

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 46-04

DECISION NO. 435 - MEC

DECISION AND ORDER

APPEARANCES

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

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

NATURE OF THE PROCEEDING

On February 26, 2004, the Inlandboatmen's Union of the Pacific, Puget Sound Region brought this matter before the Marine Employees' Commission by filing a complaint charging unfair labor practices, MEC Case 46-04. The IBU charges WSF with unfair labor practices within the meaning of 47.64.130 (1)(a) and (e) by interfering with, restraining or coercing employees in the exercise of rights; and refusing to bargain collectively with representatives of employees.

The IBU is alleging that Washington State Ferries is flouting two past MEC decisions, Decisions No. 347 and No. 391, by scheduling fuel trucks to come aboard the ferries at Anacortes with less manning on the vessel than the contract requires. IBU is also alleging that this is WSF's third flagrant violation.

MEC Case 46-04 alleges that WSF moved the ferry KALEETAN on February 20, 2004 from an operational slip to a tie-up slip, where it was secured and shut down, and then back to an operational slip in Anacortes with a fuel truck and driver aboard the ferry with less crew manning than required by the collective bargaining agreement (CBA), as noted specifically in Rule 7.02.

John P. Sullivan, a Commissioner of the Marine Employees' Commission, conducted a hearing in this matter on October 20, 2004, pursuant to RCW 47.64.130 and 47.64.280 and chapter 316-45 WAC. Briefs were timely filed.

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

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

1. The complaint charging unfair labor practices filed on February 26, 2004.
2. The amended complaint charging unfair labor practices filed on March 11, 2004.
3. The Notice of Scheduled Settlement Conference issued by the Marine Employees' Commission on May 28, 2004 (scheduled for July 30, 2004).
4. The Notice of Scheduled Hearing issued by the Marine Employees' Commission on August 5, 2004 (scheduled for October 20, 2004).
5. The official hearing transcript and one exhibit accepted into evidence.
6. MEC Decisions No. 347 and No. 391
7. Administrative and/or judicial notice taken of the CBA, June 1, 1999 through June 03, 2001, which remains in force to the present time per RCW 47.64.170(7).

THE ISSUE

Did WSF violate the IBU/WSF contract and past MEC Decisions No. 347 and 391 regarding crew manning for the KALEETAN during the period that the ferry was at the tie-up

slip on February 20, 2004 during a refueling operation, thereby committing an unfair labor practice within the meaning of RCW 47.64.130(1)(a) and (e).

CONTRACT LANGUAGE

The normal deck department manning on the KALEETAN is four (4) ABs and four (4) OSs. The applicable IBU/WSF contract rules in this matter are the following:

RULE 7 – CREW REQUIREMENTS

7.01 The Employer agrees to adopt the following minimum manning schedules as part of this Agreement:

7.02 Except in cases of emergency and for movements within the vicinity of Eagle Harbor, each vessel, while *in service*, shall have a minimum manning as follows:

Steel Electric Class (KCLICKITAT, ILLAHEE, NISQUALLY, QUINAULT, and including OLYMPIC & RHODODENDRON)

2 AB 1 OS 1 OS Watchman

OLYMPIC & RHODODENDRON

2 AB 1 OS 1 OS/Watchman

Super Class (ELWHA, HYAK, KALEETAN, YAKIMA)

4 AB 3 OS 1-OS/Watchman

One less OS will be employed on the Seattle-Bremerton run graveyard shift. One less OS will be employed on the Edmonds-Kingston run graveyard shift.

Super Class (SAN JUAN ISLANDS ONLY) April 15 through October 14 – same as above, October 15 through April 14:

4 AB 2 OS 1 OS/Watchman

Jumbo Class (SPOKANE, WALLA WALLA)

4 AB 2 OS 1 OS/Watchman

Evergreen State Class (EVERGREEN STATE, KLAHOWYA, TILLIKUM)

2 AB 1 OS 2 OS/Watchman

Issaquah Class (ISSAQUAH, KITTITAS, KITSAP, CHELAN, CATHLAMET, SEALTH)

At U.S. Coast Guard Certificate

HIYU

2 AB

TYEE CLASS

1 AB 1 OS

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.

(Emphasis added.)

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 KALEETAN, 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.”

POSITIONS OF THE PARTIES

Inlandboatmen’s Union of the Pacific

The ferry KALEETAN was operational and “in service” during February 20, 2004 even when the ferry was at the tie-up slip or dock while the fuel truck and its driver were on board and refueling the ferry.

Pursuant to the IBU/WSF CBA, Rule 7.02, the ferry was required to have a full complement of eight (8) deck crew employees on board the KALEETAN at all times while the ferry was operational and “in service,” which would include while the ferry was at the tie-up slip and being refueled.

Washington State Ferries

When the KALEETAN moved from the operational dock to the tie-up slip or dock and then back to the operational dock with fuel truck and driver on board, the ferry was crewed with

a full complement of eight (8) deck crew employees on board. The fuel truck driver would be considered a passenger even though he did not pay a fare.

When the ferry KALEETAN was at the tie-up slip or dock, the ferry was secured with heavy mooring lines, the engines were shut off and there was no deck crew aboard. Under these conditions, between 1205 and 1315 on February 20, 2004, the ferry was not operational and was certainly not “in-service.”

When the next shift of eight (8) deck crewmembers came aboard at 1315, the engines were restarted, the mooring lines were cast off and the ferry shifted over to the operational dock to load cars and passengers.

To be operational and “in service,” the full complement of eight (8) deck crewmembers was required to be aboard the ferry. A full complement of crew was not required aboard the KALEETAN between 1205 and 1315 on February 20, 2004.

FINDINGS OF FACT

1. The Kaleetan arrived in Anacortes shortly before noon on February 20, 2004, a Sunday, and unloaded cars and foot passengers at the operational slip or berth.
2. After the cars and passengers were unloaded, the fuel truck came aboard down the exit lane while the ferry was at the operational slip or berth.
3. The ferry, with a full complement of the deck crew, consisting of four (4) ABs and four (4) OSs per IBU/WSF CBA Rule 7.02 for the Super Class KALEETAN, shifted to the tie-up slip or berth.
4. When the ferry arrived at the tie-up slip or berth, the deck department tied up the ferry by securing the heavy mooring lines between the ferry and the tie-up slip or berth.

5. The entire deck crew of eight (8) completed their shift at 1205 and left the vessel with the exception of AB David McKenzie, who volunteered to remain on the car deck of the ferry.

6. The ships engineers shut off the four (4) engines and the chief engineer and his assistant engineers started taking fuel from the fuel truck on board the ferry.

7. At the tie-up slip or berth, the only way to get on and off the vessel is a gangway for the deck crew and the engine room crew to walk off the vessel.

8. There is no way to get a vehicle, like the fuel truck, off at the tie-up slip or berth, as there is only a foot gangway.

9. The next shift of the KALEETAN's deck crew came aboard at 1315 (1:15 p.m.). The deck crew was the full complement of eight employees. The engineers started the vessels engines, the deck crew untied the mooring lines and the ferry moved back to the operational slip or berth to load cars and foot passengers for the next trip.

10. AB McKenzie volunteered to remain aboard the KALEETAN during the process of transferring fuel from the fuel truck to the vessel's bunkers or tanks. AB McKenzie was an unofficial observer and did not contribute any benefit during fuel transferring to the vessel's bunkers. He departed the vessel when the new eight employees came aboard to start their shift at 1315.

11. The fuel truck driver, while not a fare paying passenger, would have the status of passenger while the ferry was at the tie-up slip and while the ferry moved between the operational dock and the tie-up slip.

12. Since the MEC issued a ruling in Case No. 38-02, Decision No. 347-MEC, (also known as the *Richard Loser* case) WSF has changed its fueling practice to ensure that there is full deck crew aboard whenever a vessel moves with a fuel truck and driver aboard a ferry.

13. MEC Decision No. 391 in Case No. 48-03 concerned a ferry that was moved from the north slip to the south slip at the Clinton terminal with a Master and two ABs during dock construction. The MEC held that off-duty crewmembers who were aboard the ferry were “passengers” for the purpose of determining whether the ferry was “in service” during the moves or shifts. The two ABs were denied short-crew pay in violation of the CBA. The MEC awarded the two ABs who worked in shifting the ferry on two different days the short-crew pay pursuant to Rule 7.04 of the contract.

ANALYSIS

On February 20, 2004 when the KALEETAN unloaded the cars and foot passengers in Anacortes, the fuel truck and driver came aboard the ferry at the operational slip or berth. On the shift to the tie-up slip or berth there was a deck crew of eight employees on board as required by the IBU/WSF CBA, Rule 7.02.

AB McKenzie testified that there was a full complement, eight IBU deck crewmembers aboard the KALEETAN when she moved from the operational dock to tie-up slip at 1205. AB McKenzie also testified that the deck crew that shifted or moved to the tie-up slip departed as their shift was completed. He testified that at 1315, a new eight-person crew came aboard and unsecured the vessel, the engineers started the engines, and the vessel moved from the tie-up slip to the operational dock. Both shifts or moves were done in accordance with CBA Rules 7.02 and 7.03.

The KALEETAN was “in service” and manned with a full crew when moving from the operational slip or berth to the tie-up slip or berth at 1205 and when moving back to the operational slip or berth at 1315.

On February 20, 2004 from 1205 to 1315, the KALEETAN was tied up with mooring lines to the tie-up slip with the main engines shut down and without a full complement of an eight person deck crew, while the engineers transferred fuel from the fuel truck to the ship's bunkers. Under these conditions, the KALEETAN was not in an "operating condition" from 1205 to 1315 and certainly not "in service."

Port Captain Saffle testified in the present case: "But the operating day per vessel is only the operating day when the deck crew are scheduled and the vessel is in operation to be able to haul passengers."

In MEC Case 38-02, Decision No. 347-MEC, (*Richard Loser* case) the fuel truck boarded the ferry, also the KALEETAN. However, in the *Loser* case, the ferry moved away or shifted from the dock and then returned to the dock with the fuel truck and driver aboard the ferry with only two ABs and one OS on board, not the full complement of eight in the deck crew. The ferry in the *Loser* case was "in service," but not manned by the deck crew required by the IBU/WSF CBA, Rule 7.02 and was a violation of the CBA.

In the instant case, on February 20, 2004, the driver of the fuel truck qualified as a passenger when the KALEETAN moved from the operational slip or berth to the tie-up slip, while it was moored at the tie-up slip and then back to the operational slip or berth as the vessel during these moves or shifts was "in service." During these moves or shifts there was a full deck crew of eight aboard the vessel on February 20, 2004 and WSF was in compliance with the IBU/WSF CBA, Rule 7.02. The fuel truck driver retained the status of a passenger even while the vessel was moored at the tie-up slip and not in service.

There was no movement of the vessel when it was not fully crewed.

Both Decision No. 347 and No. 391 addressed repositioning “movements” of the vessels to and from docks or slips with a passenger or passengers aboard.

The United States Coast Guard Certificate of Inspection reads as follows: “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.”

When making repositioning “movements” of a vessel between berths, docks or slips with a passenger aboard a vessel the vessel is “in service” and there must be a full complement of eight IBU deck crewmembers aboard the KALEETAN. Any other WSF ferry must have the full complement of deck crew as indicated by CBA Rule 7.02.

While the KALEETAN was secured to the tie-up slip, the engines were shut off and the deck crew left the vessel from 1205 to 1315; the fuel truck driver was still a passenger, but there was no movement of the vessel during this time, so the KALEETAN was not “in service” and there was no requirement that the vessel be fully staffed in the IBU deck department.

David McKenzie has worked for the WSF for 25 years and was employed on the KALEETAN as a relief AB in the deck department. Mr. McKenzie advised the Master that the IBU had an issue when the fuel truck and driver came aboard the vessel and they shifted from the operational dock to the tie-up slip. The Master said when they secured the vessel at the tie-up slip the deck crew would go home and there would be nobody from the deck crew on board.

Mr. McKenzie advised the Master that when they tied up at the tie-up slip, the IBU issue came into play and the vessel had to have a full complement of the deck crew aboard the vessel while the fuel truck driver was on the vessel as he qualified as a passenger. The Master said he had no information about crewing the vessel when it was secured to the tie-up slip, nor had he

received any directive from the WSF office about having a full IBU deck crew aboard when it was secured.

Unless he was directly ordered off the vessel, Mr. McKenzie said he was going to stick around because there was a passenger on board the vessel. The Master advised Mr. McKenzie to notify the Mate that he was going to put something on his pay order. Mr. McKenzie made an entry on his pay order for two hours of overtime.

Chief Mate Gordon Brewster wrote on the pay order alongside the “two hours” notation, “Per employee’s request G.B.”

Mr. McKenzie was a “volunteer” when he remained on the KALEETAN after it was secured to the tie-up slip, the engines were turned off or shut down and the full complement of the IBU deck crew with the exception of Mr. McKenzie left via the gangway to go home. Mr. McKenzie remained on board as a volunteer, of his own free will. He believed that a complement of eight IBU deck crewmembers was required when a passenger—the fuel truck driver—was aboard the vessel, even though the vessel was secured to the tie-up slip, the engines were shut off, and the deck crew had departed the vessel. Mr. McKenzie did not assist in any way the refueling of the vessel. His status was as a supernumerary, an extra person.

The Chief Mate noted on Mr. McKenzie’s time sheet that two hours were placed there at McKenzie’s request. The Chief Mate does not approve or disapprove the two hours added to the time sheet. The time sheet would be reviewed at the end of the pay cycle which was February 29, 2004. All the deck department time sheets are reviewed by three or four port captains who make the decision to approve or disapprove any of the hours listed. The port captains denied or disapproved the two hours Mr. McKenzie stood by on the car deck from 1205 to 1315 on February 20, 2004 and did not contribute any benefits to the refueling operations.

CONCLUSIONS OF LAW

On the basis of the record before it, the findings of fact and the contractual 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 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). This case is properly before the Marine Employees' Commission for decision.
3. On February 20, 2004, when the ferry KALEETAN, with the fuel truck and driver, shifted from the operational dock to the tie-up slip where the ferry was secured at 1205. During this shift or movement there was a full complement of IBU deck crewmembers aboard, eight persons in total as required by contract.
4. While at the tie-up slip from 1205 to 1315 the KALEETAN was not "in service" or "operational" and was not required to be fully staffed.
5. At 1315 a new crew came aboard that was a full complement of eight crewmembers. The KALEETAN was properly manned when it shifted from the tie-up slip, with the fuel truck and driver aboard, back to the operational dock to start to load cars and passengers.
6. There was no "movement" of the ferry KALEETAN when it was not fully crewed.
7. The fuel truck driver meets the qualifications and standards of a passenger while aboard the KALEETAN when she moved between the operational dock to the tie-up slip and back to the operational dock and while secured to the tie-up slip and refueling the vessel.
8. The fuel truck driver meets the standards of a passenger as outlined in the five-part test as set out in *Burgdorf v. State*, 61 Wn. App. 918 (1991), *review denied*, 117 Wn.2d 1028.
9. *Burgdorf* was cited in both Decision No. 347 (MEC Case 38-02) and Decision No. 391 (MEC Case 48-03) regarding the status of a passenger. In both decisions, the vessels were

making repositioning movements. On February 20, 2004, the KALEETAN was properly staffed per CBA Rule 7.02 when making repositioning movements and “in service.”

10. At most, Mr. McKenzie was a volunteer or a supernumerary and did not participate in any way with the fuel transfer from the fuel truck to the fuel tanks of the vessel. He testified that the ship engineers did not need his help during the refueling of the vessels.

Mr. McKenzie did not provide any benefit in anyway to the overall refueling operation on February 20, 2004. He is not entitled to two hours of straight time or overtime.

ORDER

1. The Marine Employees' Commission hereby determines that Washington State Ferries did not violate the collective bargaining agreement or MEC Decisions No. 347 and 391 when the KALEETAN was at the tie-up slip in Anacortes on February 20, 2004 from 1205 to 1315 without a full complement of eight IBU deck crewmembers aboard during refueling operations. MEC Decisions 347 and 391 are not applicable to the tie-up period on February 20 between 1205 and 1315.

2. Whenever the KALEETAN was making repositioning movements and was “in service” on February 20, 2004, there was a full complement of deck crewmembers aboard as required by CBA Rule 7.02 and 7.03.

3. WSF did not commit the unfair labor practice violations, RCW 47.64.130(1)(a) and (e), alleged in the IBU’s complaint. The unfair labor practice charges are dismissed.

4. Mr. McKenzie is not entitled to two hours of pay for the period from 1205 to 1315 on February 20, 2004.

5. Attorney fees are denied.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC's unfair labor practice ruling 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 petition for reconsideration is filed in a timely fashion, the Marine Employees' Commission will issue a second Order, which will state that this Order has become final and binding in accordance with RCW 47.64.280. That second Order will start the period running for any appeal to the Washington State Superior Court, pursuant to RCW 34.05.542 and 34.05.514.

DATED this 19th day of January 2005.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SULLIVAN, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ ELIZABETH FORD, Commissioner