

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 37-03

DECISION NO. 380 - MEC

DECISION AND ORDER

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

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

THIS MATTER came on regularly before the Marine Employees' Commission when the Inlandboatmen's Union of the Pacific filed an unfair labor practice complaint on February 18, 2003, charging the Washington State Ferries with refusing to sign an agreement that it allegedly negotiated with the Union concerning scheduling of on-call employees.

The complaint was docketed as MEC Case 37-03. A settlement conference, held on May 12, 2003 was unsuccessful. Chairman John Nelson conducted the hearing on June 12, 2003.

DISCUSSION

The issue giving rise to the instant proceeding is contained in the broader discussion of United States Coast Guard mandated crew endurance study and newly imposed requirements that certain rest periods be observed. WSF acknowledged its obligation to bargain over any changes that were required to meet the Coast Guard mandates. While bargaining over the broad topic of crew endurance was on going, IBU and WSF drew a narrower focus, which was concerned with

the scheduling of on-call employees. Each party to these on-call negotiations had certain concerns and sought, through bargaining, to address them. Thus, the IBU perceived that because of the requirement for more rest periods, regularly scheduled employees could be less available for the work required. Any additional work hours would need to be performed by relief or on-call employees. WSF doubtlessly agreed with that assessment and for that reason looked at its experience with on-calls and concluded that there may be trouble in ensuring that a sufficient number of on-calls were available. Concerns that certain of the on-call employees could exercise their contractual right to reject work or put conditions on their working availability caused WSF to want to have a simplified system for activating the on-calls, together with some form of penalty if the on-call rejected the call. IBU evinced a concern as to how the schedule would be implemented and what form the penalty for refusing a call would take. While this controversy began within the overall discussions concerning the crew endurance study, the sub-issue soon took on a life of its own.

While Labor Relations Director Mike Manning attended some of the initial meetings concerning crew endurance, there came a time after the onset of discussions over the scheduling of on-calls, that the parties relied on a so called working group to attempt to resolve the time consuming issues covering details of each party's concerns over this matter. While it is less clear as to how the IBU's committee in this working group differed from its principal negotiators in the overall discussions regarding crew endurance, it does appear that as to the WSF, Manning dropped out of the discussions while Operations individuals including Director of Marine Operations Joe Nortz, Port Captains Malde, Saffle, and Mitchell and Crew Resource Manager, Bob Wheeler comprised the WSF working group. Various of the aforementioned individuals but not necessarily all of them at the same time, met with the IBU negotiators consisting of Dennis

Conklin, IBU Business Agent; John Ross, on-call employee representative; David McKenzie and Marie Waterman. IBU Regional Director Pete Jones may have attended one or more of these sessions. These meetings of the working group were sometimes scheduled and sometimes spontaneous. All such meetings dealt only with the sub-issue of on-call scheduling and all appear to have been held in June and July of 2002. It appears that Conklin and Wheeler attended all such working sessions, and sometimes discussed issues that arose between themselves.

The IBU contends that WSF delegated its bargaining authority to this working group and that when the working group reached agreement, which is what IBU claims to have happened on July 25, 2002, WSF refused to sign the document prepared which embodied that agreement. WSF contends that it never delegated authority, but did authorize the working group to attempt to come to grips with the complexity of the issue. It is further WSF's contention that any agreement reached had to be presented to Labor Relations Director Manning for approval, but prior to that time, must be approved by Director of Marine Operations, Joe Nortz. Labor Relations Director Manning testified that he would often involve those special areas of expertise that may be impacted by the bargaining process, but that it was always his operational mode to retain the final authority to approve agreements, and that his signature was a necessary requirement to any final agreement.

Nortz was not presented for testimony during the hearing on this case, but it is clear that Bob Wheeler, who was subordinate to Nortz, was of the view that Nortz was a necessary party to the approval process. As to IBU's understanding that the working group was empowered to make a final decision, it relies primarily on recollections of statements made in the early negotiating sessions that the Operations management officials had the authority to get the agreement worked out. This was also reinforced by discussion at one of the meetings as to

whether the proper group was negotiating on behalf of the WSF. IBU negotiators were reassured that the individuals who were negotiating on behalf of WSF, namely Captains Malde and Saffle, and Bob Wheeler were the people who could do the job in reaching agreement.

In terms of how the working group operated, it appears that a master computer disc was maintained which was added to from session to session. While WSF may have printed from this disc, it is clear that IBU had its renditions also, and at least after the negotiating sessions, it would print a version that was presented as a working agreement. Toward the end of discussions between the working group, IBU, through Conklin, prepared what he characterized as the on-call agreement and presented it to Wheeler. There is dispute as to whether Conklin had signed the agreement when he presented it but there is no dispute that Wheeler did not sign the document, telling Conklin that he had to present it to Nortz. IBU contends that Wheeler claimed that Nortz would sign off; Wheeler maintains that he told Conklin that the document was too complicated and that Nortz would not sign. In any event, the document was not signed, even after Conklin made some changes as to dates and language. Wheeler did eventually get back to Conklin to report that Nortz would not sign unless changes were made to dates, and to language to make the agreement less complicated. No further negotiating sessions had been held as of the time of the hearing in this case.

ANALYSIS

Two questions are presented for analysis in this case. The first is whether WSF had cloaked its Operations managers with the authority to bind it in collective bargaining negotiations? Secondly, did the working group reach a final agreement?

To look at this issue, one must remember that the parties were involved in the larger issue of crew endurance studies, mandated by the US Coast Guard. The on-call procedures were

merely a part of this larger issue. Labor Relations Director Manning had been part of the negotiations until matters bogged down in discussion over the impact on the regular employees and their relief. WSF then convened its Operations experts who were best equipped to deal with this sub-issue of crew endurance. It appears that WSF at all times thought that the broader issue would be returned to bargaining under Manning's direction once the on-call issue was addressed, and hopefully resolved to the satisfaction of the Operations managers. While WSF could not have anticipated that IBU would drop the other issues raised by crew endurance in return for agreement on the on-call procedures, that is what happened. By the time of the hearing in this matter, it is clear that WSF had withdrawn any authority of the working group to reach and sign a final agreement.

On the other hand, it is clear that IBU relied on what it took to be a delegation of bargaining authority to the Operations representatives in the working group. While this delegation is not manifest in Manning's testimony in that he did not recall whether he had made it clear to the IBU that Joe Nortz had to "buy off" on any agreement reached by the working group, the working group itself expressed that the group then present, which did not include Nortz, was the group that could get the job done. Additionally, the IBU claims reliance on the apparent authority of the management members of the working group. In testimony, IBU characterized the Operations managers as the "heavy hitters" which appears to be an honest characterization, given the organizational ranking of Messer's Nortz and Wheeler, and Captain's Malde and Saffle. It is uncontroverted that WSF intended the working group to come to grips with the operational details involved with implementing an on-call agreement that was at variance with contractual procedures. It is also apparent, that Joe Nortz, arguably the top person

in the heavy hitter group, was not at most of the working group sessions, and had to rely on information given him by the other management members, mostly Bob Wheeler.

It is concluded that WSF delegated authority to the management members of the working group. Numerous sessions were held and there was give and take on both the IBU's and WSF's part. That conclusion brings us to the second issue identified in this analysis; namely, did the parties reach agreement? In support of its contention that agreement was reached, IBU contends that the team of regulars on the management side, including Captain Malde, Captain Saffle and Bob Wheeler were sufficiently high up in the Operations world to possess apparent authority. Further when the Conklin-Wheeler discussions occurred over the various documents introduced as working agreements, it was represented to the IBU that Nortz would sign the agreement reached. Wheeler, denying this contention insofar as telling Conklin that agreement was reached, is adamant in his position that prior to any final agreement, Nortz was required to sign off.

Based upon all of the evidence, the testimony and exhibits, it is concluded that final agreement was not reached. While IBU contends that a final version of final agreement was advanced to Wheeler, Conklin had difficulty in identifying which of the union exhibits represented the final agreement. Wheeler, maintaining that the document tendered had problems that would never be approved by Nortz, nonetheless agreed to advance the document. That Nortz rejected the putative agreement is uncontroverted.

IBU maintains that based upon its expectations as to what the bargaining process was, with agreement first with the working group, there should have been immediate acceptance and signature by Labor Relations Director Manning. The problem with this analysis is that there is no evidence that the working group reached agreement among themselves. In this regard,

Wheeler, who was present at all later meetings involving Conklin, steadfastly maintains that the document was too complicated, that he voiced these concerns to Conklin and that he agreed to seek Nortz' approval only to placate IBU, but voiced an opinion to Conklin at that time that Nortz would not approve. While Conklin disputes the Wheeler version, he was unable to identify with certainty, which of the documents in the Union's exhibit file was the final version to which the parties had allegedly agreed. Additionally, there is no language in the various exhibits that addresses any other matters of concern to the IBU relating to the overall subject of crew endurance.

Having found that bargaining went on between authorized representatives of IBU and management officials with delegated or apparent authority on behalf of WSF, it is also found that no agreement was reached. There was no meeting of the minds. It is clear that the issue of crew endurance study resolution has gone on far longer than the issue would appear to warrant. It is also clear that bargaining has been hampered to some degree by insufficiently clear ground rules. Specifically, there does not appear to have been any one person designated as scribe for these negotiations. As a result, no one seems to know who was responsible for preparing the working agreement and making changes thereto. The entire issue of the working group's exact role is cloudy. There were no clear parameters set as to what areas were to be negotiated and what the authority of the participants was. These are matters which will be addressed in the Order to follow.

//

//

Based upon the above Discussion and Analysis, the following Findings of Fact and Conclusions of Law are entered.

FINDINGS OF FACT

1. WSF was mandated to conduct crew endurance studies by the United States Coast Guard, in 2001 and early 2002. When the Coast Guard implemented the new rules, the result was changes in the work schedules of ferry crew with greater rest periods between shifts, and elimination of certain (triple back) watches.

2. WSF and the IBU engaged in collective bargaining over the rule changes required by the crew endurance study over a period of months in Spring and Summer of 2002.

3. A more narrowly focused concern arose over the status of “on-call” employees, and the impact of the rule changes upon them.

4. The parties formed a working group to discuss the details that could give rise to an agreement over the on-call employees’ sub-issue of the crew endurance rules.

5. IBU’s participation in the working group included Dennis Conklin, John Ross, Marie Waterman, Dave McKenzie and Pete Jones.

6. Joe Nortz, Captains Malde and Saffle, and sometimes Captain Mitchell, and Bob Wheeler represented WSF in the working group.

7. The working group met eight times between May and late July 2002. Not all members of the working group attended each meeting. No clear understanding of the group’s authority or limits thereon were reached prior to the group’s discussion.

8. Detailed discussions were had about the respective parties’ concerns about implementing an on-call agreement. WSF was concerned that there be sufficient on-call employee coverage to allow year-round employees the option of vacation time or days off. IBU

was concerned that language which increased the requirement for on-call employees to accept dispatches be tempered with a just system of discipline if an on-call refused the dispatch.

9. WSF was concerned that an early trial period be part of the on-call agreement. It proposed a starting date of August through October 13, 2002 for a pilot program. Eventually discussion, which was protracted, resulted in pushing the pilot program dates back to run to January 4, 2003.

10. Labor Relations Director Mike Manning did not attend the later meetings of the working group. Director of Marine Operations, Joe Nortz attended only the initial meeting of this group.

11. At some point in the working group discussions, IBU representative Ross inquired whether WSF had representatives on the working group who could come to an agreement. IBU was reassured that the WSF representatives were the group who could get the job done.

12. Documents were prepared following working group discussions. After the final working group meeting, IBU prepared a final agreement, which it presented to WSF for signature.

13. WSF did not sign the document. It claimed that the document was too complex and would not be approved by Joe Nortz.

14. No further bargaining has taken place since this refusal to sign the agreement presented after the July 25, 2002 meeting.

//

//

CONCLUSIONS OF LAW

On the basis of the Record before it, the Findings of Fact and the discussion 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 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 47.64.130).
3. WSF delegated its bargaining rights regarding crew endurance and on-call employees to its Operations representatives on the working group.
4. WSF met numerous times with IBU representatives to the working group. Language was discussed and reduced to computer disc by individual members of the working group. No one person was designated to be the scribe for these working sessions.
5. After the final session on July 25, 2002, IBU presented a document, which it characterized as the final agreement of the working group.
6. There was no meeting of the minds as to the putative final agreement.
7. WSF has no obligation to sign the document prepared after the July 25, 2002 meeting.
8. There has been, nonetheless, far too much time elapsed since the bargaining obligation over crew endurance was recognized by WSF. Thus, IBU was certainly led to believe that the working group would work out the details of an agreement. Since preparing its version of the final agreement there has been no further negotiation between the parties. This lack of agreement in such an important area of mutual concern between the parties has contributed to an aura of hostility that can and should be remedied by the Marine Employees' Commission.

9. The Marine Employees' Commission will therefore issue a remedial Order, requiring the parties to resume bargaining over on-call and any other unresolved issues presented by the crew endurance rules. It is noted that IBU, after the close of the hearing herein, requested the MEC to order WSF to bargain over the unresolved issues of the crew endurance study. It is contemplated that the Order issued herein will address this issue.

ORDER

Upon request of the IBU, WSF will meet promptly and negotiate in good faith until an agreement is concluded concerning the rules imposed by the United States Coast Guard regarding crew endurance.

1. WSF will present an authoritative person or persons empowered to reach agreement, and if such agreement is reached, reduce said agreement to writing and sign such document.

2. During negotiations leading to such final agreement, WSF and IBU will first agree on designating one person as recorder to prepare the document, which will become the signed agreement.

3. WSF will notify the Marine Employees' Commission within 30 days of the date of this Order as to what steps it has taken to comply with this Decision and Order.

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 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.

DATED this _____ day of September 2003.

MARINE EMPLOYEES' COMMISSION

JOHN NELSON, Hearing Examiner

Approved by:

JOHN BYRNE, Commissioner

JOHN SULLIVAN, Commissioner