has become a given every time sewage is pumped, this practice has been allowed to set in and now we are at the point that it will be viewed as a de facto pay cut by our deck crews. I realize this is not a comfortable situation but it is a situation that needs to be dealt with, we are where we are and we need to move forward.

WSF is contractual bound to pay penalty pay for sewage clean-up. I have not nor will I try and break that contractual agreement, but what I can not do is let IBU members decide what work they will perform, especially when the work they voluntarily and unnecessarily perform leads to claims for penalty pay. I will also not allow MM&P members authorize penalty pay for work that I believe to be unnecessary.

So, how do we proceed. the only way to get this under control is to follow the instructions given on Fleet Advisory FA002105A. This requires all penalty pay work to be preapproved. In this case that will require the C/M to confirm that there has been a sewage spill on the deck and give the deck crew permission to clean up the spill. This pre-approval process will give the crew clear expectations of when they are entitled to penalty pay. It will also stop the routine of automatically dousing the sewage hose head and/or drip tray.

As is contractual allowed any WSF employee can ask for penalty pay to be submitted even if the work is unauthorized, that is their right and you should continue to do so when requested but I will be looking for the work to be preapproved before I authorize any future penalty pay for sewage clean-up. All WSF employees have the right to appeal management decisions through the grievance procedure, if any employee so chooses then that is their right.

To recap:

- FA002105A must be followed when authorizing penalty pay

- The cleaning/disinfecting of the drip tray shall not be authorized
- The cleaning/disinfecting of the hose end shall not be authorized unless there is visible spillage on the deck and hose end

Capt. McElwaine testified he has no problem in paying penalty pay when the spillage site is inspected and preapproved by the master or mate, cleaned up and properly reported to WSF.

7. David McKenzie, an AB with WSF for over 20 years, mainly on the Mukilteo-Clinton route, testified that after the fleet advisory, amendment of March 29 and the e-mail of April 19, the mates and masters did begin inspection of spillage, preapprove the penalty pay, watch the deck crew clean up the spillage and prepare the required documentation to ensure the deck crew was paid.

8. The sewage hose is approximately 6 to 7 inches in diameter. It is stowed on the dock in a cradle and is made fast to a shoreside connection so the sewage can be pumped from the vessel to the shoreside connection where it is disposed of. A deck hand pulls the hose about 30 feet aboard the vessel, the hose cap is removed and the hose is secured by means of a camlock fitting on the shipboard connection.

The hose connection is secured to the shipboard fitting over a catch basin or drip tray that drains into a holding tank should there be any leak between the hose and shipboard drain line fitting. One of the vessel oilers from the engine room makes the hose fast to the shipboard fitting or connection. The oiler tends the hose and shipboard connection while the sewage is pumped ashore to the shoreside tanks. When the oiler makes the hose connection to the shipboard pump, the AB who pulled the hose aboard the vessel goes about his job of unloading cars from the vessel.

When the sewage has been pumped ashore the shipboard pipes and rubber hose are flushed with fresh water to remove any sewage still in the pipes and hose. The oiler unfastens the

hose from the shipboard fitting, secures the camlock fitting on the shipboard pipe, puts the plug in the end of the hose and an AB returns the hose ashore and replaces it in the holding cradle. If there was any spillage, it would be when the vessel was at the dock and the cars unloaded.

9. Capt. McElwaine made a study of “penalty pay for sewage contact” for Fiscal Year 2004-2005. He testified to the costs and prepared a graph as Exhibit 12 (reproduced below). The vessels included in the study were of the Issaquah Class and the Issaquah 130 Class. The Issaquah class carries 100 cars while the Issaquah 130 Class was rebuilt to carry 130 cars. The vessels ISSAQUAH, KITSAP, KITTTITAS and CATHLAMET are of the Issaquah 130 Class.

The CATHLAMET and KITTTITAS were exclusively on the Mukilteo-Clinton route. In FY 2004-2005, the KITTTITAS was in the shipyard from late September to late October. The penalty pay for sewage contact was as follows for FY 2004-2005:

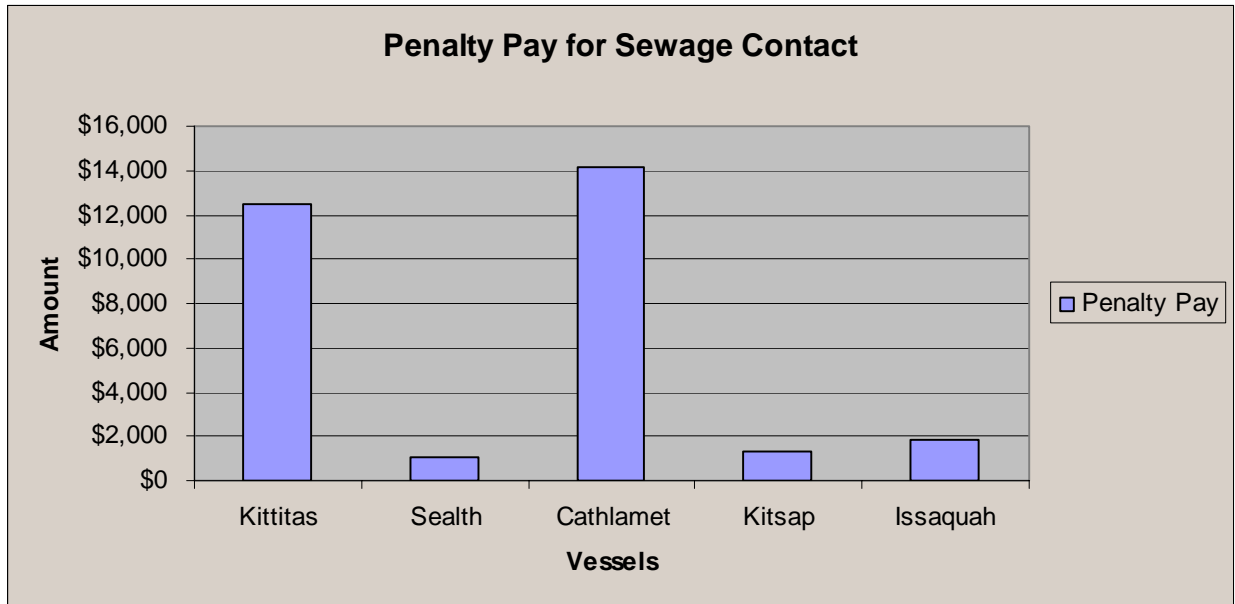
- CATHLAMET = \$14,186
- KITTTITAS = \$12,487
- ISSAQUAH = \$1,864
- KITSAP = \$1,334
- SEALTH = \$1,065

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10. Kenneth Hunting is the WSF current Marine Safety Officer. He retired from the U.S. Coast Guard after 27 years of service as a Marine Safety Officer. His Coast Guard duties specifically included inspecting all types of vessels for, among other things, sewage treatment. He testified that there is no reason to sanitize the catch basin or drip pan when a few drops of flushing water drop into it, on WSF vessels. WSF does not require such cleaning.

Mr. Hunting retired from the Coast Guard in 1998. After that, he worked as a Marine Safety Officer in Dubai, in the Middle East for a fleet of 85 vessels of all sizes, and a variety of vessels in West Africa. He testified that in his opinion, WSF vessels are operated consistently with the highest standards of marine safety and are cleaner than most commercial and military vessels that he has been aboard as a marine safety officer.

ANALYSIS

WSF management directed the method and procedure for cleanup of any spillage of sewage. In their notices, Capt. McElwaine and Capt. Williams were acting on behalf of management.

After the March 29, 2005 fleet advisory amendment FA002105A to all licensed and unlicensed deck crews and the April 19, 2005 memo to masters and mates, there was a change in the procedure regarding sewage pumping at Mukilteo. AB McKenzie testified that after the Port Captains' notices, the master or mate aboard the vessels on the Mukilteo-Clinton route personally viewed the site of any spillage of sewage, checked the cleanup and prepared the necessary documents to authorize penalty pay per the CBA.

The route from Mukilteo to Clinton is approximately 2.3 nautical miles and takes 12 minutes. The Port Captains for the North and South Regions were very concerned about the high cost of penalty pay for sewage cleanup on the CATHLAMET and for the KITTITAS, compared to that experienced by other vessels of the same class, the ISSAQUAH, KITSAP and SEALTH. (See FF 8.)

It would appear that while the unlicensed deck crew members previously reported to the master or mate that they had cleaned up sewage spillage, it might have occurred the same day, a few days later or at the end of the pay period. Capt. McElwaine was concerned that there was a possibility that deck crew members were making decisions on their own, doing voluntary and unnecessary cleanup that lead to the large sewage cleanup costs on the Mukilteo-Clinton route as compared to the other vessels in the same class. Capt. McElwaine spelled out his concern in detail in the March 29 and April 18, 2005 notices sent out to the crew members.

Capt. McElwaine testified that WSF is contractually bound and expects to pay all the penalty pay for sewage cleanup that was preapproved by the master or mate. The basic change was that the spillage had to be verified, as well as cleaned up and documented to WSF.

Dennis Conklin worked for WSF as a deckhand for 12 years, then spent 12 years as Business Agent for the IBU. For the past two years, he has been IBU's Regional Director. Mr.

Conklin testified that WSF has the power and authority to check to see whether the deckhands are actually doing the work that they are claiming, and that it is appropriate for the master or mate to do the checking and verifying. It was a favorite saying of former President Ronald Reagan (in regards to the Soviet Union), “Trust but verify.”

WSF’s management rights are set out in a single paragraph in Rule 4 – Management Rights. WSF retains the right and duty to manage its business and to direct the work force consistent with work procedures as are necessary to maintain, efficiency, and quality of service. The definition of efficiency is as follows: “Producing the desired result with a minimum of effort, expense or wasted productivity.”

CONCLUSIONS OF LAW

On the basis of the record before it, the findings of fact and 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 started expiration date by operation of law (RCW 47.64.170).
2. The Marine Employees’ Commission has jurisdiction over the parties and the subject matter (RCW 47.64.280). This case is properly before the Marine Employees’ Commission for decision.
3. WSF’s actions did not violate the limited terms of the settlement in Case 40-02. The settlement did not spell out when the mate or captain was to be notified. However, it would make no sense and defeat the purpose of the notification for it to be done after-the-fact.
4. Based upon the CBA, Rule 4.01 Management Rights, WSF “has the right and duty to manage its business . . . and to direct the work force consistent with work procedures as are necessary to maintain safety, efficiency”

5. WSF was acting in its management capacity when it had the port captains direct the work force to follow outlined procedures requiring the master or mate to view the spillage site, preapprove the cleanup and prepare documentation for the penalty pay.

6. There is no so-called “de-facto pay cut in the deck crew wages.” The deck hands are not being denied any penalty pay work by the procedures put into effect by Port Captains McElwaine or Peterson. When there is a spill of sewage, it is verified by the master or mate and preapproved for cleanup and penalty pay. The deck hands still perform the cleanup and are paid penalty pay. The master or mate does verify the spillage which is a work procedure instituted by management, in keeping with the Management Rights paragraph, Rule 4.

7. Captain McElwaine testified under oath that all verified cases of spilled sewage that have been cleaned up are being paid penalty pay according to Rule 30.03 of the CBA.

ORDER

1. The Marine Employees’ Commission hereby determines that WSF did not commit an unfair labor practice by having the master or mate preapprove and verify every sewage spillage, observe the cleanup and prepare the documentation to authorize penalty pay per the CBA.

2. WSF acted in accordance with the CBA, Rule 4 – Management Rights and specifically Rule 4.01. The basis for the work procedures is a management right. There is no requirement for such action to be bargained.

3. WSF did not in any way interfere with, restrain, or coerce employees in the exercise of rights.

4. WSF did not encourage or discourage membership in an employee organization by discrimination in regard to hiring, tenure, or any term or condition of employment.

5. The unfair labor practice charges are dismissed.

6. Attorney fees are denied.
7. Each requested remedy sought, including 1 through 6 inclusive, is hereby denied.

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 11th day of January 2006.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SULLIVAN, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ ELIZABETH FORD, Commissioner