

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

|                           |   |                       |
|---------------------------|---|-----------------------|
| INLANDBOATMEN'S UNION     | ) | MEC Case No. 1-92     |
| OF THE PACIFIC,           | ) |                       |
|                           | ) | DECISION NO. 87 - MEC |
| Complainant,              | ) |                       |
|                           | ) |                       |
| v.                        | ) | DECISION AND ORDER    |
|                           | ) |                       |
|                           | ) |                       |
| WASHINGTON STATE FERRIES, | ) |                       |
|                           | ) |                       |
| Respondent.               | ) |                       |
|                           | ) |                       |

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Schwerin, Burns, Campbell and French, attorneys, by John Burns, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by Robert McIntosh, Assistant Attorney General, for and on behalf of Washington State Ferries.

INTRODUCTION AND BACKGROUND

On January 22 and 24, 1992, the Inlandboatmen's Union of the Pacific (IBU) filed two unfair labor practice complaints (ULP) against the Washington State Ferries (WSF). The Marine Employees' Commission (MEC) discussed the complaints at its monthly meeting on January 2, 1992 and in a telephone conference on February 10, 1992, and determined that the complaints were not specific enough to comply with WAC 316-45-050(3) and so notified IBU by letter on that latter date. MEC also noted that if the complaints were amended to comply with WAC 316-45-050(3) by February 18, 1992, MEC would resume discussion of the complaint at its next monthly meeting, February 21, 1992.

On February 11, 1992 IBU did file amendments to the complaints, and MEC did resume consideration. MEC determined that practices

described in both complaints may be unfair labor practices if later found to be true and provable. The practices described in the two complaints were similar enough that MEC assigned them to Commissioner Donald E. Kokjer for the purpose of determining whether they could be consolidated for hearing and decision.

On March 6, 1992, Examiner Kokjer convened a prehearing conference, following which he recommended to MEC that the cases not be consolidated. MEC Case No. 1-92 was thereupon assigned to Commissioner Louis O. Stewart to act as examiner pursuant to WAC 316-45-130.

On July 28, 1992 Examiner Stewart conducted a hearing, at which the parties agreed to file additional affidavits and post hearing briefs. Only WSF filed said affidavits. Both parties filed briefs.

#### VIOLATIONS ALLEGED BY COMPLAINANT

IBU alleged that WSF had engaged in unfair labor practices with the meaning of RCW 47.64.130(1)(a) and (e) and WAC 316-45-003(1)(a) and (e) by refusing to comply with a prior agreed-upon settlement of a grievance involving holiday-overtime pay (Douglas E. Schlieff v. WSF, dated January 11, 1990). Examiner Stewart advised the parties in the hearing notice that and again at the beginning of the hearing that the purpose of the hearing was only to determine whether agreement had actually been reached in the aforesaid grievance and not for the purpose of arbitrating said grievance.

#### POSITIONS OF THE PARTIES

##### Complainant IBU

IBU charged that WSF officials had agreed to settlement of certain grievances, but had refused to execute said settlement agreements.

IBU contends that repudiation of a settlement agreement is an unfair labor practice. IBU relies on B. N. Beard Co., 231 NLRB 191, Ellen Materials, Inc., 252 NLRB 1116 (1980), and Adams Iron Works, Inc., 221 NLRB 71 (1975) for that contention.

IBU asks MEC to "order payment of holiday or compensatory time in those and other cases that have arisen since July 29, 1991.

Respondent WSF

During the prehearing conference on March 6, 1992, WSF moved for dismissal of this ULP on the grounds that it is "inappropriate and vague." (Examiner Kokjer reserved ruling on the WSF motion.)

WSF denies that two of the grievances cited by IBU are relevant and admissible in this proceeding and denies that any of them were settled so as to create a precedent or past practice, and argues that failure to follow a past practice does not constitute a ULP, but is only grounds for another grievance.

With regard to the alleged settlement of the one remaining grievance, WSF argues that it cannot establish a binding precedent for past practice:

1. There was no "meeting of minds" between IBU's Dennis Conklin and the two WSF personnel managers;
2. There was no written memorandum of the "non-meeting;"
3. They never agreed to create a precedent by settling this case;
4. Settlements of the "Rice and Conklin levels" are "simple, routine matters and not precedent-setting,"

5. WSF's letter in an earlier 1990 payment for holiday overtime was explicitly not precedent-setting.

Then WSF argues that even if WSF created a precedent in settling Grievance No. 91-76 (Schlief, 1991 Thanksgiving Day), taking a contrary position in a different grievance cannot support a ULP charge, but should be considered as an additional grievance. WSF relied on Lockheed Aircraft Service Co., 44 LA 51 (1965), Elkouri and Elkouri, How Arbitration Works (4<sup>th</sup> Ed. 1985), and other authorities for that argument.

#### ISSUES

There was no stated agreement of the issue(s) in the present case; therefore MEC determines from the complaint and the ensuing record that the issues are as follows:

1. Did IBU and WSF reach a settlement agreement in IBU Grievance Nos. 91-76, 91-55 and 91-44?
2. If the answer to Issue No. 1 is "Yes," did WSF faithfully execute those agreements?
3. If the answer to Issue No. 2 is "No," does the failure to execute said agreements constitute an unfair labor practice?

Having read the entire record, the Marine Employees' Commission hereby establishes the following findings of fact.

FINDINGS OF FACT

1. IBU has long been recognized as the sole representative of certain WSF employees in a collective bargaining unit partially comprised of ferry terminal employees.
2. On January 23 1992 IBU Business Agent Dennis Conklin met with WSF Personnel Manager David Rice and Terminal Personnel Director Tom Opheim regarding certain grievances, two of which involved an alleged shortage of pay (or compensatory time credit) for overtime hours of work performed on recognized holidays for which premium wage was paid for work on the scheduled shift(s).
3. On January 24, 1992 Dennis Conklin sent a memorandum to Rice, Opheim and WSF Director of Human Resources Richard Jackson of his understanding of the results of the January 23<sup>rd</sup> meeting, as follows:

THE FOLLOWING IS A RECAP OF THE WORK DONE AT OUR MEETING YESTERDAY, 23 JANUARY 1992:

GRIEVANCE NO. 91-75; 1-23-92; DOUG SCHLIEF: 3 Hours Compensatory time to be paid.

NO. 91-55; 10-2-91; LINDA LINDSLEY: Review for Payment—to be finalized 1-30-92.

NO. 91-44; 7-28-91; LILA SMITH: Review for Payment—to be finalized 1-30-92.

I LOOK FORWARD TO OUR MEETING NEXT THURSDAY, JANUARY 30, 1992.

4. No other written summary of the agreement was made. The record is silent as to whether Conklin asked Rice to sign a settlement agreement. It was undisputed that Conklin had often followed his agreements with WSF by memoranda.

5. WSF Personnel Director David Rice testified that he had agreed to compensate Terminal Agent Doug Schlieff, but that he had misunderstood the grievance. He had thought Schlieff had been shorted three hours' pay. But the WSF Finance Office personnel informed him that this was claim for overtime payment.
6. In 1989 or 1990 Terminal Manager Carol Lien began the practice of altering time sheet claims for holiday overtime pay "to be consistent with what I regard to be the past and current practice—the payment of no additional compensation for hours worked beyond a regular shift on a holiday."
7. There is no substantial evidence in the record that Conklin and Rice and Opheim reached agreement on resolution of the grievances filed by Lila Smith and Linda Lindsley. On the contrary, Conklin's January 24 "recap" indicates in each "...to be finalized 1-30-92."
8. At their next meeting (presumably January 30, 1992) Rice informed Conklin that Schlieff would not be compensated for the agreed-upon three hours overtime.
9. The record is silent as to whether or not either IBU or WSF made any attempt to clarify the disputed interpretation of holiday overtime compensation at any IBU/WSF contract renewal negotiation either before or after these grievances.
10. The record is silent as to whether or not IBU applied to the Federal Mediation and Conciliation Service for arbitration of this matter, pursuant to the terms of Rule 16 of the IBU/WSF Agreement.

Having made the foregoing findings of fact, the Marine Employees' Commission now hereby enters the following conclusions of law.

## CONCLUSIONS OF LAW

1. MEC has jurisdiction over this subject matter and the parties involved. Ch 47.64 RCW, especially RCW 47.64.130 and 47.64.280.
2. Although Rule 16, IBU/WSF Agreement, sets forth certain time limits within which Steps I, II, and III must be invoked in case of disputes, and although the first meeting between IBU and WSF concerning a grievance based on Thanksgiving Day 1992 overtime work occurred on January 23, 1992, the record is silent regarding the timeliness issue. Therefore, MEC concludes that the January 23 1992 grievance meeting between IBU and WSF was timely.
3. Because the record is silent as to whether the terminal personnel have elected a Shop Steward to meet with terminal supervisor(s) for a Step I meeting, MEC may conclude that the January 23, 1992 meeting between IBU Port Agent Conklin and WSF personnel managers Rice and Opheim constituted Step I, or "local level," in the dispute process. Rule 16, IBU/WSF Agreement.
4. Although IBU clearly did not prove "beyond a reasonable doubt" that an agreement was reached in IBU Grievance No. 91-76 (Doug Schlieff, dated 1-23-92), the preponderance of credible evidence leads MEC to the conclusion that a settlement agreement was reached on that date. WSF Personnel Manager Rice admitted that he had agreed, even though he later recanted on the grounds that he had been mistaken. He admitted under oath that he had authority to reach the agreement. And it was undisputed that the practice after dealing with Rice was to send him a memorandum of agreement. MEC must conclude that repudiation of the settlement agreement of IBU Grievance No. 91-76 casts a chill on the dispute

resolution process in Rule 16 of the IBU/WSF Agreement. Step I is rendered useless if the union cannot rely on a settlement agreement at that level. Therefore MEC must further conclude that repudiation of the Doug Schlieff settlement constitutes an unfair labor practice. RCW 47.64.130(a) and (e). B. N. Beard Co., 231 NLRB 191, 96 LLRM 1123 (1997). Even if Rice had been mistaken in this routine grievance, such confusion would not release WSF from the obligation incurred thereby. B. N. Beard Co., Ibid.

5. The WSF Motion for Dismissal on the grounds of vagueness is well-taken as to IBU Grievance No. 91-44 (Lila Smith) and 91-55 (Linda Lindsley). In any event, the record is clear that no final agreement was reached in either of those grievances. However, the overall motion to dismiss is not well-taken. The allegations and facts presented regarding IBU Grievance No. 91-76 were not vague. The motion should be denied.
  
6. Because the record only indicates one prior settlement of a grievance concerning holiday overtime compensation, and it clearly settled for procedural reasons and specifically not on its merits, and because the January 23, 1992 settlement agreement between Conklin, Rice and Opheim was at Step I, or "local level," MEC finds that the said January 23 agreement on Grievance 91-76 (Schlieff) does not constitute a precedent interpretation of Rules 11, 25 and/or 26 of the IBU/WSF Agreement. Conclusive interpretation of these rules would have to be made at a higher level of authority or by arbitration under the present IBU/WSF Agreement. The alternative is to clarify the intention of the parties regarding overtime worked on a holiday during collective negotiations on amendment or renewal of said Agreement.



Having read the entire record including but not limited to the complaint, the hearing transcript, the exhibits, the affidavits, and the briefs, the Marine Employees' Commission now enters the following order.

ORDER

1. The Washington State Ferries Motion for Dismissal is hereby denied.
2. The Inlandboatmen's Union of the Pacific charge of unfair labor practice against Washington State Ferries is hereby upheld.
3. Washington State Ferries shall immediately compensate Terminal Agent Doug Schlieff for three additional hours at the straight time rate of pay or of compensatory time credit.

DONE this 23<sup>rd</sup> day of October, 1992.

MARINE EMPLOYEES' COMMISSION

/s/ DAN E. BOYD, Chairman

/s/ DONALD E. KOKJER, Commissioner

/s/ LOUIS O. STEWART, Commissioner