

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

INTERNATIONAL ORGANIZATION OF)
MASTERS, MATES AND PILOTS and)
TERRY LEE,) MEC CASE NO. 7-86
)
Grievants,) DECISION NO. 30A - MEC
)
v.)
)
WASHINGTON STATE FERRIES,) AMENDED FINDINGS OF FACT,
) CONCLUSIONS OF LAW AND
Respondent.) ORDER
_____)

Kenneth Eikenberry, Attorney General, by Robert M. McIntosh, appeared on behalf of Washington State Ferries.

J.E. Fischnaller, of Reaugh, Fischnaller & Oettinger, appeared on behalf of Captain Lee.

I. BACKGROUND

The Marine Employees' Commission issued its Decision No. 30-MEC on this case on June 15, 1987, in which the majority of the Commission, in the persons of Chairman Haworth and Commissioner Kokjer, upheld the Washington State Ferry System's disciplining of Captain Terry Lee, grievant, in connection with the April 14, 1986 ground of the ferry vessel Hyak. Commissioner Stewart dissented in a Dissenting Opinion issued on June 24, 1986.

On July 15, 1987, Captain Dave Boyle of the International Organization of Masters, Mates & Pilots, acting on behalf of Captain Lee, petitioned for review of the majority decision. On July 20, the Commission advised Captain Boyle that it would review that petition at its August meeting. On August 6, Assistant Attorney General Robert McIntosh, writing on behalf of Washington State Ferries requested dismissal of the petition. At its August 28, 1987 meeting, the Commission agreed to review its majority decision.

The process for conducting this review was ultimately established to be as follows. By October 27, 1987, the Grievant's Brief on Review was to be mailed to the Commission. At successive one-week intervals thereafter, Washington State Ferries was to mail a Reply Brief and, finally, if desired, Grievant was to submit a Reply Brief on Review.

These submittals were made and received by the Commission per this schedule. Upon consideration of the issues discussed in them and based on those issues, the Commission issues the following Amended Findings of Fact, Conclusions of Law and Order.

II. AMENDED FINDINGS OF FACT

Findings of Fact Nos. 1 through 3 are retained as stated in Decision No. 30-MEC.

The following Finding of Fact is added:

4. Paragraph 21.02 of Rule XXI of the Labor Agreement between the parties states that "The Employer shall prepare and disseminate to all Deck Officers a set of guidelines specifying rules of conduct and areas of responsibility for Deck Officers...Such guidelines shall list causes for termination, suspension, and demotion."

Findings of Fact Nos. 4 through 13 are retained as stated in Decision No. 30-MEC, but are renumbered 5 through 14, respectively.

The following Findings of Fact are added:

15. The vessel Hyak ran aground from 150-250 yards off Shannon Point (TR 128, 348, 403).
16. The failure to reconcile a difference in perception of appropriate distance to be maintained off Shannon Point was therefore a factor in causing the grounding of the vessel Hyak.
17. This managerial failure is attributable to Captain Lee as Master under the Master's Authority & Responsibilities as outlined in Washington State Ferries Policy Circular #01-R1.

Findings of Fact No. 14 and 15 are retained as stated in Decision No. 30-MEC, but are renumbered 18 and 19 respectively.

III. AMENDED CONCLUSIONS OF LAW

Conclusions of Law Nos. 1 through 7 are retained as stated in Decision No. 30-MEC.

The following Conclusion of Law is added:

8. The full requirements of just cause for discipline have not been met by Washington State Ferries in their disciplining of Captain Lee. In particular:

The relationship between the requirements of Policy Circular #01-R1 and the possible or probably disciplinary consequences of a Master in failing to meet any or all of them were not clearly defined by WSF management prior to their action with regard to Captain Lee.

The suspension of Captain Lee was an excessive degree of discipline given both the degree of managerial failure involved on his part and his excellent record of service with Washington State Ferries.

IV. AMENDED ORDER

Based on the foregoing amended Findings of Fact and in accordance with the above Conclusions of Law:

1. The suspension of Captain Terry Lee by Washington State Ferries management, as described in their April 17, 1986 letter, is ordered rescinded.
2. Washington State Ferries shall pay Captain Lee the wage he would have earned had he not been suspended for ten working days, in accordance with Article 21.03, WSF/MM&P Agreement.
3. Washington State Ferries shall restore full seniority to Captain Lee.

DATED at Olympia, Washington, this 5th day of December, 1987.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ DONALD E. KOKJER, Commissioner

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DISSENT

Although the amended majority decision is substantially in agreement with my earlier Dissenting Opinion in Decision 30A-MEC, I have declined to sign said majority decision for four reasons.

First, both by statute and by common law, the Order contained in Decision No. 30-MEC is final and binding upon the parties. Reconsideration and Amendment should occur rarely and only for specific reasons. (See RCW 47.64.280 and the discussion of reconsideration and amendment of awards in Elkouri and Elkouri, How Arbitration Works, 3rd Ed., 239 ff. See also Hall v. Seattle, 24 Wn. App. 357 602 P.2nd (1977).) The majority granted reconsideration and amended its award following request by a single party and without stating a reason for doing so.

Second, the majority insists on substituting its judgment on certain seamanship factors for that of the U.S. Coast Guard. Although they couch their discussion of the proper distances for turnaround maneuvers in terms of management, I believe they are making a de facto evaluation of Captain Lee's seamanship at the time of the grounding of the Hyak. The U.S.C.G. is the agency which is competent to judge pilotage, seamanship and the handling of a vessel at sea. The evidence is clear that the USCG found no fault with Captain Lee as the Master of the Hyak at the time of the ground. The majority de facto evaluation in the original Decision No. 30-MEC is continued in Decision No. 30A-MEC. In my opinion the majority is in error in that judgment.

Third, there is a contradiction between the majority Conclusions of Law No. 1 and the new No. 8. Although No. 1 concludes that WSF followed the contractual procedures in Rule XXI of the WSF/MM&P Agreement, the new No. 8 concludes that the full requirements of "cause" in Rule XXI were not met. I do agree with the latter conclusion; therefore, I believe Conclusion of Law No. 1 should be stricken or amended.

Fourth, I believe the award to Captain Lee as stated in the Amended Order is insufficient. Although the majority now orders rescission of the suspension of Captain Lee, the majority failed to order the purging of any references to the Hyak grounding and subsequent suspension from Captain Lee's personnel or other files and records. Although the majority orders WSF to make Captain Lee whole with regard to wages and seniority, the majority fails to assure that Captain Lee's other rights and benefits are made whole and protected, including protection from future negative evaluations.

CONCURRENCE

Although I have strong reservations regarding the Amended Decision No. 30A-MEC, as discussed in the foregoing dissent, I do agree with the Order as amended therein to the extent of the amendment. Despite my reservations about reassuming jurisdiction following the issuance of a final award, and despite my disagreement with certain Findings of Fact and Conclusions of Law in the Amended Decision, I do concur with the major conclusion of the majority, viz., that WSF violated the WSF/MM&P agreement by disciplining Captain Lee without a sufficient showing of cause. And although the Order, as entered by the majority, falls short of my expectations, I do believe that justice is being served by the majority decision as far as it goes. Therefore, I concur with entering Decision No. 30-A MEC.

Dated at Olympia, Washington this 9th day of December, 1987.

MARINE EMPLOYEES' COMMISSION

/s/ Louis O. Stewart
Commissioner