

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration  
Before John Swanson

INLANDBOATMEN'S UNION  
OF THE PACIFIC on behalf of  
WANDA WELLS,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 67-04

DECISION NO. 430 - MEC

DECISION AND AWARD

**APPEARANCES**

Schwerin, Campbell and Barnard, by *Judith Krebs*, Attorney, appearing for the Inlandboatmen's Union of the Pacific and Wanda Wells.

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

**STATEMENT OF THE CASE**

This case is before the MEC based on a complaint filed by the Inland Boatmen's Union of the Pacific (IBU). The complaint alleges that Washington State Ferries (WSF) unjustly terminated employee Wanda Wells without evidence of wrongdoing and without just cause.

WSF contends that based on the conduct of the employee involved, the evidence supplied by the Terminal Agent, and after an investigation, the employee involved is guilty of a violation of Washington State Ferries Code of Conduct, Item #3 Theft and Item #15 Violation of Policies and Rules. The termination was effective May 20, 2004.

## **STATEMENT OF THE ISSUE**

Was the grievant, Wanda Wells, terminated for just cause? The parties to this dispute have agreed that the standard of “just cause” should be used to determine the decision in the matter before the Arbitrator. While there is no specific definition of just cause in the IBU/WSF Bargaining Agreement, there are generally accepted principles aside from common sense that are used to determine whether just cause has been applied. (*Enterprise Wire Co.*, 46LA359.) Guidelines developed in this case by Arbitrator Daugherty are often used in analyzing whether the “just cause” test has been met. It is also true that an answer of “no” to any of the guidelines may not be sufficient to nullify management’s decision depending on the penalty. However, the guidelines establish criteria that should very well be considered before a decision to terminate an employee is finalized.

If not, what is the appropriate remedy?

## **RECORD BEFORE THE COMMISSION**

The MEC has the following record before it:

1. Request for grievance arbitration assigned Case No. 67-04.
2. The Notice of Settlement Conference and the Notice of Hearing.
3. The IBU and WSF Collective Bargaining Agreement for the period July 1, 1999 through June 30, 2001.
4. Transcript of the hearing of 67-04, conducted on October 13 and October 21, 2004 (455 pages).
5. Transcript of the Continuation of Hearing of 67-04 on October 21, 2004 (445 pages).
6. WSF exhibits nos. 1 through 10 accepted into evidence during the course of the hearing.

IBU exhibits nos. 11 through 21 (exhibit no. 15 was not entered into evidence) accepted into evidence during the course of the hearing.

7. The parties agreed they might also wish to submit a statement of “Findings of Fact” prior to receipt of the transcript that was to be on an expedited basis November 10, 2004. The IBU did submit such a document, “Proposed Findings of Fact, Conclusions of Law and Order” received by the MEC on November 9, 2004.

## **CONTENTION OF THE PARTIES**

### **Summary of Employer Position**

The case before the Arbitrator is a termination based on theft. The matter concerns the trustworthiness of a ticket seller whose primary job is dealing with state funds. WSF exercises diligent care and has developed guidelines, procedures and policies to safeguard and secure the public’s assets. Theft is considered a violation of understood policy that cannot be tolerated and is a cause for immediate termination. There is no requirement for progressive discipline in theft cases.

The Terminal Agent notified the grievant that he would be doing a cash verification on Sunday, February 29, 2004. He decided it would be a good time to perform the verification because it was an overlap day. It was the first time he had performed a cash verification on a ticket seller. The Terminal Agent became concerned during the verification because the grievant had WSF funds in her purse that were co-mingled with her personal funds. The Terminal Agent told the grievant “I told her that, you know, you’re not allowed to have state money in your purse.” The Terminal Agent was concerned by this circumstance because he had “never seen it done before. Especially to count out—take a wad of money—have to count out—you know, count the money out”.

The Terminal Agent contracted the Terminal Manager/South region on March 1, 2004. After discussion with the agent, the Terminal Manager instructed the agent to relieve grievant “from the job site, collect her key, do a complete cash count audit of her funds and inform her that I would be in contact with her”. A meeting, Fact finding Pre-Disciplinary Conference concerning work performance was held on March 8, 2004. Grievant’s response to WSF concerns were unsatisfactory so a Loudermill hearing was scheduled and convened, but because the Terminal Manager had a family emergency, it was recessed and another Loudermill was scheduled for Thursday, April 1, 2004 at 2:30pm. On May 20, 2004, after considering all the circumstances involved and grievant’s explanation of her actions on February 29, 2004, the grievant was notified by letter that she was terminated for a violation of Washington State Ferries’ Code of Conduct, Item #3 Theft and Item #15 Violation of Policy and Rules.

Washington State Ferries conducted a balanced investigation at which time the Union had every opportunity to raise all of their concerns. Neither the Operations Manager nor the Terminal Manager rushed to judgment with respect to this serious matter. They considered the Union arguments and carefully investigated the circumstances and reached the conclusion this was an attempt to steal. WSF entrusts its ticket sellers with a working fund—in this case one thousand dollars. Both managers and employees, have an obligation to the State and taxpayers to safeguard and protect that money. WSF has every right to perform cash verification. It was recommended by the State Auditor and is implemented fleet-wide to all the terminals and ticket sellers. The Terminal Agent is consistent in his observations and testimony and can readily identify what is real from what is play money. He was very close to the grievant when she handed him the three hundred dollars to buy ones. He watched her count out the money and return some of the money to her purse. The ferry service must have the ability to hold ticket

sellers responsible for the funds entrusted to them and WSF has established policies to make sure funds are safeguarded. The Operations Manager, after a careful deliberative process determined the grievant was guilty of theft. WSF has reviewed the employee's record and after a thorough and complete investigation of the facts and finding no mitigating circumstances that might influence their decision in this matter acted properly. Theft of funds is a terminable offense and therefore the Arbitrator should sustain the WSF's actions in this matter. The Arbitrator, based on the facts in this case, should not substitute his judgment for management's and should deny the Union's grievance.

### **Summary of Union Position**

Grievant Wells has worked for WSF since 1990 and at the time of the incident, was a ticket seller at the passenger tollbooth in Edmonds. Her work schedule was Saturday, Monday and Tuesday from 5:10 a.m. to 3:10 p.m. and on Sunday from 6:10 a.m. to 4:10 p.m. The work schedules are necessarily consistent with ferry schedules. The grievant had part of her working fund in her purse to protect the money and to keep it separate from her working fund because she was going to purchase change for the following shift in dollar bill denominations. It is a generally accepted practice to carry money in differing ways. Ticket sellers carry money in backpacks, in their pockets, in suitcases, garbage bags, tackle boxes, tool boxes and in some cases, in their hands—depending upon the situation.

In Edmonds ticket sellers are given a working fund of one thousand dollars. This fund is provided so the ticket seller has the necessary funds to perform their work and gives them the necessary resources to secure money in the needed denominations allowing them to make the proper change when selling tickets to customers.

WSF provides ticket sellers and agents with blue bank bags marked "WSF". These bags are not generally used as they clearly identify that the employee is carrying money. At Edmonds, the ticket booths are some distance from the agent's office and employees involved choose not to advertise the fact that they are carrying money. There is no WSF policy indicating specifically what method an employee should use when carrying WSF funds. However, WSF does have a Code of Conduct Rule #8 that prohibits employees from co-mingling WSF funds with their personal funds. Because money is transported in so many different ways by tellers and agents, the rule against co-mingling is not being enforced nor can anyone attest to how often funds are co-mingled. There is no evidence that co-mingling has in anyway contributed to lost revenue and no evidence it has created other than a perception problem prior to this situation and, in this case, the question of co-mingling has not been substantiated.

On Sunday, February 29, 2004 the grievant started work at 6:10 a.m. as a ticket seller. She had in her possession her tackle box containing her working fund and passenger tickets. She also had her purse containing make-up, a maroon checkbook, one piece of laminated play money in a \$10,000 denomination and a small notebook with a cover that looked like a \$50 bill. She also had a plastic grocery bag with a book and food in it. The grievant had no direct contact with the terminal agent until the end of her shift on February 29, 2004. The grievant had separated her funds so as to purchase change from the agent for the next day. This was necessary because when the following day shift started, there was no agent available to make the necessary change. Grievant was carrying some funds in her hand when she realized there were people on the dock milling around waiting for the ferry to load so she put the funds she had in her hand in her purse which was in the grocery bag she was carrying in transit to the agent's office. Grievant did not put the money in her pants pocket; in her coat pocket she had personal cash and her wallet.

Grievant then went to the agent's office to check out at the end of her shift. The process is generally routine; however, on February 29<sup>th</sup> the agent told the grievant he was going to perform a cash verification. The grievant told the agent her tackle box would be \$300 short because she was going to buy dollar bills. The grievant retrieved the \$300 from her purse that was in the grocery bag she carried with her into the office. The agent then performed the cash verification and provided grievant with the requested dollar bills. The grievant's account was \$25 over. After the cash verification, the agent told the grievant not to carry her money in her purse again. There was never any discussion about the grievant failing to use a change form. The following day at about 9:30 a.m., the agent instructed the grievant to write up the circumstances of February 29<sup>th</sup>. Sometime in the morning of March 1, 2004, the grievant was relieved of duty. At some time during March 1, 2004 the agent wrote a statement of what had occurred on February 29, 2004. Sometime thereafter, between March 1 and March 7, 2004 the agent wrote additional statements at the request of the Terminal Manager because the first March 1, 2004 statement did not provide enough detail. The other of the agent's statements contain inconsistencies with the first statement.

A fact-finding meeting was held to discuss the circumstances surrounding the grievant's situation. This meeting occurred on March 8, 2004. The charges against the grievant were identified as violations of Code of Conduct #3 (Theft) and #8 (Cash/check handling). The agent involved in the case who performed the cash verification and witnessed the alleged misconduct was not in attendance. The original statement of the agent supplied to the Union dated March 2, 2004 was the only statement related to the incident discussed at the meeting, in spite of the fact that WSF was in possession of a second statement from the agent, that statement was never supplied to the Union until the matter was submitted to arbitration. There was some discussion

at the Loudermill hearing about the agent's inconsistencies that must have been pointed out by the Employer because the second statement was not provided to the Union. The Union had also requested other documents that they needed to represent the grievant. WSF also failed to provide these requested documents.

The Ferries' case is a house of cards based on facts not in evidence such as everyone uses change orders and everyone knows you're not supposed to carry money on your person. That is what the Terminal Manager says he believes but that is not what is happening in the ferry system, nor is it happening in Edmonds. The idea that you can infer theft from the fact that the grievant didn't have a change order or was carrying money in her purse is so far from reasonable as to be unbelievable based on clear evidence of other ticket sellers and terminal agents themselves. The grievant's testimony is clear and convincing and no one can know how many different statements have been made by the agent. The Terminal Manager jumped to a conclusion and with respect to an investigation, we have evidence the investigator actually influenced the witness statements in this case. This conduct taints the primary witness statement. The Union was denied necessary requested information that is in itself problematic and interferes with a proper investigation. Theft has not been proven. The grievant was not charged with mishandling cash. That wasn't the reason for the termination. The termination was for a violation of procedure #15, that on its face, requires some kind of progressive discipline. The entire issue before the Arbitrator is #3-Theft.

WSF did not ensure a proper process by maintaining some level of distinction between the investigative phase and the decision-making phase and between pre-Loudermill and post-Loudermill. WSF has not proven theft occurred by either testimony or evidence. WSF has not proven that the grievant acted in a way contrary to the everyday actions engaged in by ticket



sellers and agents. It has been the position of the Union as previously stated in the record that WSF has failed to present a prima facie case and this matter has caused the grievant personal damage and the Union unnecessary expense. The grievant should be reinstated. She should received back pay, seniority and all benefits she would have received had she not been unjustly terminated. Her records should be purged of all records related to this incident.

### **DISCUSSION**

Both learned counsel are aware that in cases where moral turpitude is involved, the Employer must establish guilt “beyond a reasonable doubt.” More specifically, to uphold a termination based on one person’s allegations about another, which not only terminates an employee’s present means of livelihood but may well affect his/her chances of obtaining a job with another employer in their line of work, arbitrators insist that the Employer has to go beyond supposition or an indiscriminate application of policy or rules. The Employer must prove their case beyond a reasonable doubt. In this case, the evidence itself provided by the Terminal Agent, at the very best, presents a picture that is confusing and inconsistent.

At the worst, it conveys a scenario of manipulation and cooperation with superiors to support a foregone conclusion. Termination appears to be based on incomplete and inadequate evidence that, at the time the decision was made, was not properly investigated. The proof or degree thereof must achieve a requisite clear and convincing demonstration of the commission of a dishonest act before a decision to terminate an employee is determined appropriate. The record in this case is troubling and the record of the Agent’s observations and statements as well as his correspondence are confusing and cannot be supported by a reasonable analysis.

The record supports the conclusion that “change orders” are almost never used in “face to face” transactions and the Agent’s testimony (TR page 29, line 21-24) is opposite to credible

testimony from both Union and WSF witnesses. The Agent's correspondence with the Terminal Manager is also troubling as to the dates of the correspondence. The Agent testifies he believes dates are automatically put on the documents by the computer on the day you print. If that is the case, why would the dates on the documents alleged to be printed on March 1, 2004 be dated WSF Exhibit #1 date 3/1/2004 and WSF Exhibit #2 **March 1, 2004?** It raises the question as to when Exhibit #2 was printed. (Emphasis added.)

WSF Exhibit #2 is signed by the Agent, so it raises the question of how and when was it transmitted? It is the Arbitrator's understanding that a signature cannot be e-mailed. Union Exhibit #36, a supposed duplicate of WSF Exhibit #2 that was allegedly sent to the Terminal Manager by e-mail Sunday, March 7, 2004 at 2:15 p.m., is not signed by the Agent. When was it written and when was WSF Exhibit #2 signed? There has been no reasonable explanation as to the Terminal Manager and the Agent's conduct in transmission, preparation or explanation of these obvious inconsistencies. The errors in dating of other important documents containing dates prior to the incident having occurred may be explained as carelessness in proofing and carelessness is questionable and unfortunate in a case of this consequence. The discrepancies in WSF Exhibits #1 and #2 and Union Exhibit #14 and #36 as to signatures and dates as well as content, create a serious question as to the reliability of the evidence. This evidence provided by the agent is the only evidence relied on by WSF in the termination of the grievant.

It has been established by testimony of reliable witnesses (both the Employers and the Unions) that change orders are not used in face-to-face transactions much of the time and there is ample evidence to support the rationale for not requiring their use. The practice testified to by both WSF and IBU witnesses clearly demonstrate company rules and policies are not applied consistently and uniformly. The concept of "proof beyond a reasonable doubt" is that the

“people” must never overwhelm the rights of the “person”. In a case such as this where the rights and interests of WSF come in conflict with the rights of the grievant, the level of proof must accordingly be very high before the action of the Employer can prevail over the grievant.

This case before the Arbitrator cannot be supported by either the standard of “clear and convincing” or “beyond a reasonable doubt”. It may be argued that the “beyond a reasonable doubt” test should only be applied as a criminal standard and there is a debate among arbitrators when this test is applied. In this case, there has been no “preponderance of evidence”, no “clear and convincing” evidence and no “beyond a reasonable doubt” standard established by the Employer. WSF has not provided sufficient evidence.

The testimony of the Employer’s witnesses, particularly Mr. Rogers and Mr. Anderson, exhibits the real concern WSF has to protect the reliability and commitment of management to be good stewards of the State and taxpayer’s money. They are also committed to customer service and the integrity of WSF. Also, they both express their desire to have all policies and rules applied in all cases by everyone unscrupulously. The problem is what they strive for and are committed to themselves is not what happens. It is true that the vast majority of WSF employees are hardworking, dedicated, honest and motivated employees who provide excellent customer service. It is also true that rules and policies are not applied as written. In many cases, employees literally interpret rules to meet the needs of the operation and to work together for the convenience of everyone involved in the day-to-day operations. This working environment is a natural course of events in day-to-day operations where employees have worked together for long periods of time, are experienced in what they do and have found ways to do it better and more effectively than the specific rules, if applied literally, would allow. Everyone involved in this case understands the need to protect WSF and the public’s resources. No one condones

misappropriation or theft of WSF funds. The WSF, Union and their employees are committed to their responsibility and public trust and all recognize the scrutiny and standards expected of them. The public should recognize the degree of commitment that WSF, the Union and their employees have in their service to customers. Unfortunately, it only takes one incident to diminish the customer's perception of WSF and its employees. In this case before the Arbitrator, due to a rush to judgment, it appears predicated partly on unjustly deserved public scrutiny, we have an employee terminated with insufficient evidence to justify any disciplinary action by WSF. It is unfortunate that some stigma is inevitable when decisions are made in these cases without taking the time necessary to review in detail all aspects of the situation and circumstances involved. WSF is without question a complex and employee-intensive organization. It also should be given the credit it deserves. It is without doubt the shining star of the Department of Transportation. In spite of customer complaints that get highlighted, it must still take time and perform the necessary diligence before it acts prematurely. It is important to remember that one of the principles I know they believe is to see that they do not lend themselves to the wrongs they condemn. The public many times learns of situations at WSF without information necessary to make a proper judgment. Management must not act without proper information and then attempt to justify such action by influencing or in some way expanding on evidence. The real obligation of each of us and the one that we should assume, is to do at any time and all the time what we think is right. That is not what was done in this case and there is no real evidence to conclude the right decision was made.

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## **FINDINGS OF FACT**

1. The grievant has worked for WSF since 1990.
2. The grievant has no previous record of unsatisfactory performance and has acted in the capacity of ticket seller for approximately 10 years, working in that capacity in Edmonds for seven or eight years.
3. The grievant has been commended for her performance on at least two occasions (Union Exhibits #28 and #29).
4. WSF ticket sellers carry their working fund and funds used to purchase change in any number of ways, i.e., pockets, hands, back packs, sacks, etc. There is no one specific required way to transport funds from ticket booths to the office.
5. There is no evidence that other ticket sellers do not carry money in either their wallets or purses.
6. The evidence supplied by the agent to the Terminal Manager has not been reasonably explained, i.e., his allegations with regard to conflicting dates of transmission, when he signed the documents or the discrepancies in the agent's observations.
7. An examination of the purse used by grievant in the transporting of funds to purchase change does not support the observations of the agent. The design of the purse would preclude anyone from observing what money was present in the purse and in particular, if the money was removed from the purse by the grievant as described by the agent, he would not have observed other funds that may or may not have been present in the purse or identify their denomination.
8. WSF did not provide the Union with the agent's enhanced statement of March 1, 2004 during or prior to the fact-finding meeting of March 8, 2004. The Terminal Manager testified as follows about discussions during the meeting (TR page 393, lines 20-24):

Q: And at that time did you tell Mr. Conklin that another statement from Mr. Montgomery was forthcoming?

A: Yes, I did. I told him that this one was just kind of a basic statement and that a more detailed one was supposed to be coming to me.

Union Exhibit #36 dated March 7, 2004 contradicts the Terminal Manager's testimony.

He was already in possession of Mr. Montgomery's more detailed statement at the time of the meeting. The record supports a conclusion that WSF withheld information in their possession-information requested by the Union and information that was relevant for the proper representation of the grievant.

9. WSF did not conduct an independent investigation of the facts in this case by anyone who had not already made up their mind. Termination cases of this type require an independent, unbiased investigation.

10. The record clearly supports the fact that WSF has not applied its rules, orders and penalties even-handedly and without discrimination to all employees.

11. Before administering discipline to the employee, WSF did not make an effort to discover whether the employee did, in fact, violate or disobey a rule or order of management. A decision was made to discipline the grievant on receipt of a phone call or limited report from the agent who testified at the time of the incident as follows (TR Volume II, page 405, lines 13-20):

Q: Okay. Now, at that time is there – is there a reason why you didn't ask to perhaps, you know, identify that money as separate money from what she had counted out?

A: No, she says she – she would be \$300 short, she counted out 300 and she told me the reason why, she wanted to buy ones.

Q: Okay.

A: So I didn't assume anything else was, you know.

According to the testimony of the agent at the time of the incident, there appeared to be nothing wrong. This testimony raises questions that only an independent investigation would have tried to answer. No independent investigation was pursued. Based on the record, none of the WSF

officials who concluded termination was appropriate visited the agent's office in Edmonds to review the scene or had any direct contact with the agent or with the agent and grievant.

According to the record, all communications were done either telephonically or by e-mail. Even though documents are in evidence and are used to support WSF's decision, they don't appear to be able to be e-mailed.

12. Did the employer give the employee forewarning or foreknowledge of the possible consequences of the employee's disciplinary conduct? WSF has no specific rule or requirement as to how funds are transported from ticket booths to the agent's office. It appears that each employee has developed their own method of transporting funds and while it is clear the Terminal Manager does not want funds carried in purses or wallets, there is ample evidence to suggest a practice of employee's using means they determine appropriate depending upon circumstances. There was no notice to employees that the practice used by the grievant was a cause for discipline or termination. There is no evidence that funds carried in back packs, pockets, hands or other methods are not co-mingled or may be co-mingled.

### **CONCLUSIONS FROM THE RECORD**

1. The "judge," in this case the Terminal Manager, did not obtain substantial evidence that the employee was guilty as charged. His judgments were based on information provided by an agent whose evidence was confusing and contradictory and a Terminal Manager who made a decision based on the fact the employee had the funds in her purse. At no time during either the investigation meeting or the Loudermill hearings was the agent present to respond to the questions raised by the Union. There was no investigation of substance into the facts, circumstances and resultant consequences of the decision arrived at in this case.

2. WSF clearly recognizes their responsibilities to the State, taxpayers and traveling public and is conscientious in their responsibility to safeguard funds entrusted to them. However, no matter how well meaning, their action in this case can only be described as a rush to judgment.

3. The Employer has not established any evidence that would prove the grievant guilty of theft “by a preponderance of evidence”, or “by proof beyond a reasonable doubt, or “by clear and convincing evidence.”

### **AWARD**

Thus, for all the reasons set forth in the foregoing discussions, the grievant was not discharged for just cause. The grievant is to be reinstated to her former position with seniority and other contractual benefits to which she would have been entitled from the date of discharge to the date of reinstatement. The Union’s grievance is sustained. The Arbitrator will retain jurisdiction until the award is implemented.

DATED this 1st day of December 2004.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved by:

/s/ JOHN SULLIVAN, Commissioner

/s/ JOHN BYRNE, Commissioner