

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration Before  
John R. Swanson

INLANDBOATMEN'S UNION  
OF THE PACIFIC on behalf of  
QUENTIN BERRYMAN,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

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INLANDBOATMEN'S UNION  
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 7-07

MEC CASE NO. 20-07

MEC DECISION NO. 535 - MEC

DECISION AND AWARD

**APPEARANCES**

Schwerin, Campbell and Iglitzin, by *Natalie Teague*, 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.

**STIPULATED ISSUE**  
**CASE NO. 7-07**

Did Washington State Ferries violate the Washington State Ferry Respiratory Protection Program, which was a product of negotiations and arbitration between the parties, by requiring Mr. Berryman to shave off part of his mustache on April 29, 2006?

If so, what is the appropriate remedy?

**SECONDARY ISSUES  
PROPOSED BY THE UNION  
CASE NO. 20-07**

1. Did WSF commit an unfair labor practice when it unilaterally implemented a new facial hair policy as applied to Mr. Berryman and other employees as testified to at the hearing?

2. Did WSF commit an unfair labor practice when it unilaterally implemented periodic additional medical evaluations for all employees?

If so, what is the appropriate remedy?

**NATURE OF THE PROCEEDING**

The Able-bodied Seaman (AB) position is a position on the Ferries that requires AB's in certain situations to wear a respirator. While these situations are unusual and infrequent, to protect the passengers and crew members AB's must meet the Respiratory Protection Program requirements to accomplish the job requirements involved. WSF concluded that Mr. Berryman did not meet the criteria they had established because his mustache did not comply with published examples of WSF's acceptable mustaches or facial hair. Based on those published examples cited by WSF, Mr. Berryman did not qualify to be fitted for a respirator. As a result, Mr. Berryman was disqualified as an Able-bodied Seaman and denied that position. The Union grieved claiming WSF's action violated the specific negotiated, written agreement of the parties.

WSF is also alleged to have unilaterally instituted changes in (a) already agreed-upon facial hair requirements and (b) medical questionnaires and evaluations. These changes were instituted without prior bargaining and/or negotiations with the Union.

Protracted discussions regarding the Respiratory Program and its application took place between the parties who ultimately could not reach agreement on the issue resulting in the grievance being submitted to the Marine Employees' Commission for arbitration. MEC

consolidated Case Nos. 7-07 and 20-07 for the purpose of conducting a hearing. Hearings on MEC Cases 7-07 and 20-07 were held on May 3, September 6 and September 17, 2007.

### **RECORD BEFORE THE COMMISSION**

The MEC has the following record before it:

1. The Notice of Settlement Conference and Notice of Hearing.
2. The request for grievance arbitration and complaint charging unfair labor practices.
3. The IBU and WSF Collective Bargaining Agreement for the period July 1, 2005 through June 30, 2007.
4. Transcripts of MEC Cases No. 7-07 and 20-07 May 3, 2007 hearing and continued hearings of September 6 and September 17, 2007.
5. Exhibits of both parties accepted into evidence during the original and continued hearing dates.
6. WSF and IBU post-hearing briefs of November 14, 2007 completing the record.

### **SUMMARY OF UNION POSITION (IBU)**

- The issue of respirators and the policy with respect to the wearing of respirators has been an issue between the parties as far back as 1997. In 1997 the MEC directed WSF to “bargain collectively in good faith” with each of the complainant unions relative to the impact and effect on working conditions of WSF’s contemplated implementation of WAC regulations pertaining to respirators.
- On May 30, 2001 in MEC Case No. 10-01, MEC found that its order requiring the parties to engage in collective bargaining relative to the use of respirators “remained in an unfulfilled state.” The parties were again ordered, during the following thirty (30) days, to engage in a good faith effort to reach a settlement on the matter of respirators.

- The parties were unable or unwilling to resolve the issues before them and the issues were submitted by letter to the Arbitrator on September 5, 2001. The Arbitrator received 52 separate proposals from the Union and 10 Employer proposals. Objections to certain of the Union proposals were made to the Arbitrator by WSF. Joint Ex. 4.

- Based on the information and his review of the previous record, the Arbitrator concluded that the matter before him was “regarding the respirator mask policy.” He concluded his charge was to consider the “impact and effects” of the Employer’s no beard policy. The Arbitrator submitted his decision dated April 8, 2002. Joint Ex. 4.

- There can be no dispute that the MEC and the Arbitrator concluded that changes in the respirator procedures and policies have “impact and effects” on employees and are mandatory subjects of bargaining between WSF and the Union. Joint Ex. 4.

- The parties negotiated a medical questionnaire to be completed by Union members who, as part of their assignment, were required to be fitted for respirators. Able-bodied Seamen were subject to the medical questionnaire and evaluation. The parties had agreed that employees with medical problems, religious or personal reasons would be exempted from the AB position and not subject to the respirator policy.

- The parties agreed that after employees completed the medical questionnaire, it would be reviewed at Virginia Mason and if necessary, the employee involved would be contacted and with the employee’s permission, their personal physician, for the purpose of resolution regarding fitness questions. This one-time evaluation, required WSF’s involvement regarding six or seven employees who were then cleared to wear respirators.

- There are exceptions to the questionnaire where it is medically necessary to re-evaluate an employee after the initial evaluation because of a complication. Such exception may later be found to disqualify an employee from wearing a respirator.

- This medical questionnaire and evaluation was negotiated by the parties. Its purpose and application were agreed upon by WSF and the Union.

- During negotiations, the parties agreed to the adoption of the following Facial Hair Policy language which was included in the Respiratory Protection Program HRST SAFE 0100, Pg. 13 of 33 (Joint Ex. 3) DECK SAFE 0140, Pg. 3 of 5 (Joint Ex. 2), Fleet Advisory (Joint Ex. #6), Fleet Advisory (Joint Ex's. 7 and 8) consistent with the RPP requiring an employee be "clean shaven on the sealing surface of the face" (Joint Ex. 8) or "clean shaven on the portions of the face that are sealing surfaces for respirator masks" (Joint Ex. 7).

- On or about April 27, 2006, Mr. Berryman was told by his captain that he would have to shave his mustache. Mr. Berryman had never been asked to shave prior to this order of April 27, 2006.

- On April 27, 2006, Mr. Berryman faxed a doctor's note to WSF personnel concerning his medical condition regarding shaving.

- On or about April 29, 2006, when Mr. Berryman came to work and was offered a chance to bump up, he was told he was not allowed to bump up unless he shaved. Prior to this incident, Mr. Berryman had never been asked to shave in order to bump up to AB.

- Subsequently, Mr. Berryman spoke to WSF management and told them he had, previous to this order, always had a perfect fit when being tested or when he wore a respirator. WSF's management informed Mr. Berryman "it's not about a perfect fit, it's about conforming."

- On May 4, 2006, Mr. Berryman had not shaved his mustache and attended a safety training class. Mr. Berryman was fit-tested by the Respiratory Protection Program Manager; he passed the test and was informed he had one of the best fits in the fleet.

- Other employees who had been fit-tested and passed the fit test were ordered to shave off facial hair that had previously not interfered with a proper fit because their facial hair did not correspond to the illustrated examples of either “acceptable or unacceptable” sketches of facial hair. Joint Ex. 5, Joint Ex. 6, Joint Ex. 7 and Joint Ex. 8. Having been ordered to shave off some facial hair and afraid of reprisals, some employees did shave their facial hair as ordered.

- During the 2007 safety training class, WSF refused to fit-test Mr. Berryman because of his mustache.

- Employees Ollie McCall, Thomas Hobbs, David Guerrero, Dan Murphy, Kris Kaspersen are some employees adversely affected by WSF’s unilateral change in the Respiratory Protection Program.

- WSF’s unilateral change and implementation of the new facial hair standard inconsistent with the Respiratory Protection Program language agreed to by the parties without negotiating with the Union may be an Unfair Labor Practice.

- The illustrations attached to Fleet Advisory (Joint Ex. 5, 6, 7 and 8) are not the facial hair standards agreed to by the parties or consistent with the language contained in the RPP.

- Prior to 2006, the standards applied to facial hair were the standards outlined in the agreed-upon standards in the RPP.

- WSF clearly violated the RPP by refusing to allow Mr. Berryman to work as AB when he had previously been fit-tested. Mr. Berryman’s facial hair does not come between the respirator’s sealing surface or interfere with the respirator’s valve function.

- WSF refused to allow Mr. Berryman to be fit-tested during the arbitration hearing even though they were asked to do so by the Arbitrator. They declined because Mr. Berryman's mustache did not match the illustrations of either acceptable or unacceptable facial hair.
- WSF's unilateral implementation of periodic additional medical evaluations without negotiating with the Union is a ULP. The agreed-upon medical evaluations allow additional medical evaluations after the initial evaluation only under specific agreed-upon conditions.
- WSF should be directed by MEC to restore status quo set forth in the RPP and make the affected employees whole. WSF should be ordered to destroy all medical questionnaires and other medical information obtained as a result of the December, 2006 questionnaire distributed to all employees. In addition, the Union requests all other relief as set forth in unfair labor practice complaints 7-07, 14-07 and 20-07.
- The Union urges the Commission to find merit in the ULP charge filed by the Union, sustain Mr. Berryman's grievance and the requested relief sought by the Union.

#### **SUMMARY OF EMPLOYER'S POSITION (WSF)**

- This matter is the consolidation of grievance case MEC 7-07 and an unfair labor practice case, MEC 20-07.
- WSF properly restricted Mr. Quentin Berryman from serving as an Able-bodied seaman (AB) when he refused to trim his mustache. An AB must be able to wear a respirator in the performance of his duties. The Union, in this case, is advocating a reduced – rather than elevated – level of workplace and employee safety.
- The case is ultimately about a safe workplace not about facial hair. It is absolutely essential that the crew members fighting fire are protected as adequately as possible. Any change in the Respiratory Protection Program should not be ordered without serious

consideration. The RPP has been working well for about five years. The facial hair standards provide for a reasonable margin of safety and the examples establish clear identification as to what is acceptable and what is not.

- The IBU standard is that it is permissible if hair touches but does not go under the sealing surface of the respirator. If the Union prevails in this case, WSF is clearly in a confusing situation with the potential of decreasing safety. If the Employer prevails, some other employees may be asked to shave their mustaches. If the Union wins, someone might die.

- The sole issue for decision by the hearing officer is whether Mr. Berryman's mustache was within the allowable standards under the RPP.

- There is no dispute that the Captain gave Mr. Berryman an order to shave to be qualified to be an AB.

- The Union position is that Mr. Berryman's mustache is the same as it has always been during his employment with WSF. It is obvious that no mustache in fact remains the same from one day to the next, over a period of thirteen years.

- After the introduction of Exhibit 23, Mr. Berryman's ID photo, Mr. Berryman seemed to back away from his earlier claim that his mustache has always been the same suggesting that the photo had been taken several years ago. In fact, the picture looked about the same as Mr. Berryman himself looked at the September 6, 2007 hearing.

- Witnesses for WSF described the respirator sealing surface and the lower portion of that surface are illustrated by the drawing circulated in the Fleet Advisory by Exhibits 5, 6, 7 and 8. The Hearing Officer himself had a chance to examine the respirator mask and inspect the sealing surface.



- It is completely impossible to conclude that the mustache shown in exhibit #23 or the mustache worn by Mr. Berryman during his testimony in the hearing would not come between the sealing surface and his skin. It clearly would.

- The Union has failed to meet its burden of proof on this crucial safety matter. In fact, it cannot be argued that Mr. Berryman's mustache is in compliance with the standard advance by the Union.

- Regarding the Unfair Labor Practice of the Union, in 2006 WSF did not unilaterally expand the areas of the face which it required to be clean shaven. The RPP has been administered under the same standards since inception with full knowledge and concurrence of the IBU. The Union now contends that the following language from the RPP is the only standard which was negotiated and agreed to. That language is:

It has long been recognized that tight-fitting respirators must fit properly to provide their expected level of protection. Therefore, employees who have any facial hair that is visibly projecting above the skin (stubble, mustache sideburns, portions of a beard, low hairline, bangs, etc.) that comes between sealing surface and the face or that interferes with valve function, shall not be fit tested or allowed to wear tight-fitting respirators.

- Evidence of the mutual understanding of the parties as to the meaning of this language and how it would actually be applied in the workplace is needed. The best place to find evidence of the understanding of the parties is the past practice, defined as:

A past practice binding on the parties may be defined as one which is directly, repeatedly and consistently associated with a specific condition and must have been practiced with such regularity, consistency and constancy as to disclose a definite, distinct pattern mutually accepted in the past by the parties.

- Significant evidence was introduced by WSF proving a consistent, uniform practice with respect to facial hair based upon Exhibits 5, 6, 7, 8 and 24.

- WSF Safety Manager and the Fleet Safety Coordinator both testified that since the inception of the RPP, WSF's fit testers have been told to test only those employees with facial hair below the lip line. This is consistent with the illustrations of "acceptable" facial hair labeled "narrow mustache."

- This standard as testified to by safety managers was well understood. It was rare for anyone to show up for fit testing with facial hair below the lip. When they did, they were told to shave and they did. These illustrations which started in 2001 were an important part of the negotiations which resulted in the RPP.

- In the Hofto grievance settlement in 2003, WSF sent a letter to the IBU part of which reads as follows:

The pertinent information that you request in number seven is very obvious. **There shall be no hair growing below the lip that could interfere with the sealing of the mask.** That is the issue at stake. As I stated, that issue was negotiated over a three-year period with the IBU. WSF has no interest in having to maintain a program of looking at the shaving levels of an individual on a daily basis to assure that he can maintain a proper fit to protect his life. That is why there is the requirement that there be no facial hair.

Emphasis added.

- There has been no change in WSF's practice with respect to the administration and application of the RPP since its inception. There is no merit to the charge that WSF changed facial hair standards in the spring of 2006 or at any other time. They have always been the same. The charge should be dismissed.

## **FINDINGS OF FACT**

1. The grievant, Mr. Quentin Berryman, has been an employee of WSF since 1995.
2. The grievant is a permanently assigned Ordinary Seaman (OS).
3. The grievant received his AB ticket in the year 2000.
4. Prior to April 27, 2006, the grievant had worked as an AB on numerous occasions.
5. During his employment with WSF, the grievant has had substantially the same facial hair (mustache) in April 2006 that he had in the arbitration hearings of May and September, 2007.
6. The grievant's facial hair, mustache, does not fit any of the examples of either acceptable or unacceptable facial hair in the illustrations of Exhibits 5, 6, 7 or 8.
7. The "below the lower lip" extended mustache example in the exhibits in evidence goes below the chin and extends far below the grievant's mustache.
8. The examples of "acceptable" facial hair in Exhibits 6, 7 and 8 are significantly more restrictive than the agreed-upon, negotiated language in the RPP.
9. There is no evidence in the record that would support a conclusion that the illustrated examples in Exhibits 5, 6, 7 and 8 are the only examples of facial hair that would meet the requirements of the explicit, agreed-upon language in the RPP.
10. There is no agreement between the parties that would allow the illustrated examples in the exhibits to exclude employees from the Program who would otherwise qualify under the agreed-upon language in the RPP.

## CONCLUSIONS FROM THE RECORD AND THE LAW

On the basis of the evidence and analysis of the record of the proceedings before him, the findings of fact and the contractual and legal analysis, the Arbitrator makes the following conclusions:

1. Agreement by and between Washington State Ferries and Inlandboatmen's Union of the Pacific July 1, 2005 through June 30, 2007 was in effect at the time of the dispute.

2. The Respiratory Protection Programs HRST SAFE 0100 and DECK SAFE 0140 are agreed upon, controlling documents for safety of employees required to wear respirators.

3. The Settlement Agreement (MEC Cases 7-07 and 14-07) is still in force and effect.

4. The matters are properly and procedurally before the Arbitrator for decision (RCW 47.64.200).

5. WSF's contention that a consistent and uniform practice has been followed with respect to facial hair and the illustrations in Exhibits 5, 6, 7 and 8 is not borne out by the record. The grievant and other employees had been fit tested and passed the fit test prior to fit testing in 2006 and the enforcement of the illustrations in Exhibits 5, 6, 7 and 8.

6. The record supports a conclusion that prior to April 27, 2006 the grievant had qualified for the program with the same facial hair that excluded him after April 27, 2006, even though the illustration 'extended mustache' in the exhibits is substantially longer and does not compare with the grievant's.

7. The refusal of WSF's safety personnel to fit test the grievant during the hearing seriously challenges the Employer's position that the grievant's mustache extends into the respirator sealing surface. It would have cleared up the matter had the fit test been administered.

8. Both the Union and the Employer are committed to the protection of the employees who are required to wear respirators in the performance of their duties and nothing in the record suggests otherwise.

9. The language agreed upon by the parties in the RPP is specific and unambiguous.

**Employees who have any facial hair that is visibly projecting above the skin (stubble, mustache, sideburns, portions of a beard, low hairlines, bangs, etc.) and comes between the sealing surface and the face or that interferes with valve function, shall not be fit tested or allowed to wear tight-fitting respirators.**

Emphasis added.

10. The grievant is not excluded from being fit tested by the agreed-upon language in the RPP. If he, in fact, cannot pass the test based on the above language, then he must remain an exempt OS with a medical exemption and under the Agreement qualify for any benefit he may be entitled to effective April 27, 2006.

11. The record does not support a conclusion that there has been no change in the RPP for many years. The Settlement Agreement of February 16, 2007 supports the fact that changes in the program were being instituted by WSF and challenged by the Union.

12. The record supports the conclusion that an Unfair Labor Practice is premature, if one should issue at all.

13. Mr. Dryer of the Governor's Labor Relations Office in a letter dated January 27, 2007 (Exhibit 8) in response to Regional Director Conklin's December 27, 2006 letter (Exhibit 20) requesting negotiations, indicated WSF's willingness to meet with the Union regarding changes in the RPP.

14. It is clear in the record that the Union has requested and WSF has agreed to meet and discuss issues related to the current implementation of the RPP. This meeting is necessary to

comply with previous notice to WSF and to comply with paragraph 3 of the Settlement Agreement of February 16, 2007. It appears that the press of business or extenuating circumstances have precluded the scheduling necessary for the meeting. If WSF refuses to follow through and meet with the Union as required, then it may be a matter that could require the Union to pursue some appropriate remedy.

### **DECISION AND AWARD**

1. The grievant, Mr. Berryman, will be fit tested by the appropriate WSF safety personnel to determine whether or not he qualifies for an AB position. He will not be denied a test based on WSF's illustrations of facial hair. Such fit test will be done in accordance with the specific agreed-upon language in the RPP. During the fit test, a representative of the Union will be present, either Ms. Pelland, Mr. Conklin or their designee.

2. If it is determined that the grievant does not meet the sealing requirements necessary to properly fit test as a result of the medical circumstances regarding his facial hair, he will be compensated as previously proposed by WSF – the AB's rate of pay prospectively and retroactively from April 27, 2006 and will continue in his exempt status.

3. There is no finding of an Unfair Labor Practice. The parties are instructed to meet as requested by Mr. Conklin in December of 2006 and suggested by Mr. Dryer in January of 2007. The parties are also directed to meet as required by paragraph 3 of the Settlement Agreement (MEC Case 7-07 and 14-07) dated February 16, 2007. Failure of WSF to meet in a reasonable time on the matters above may, if supported by evidence, constitute an Unfair Labor Practice.

4. WSF is also directed to delay any action relative to Medical Evaluation Questionnaire issues until the meeting referred to above has taken place.

## 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 21<sup>st</sup> day of December 2007.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator/Examiner

Approved by:

/s/ JOHN SULLIVAN, Commissioner

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ELIZABETH FORD, Commissioner