STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, Complainant, v. WASHINGTON STATE FERRIES, Respondent.	)	Case No.: No. 13-98 DECISION NO. 207–MEC DECISION AND ORDER

Schwerin, Campbell and Barnard, attorneys, by Dmitri Iglitzin, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by David Slown, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

These matters came on regularly before the Marine Employees' Commission on September 30, 1998 when the Inlandboatmen's Union of the Pacific (IBU) filed an unfair labor practice complaint against the Washington State Ferries (WSF). IBU's complaint charged WSF with engaging in unfair labor practices within the meaning of RCW 47.64.130 by interfering with, restraining or coercing employees in exercise of rights, and refusing to bargain collectively with representatives of employees. IBU alleged that WSF had failed to abide by the settlement in MEC Case No. 8-96 and in September 1998 unilaterally adopted a rule of not scheduling vacations of employees who had submitted requests pursuant to the contract.

Commissioner David E. Williams was assigned to act as Hearing Examiner. On October 23, 1998, Commissioner John Sullivan conducted a settlement conference in this matter. The parties failed to resolve the issue. A hearing was convened on November 10, 1998.

PRELIMINARY STATEMENT

This is a controversy regarding allowance of time for vacations to employees. The matter has

been accorded an especially accelerated hearing because of the proximity of Christmas 1998. The following analyses, opinion and disposition are grounded on that basic description of the immediate problem, i.e., vacations in that season.

In 1996, the parties here were involved in a controversy as to the employer's allowance of vacations to its union-represented personnel. Eventually, absent an agreeable solution to the problem, the union lodged a charge of unfair labor practice against the employer with this Commission (MEC Case No. 8-96). Thereafter, to their warranted credit, the parties settled the dispute, by means of concentrated collective bargaining, and with a written memorandum, reading as follows, in material part:

> 1. WSF agrees that the parties' current contract and practice allows employees to request vacation after the December date specified for initial vacation selection in Rule 20.03. If staffing levels are such that vacation slots are available for requested dates, such vacation requests will be allowed based on seniority.
>
> 2. The vacation requests of the following people will be honored for the specified dates, unless staffing levels are such that vessels would not be able to sail as scheduled due to crew shortages:
>
> | | |
> |---|---|
> | Claudia Leahy | (to be added) |
> | Stacey Peabody | (to be added) |
> | Karen Paulson | Nov. 26-30 |
> | Mark Souve | Dec. 24-27 |
> | Casey Jones | Dec. 25 and 26 |
> | Lee Anderson | Dec. 24 and 25 |
> | Shawn Robles | Nov. 28-30; Dec. 24-26 |

In effect, the settlement was then approved and adopted by the Commission with its formal dismissal of the union's complaint in favor of that negotiated and agreeable resolution reached by the parties themselves.

This, then, is a case, which to a significant extent, involved action of the Commission because the 1996 settlement was approved thereby expressly. Thus, the pertinent order includes the following recital.

> By facsimile on November 22, 1996, John Burns notified the MEC that the parties had negotiated a mutually agreeable settlement of this matter and requested the complaint be withdrawn. On December 2, 1996, MEC received a notice of withdrawal of the complaint from IBU counsel Cheryl French as well as signed copies of the parties' settlement agreement. Copies of the signed agreements are appended hereto and are included in this Order by reference.

Under such circumstances and the applicable and governing law, the Commission cannot knowingly countenance unilateral departure, by either party, from the documented, meaningful and commendable disposition of a serious dispute between them by the highly favored process, under the statute, i.e., by good faith and successful collective bargaining.

Therefore, the ultimate and immediate questions submitted by this case to the Commission are, relative to Christmas, (1) What was the intended and applicable meaning of its quoted 1996 order, and 2) What deviation, if any has been made therefrom, by WSF?

Each party has submitted a helpful brief, in support of its contentions. Those briefs have been duly considered by the Commission and the various arguments advanced thereby were weighed and otherwise evaluated. Although these admirable exercises in advocacy are certainly appreciated, it appears that, understandably, the ultimate contentions, regarding Christmas vacations, are summarized by "40" on the one hand and "72" on the other. It is against this background, that the case must be resolved reasonably, in fulfillment of the Commission's obligations.

FINDINGS OF FACT

1. Complainant, Inlandboatmen's Union (IBU) and Respondent, Washington State Ferries (WSF) are parties to a collective bargaining relationship, under chapter 47.64 RCW.

2. In the course of that relationship, the parties effected a collective bargaining contract which, in part, provided for allowance of vacations, by WSF, to employees, in the unit represented by IBU, as follows:

> 20.03 Vacation leave shall be taken at a time mutually acceptable to both Employer and employee. Vacations shall be scheduled to coincide with the employee's regular days off. Vacation scheduling will commence no later than November 1 for the succeeding year. All requests for vacation shall be in to the

employer by December 1st of each year. The employer will reply to each request by December 15th of that said year. Vacations will be scheduled by seniority in the Department. The Union will be sent copies of all requests, including the Employers replies.

3. In 1996, the parties were in dispute as to application of the quoted contract with respect to WSF's granting of vacation time to employees concerned.

4. Such dispute was referred by the IBU to the Commission with a complaint of unfair labor practice against the WSF (MEC Case No. 8-96). After such referral, by means of collective bargaining, the parties settled their disagreement with a formal memorandum in November of 1996. This document was lodged with the Commission on December 2, 1996.

5. Such formal agreement of the parties, in its germane aspects, reads as follows:

> 1. WSF agrees that the parties' current contract and practice allows employees to request vacation after the December date specified for initial vacation selection in Rule 20.03. If staffing levels are such that vacation slots are available for requested dates, such vacation requests will be allowed based on seniority.
>
> 2. The vacation requests of the following people will be honored for the specified dates, unless staffing levels are such that vessels would not be able to sail as scheduled due to crew shortages:
>
> | | |
> |---|---|
> | Claudia Leahy | (to be added) |
> | Stacey Peabody | (to be added) |
> | Karen Paulson | Nov. 26-30 |
> | Mark Souve | Dec. 24-27 |
> | Casey Jones | Dec. 25 and 26 |
> | Lee Anderson | Dec. 24 and 25 |
> | Shawn Robles | Nov. 28-30; Dec. 24-26 |

6. In December of 1996, the Commission, in reliance on the parties' quoted accord, "made and entered" its Order of Dismissal, in MEC Case 8-96, whereby such accord was designated as a part of the order by specific reference and by an actual attachment.

7. Relative to the operation and effect of the parties' 1996 settlement, the parties are again in dispute. Their dispute in this respect is at base in this case, resultant from the filing of another claim of unfair labor practice, against WSF, by IBU.

8. Although there are additional and related complaints, essentially, the parties current dispute is grounded on the difference between them as to the number of represented employees who ought to be granted vacation leave over the 1998 Christmas season by WSF. Thus, WSF contends that the maximum ought to be 40, while IBU submits that the total should be 72.

9. In this connection, WSF acknowledges that, in 1997, as response to the 1996 settlement adopted then by the Commission, it granted "Christmas off" to 52 unit employees. WSF has not established by a preponderance of the evidence that such 1997 allowance is no longer appropriate because of substantial changed conditions.

10. Although, in apparent and insistent good faith, IBU advances the assessment that 72 of those it represented were given a Christmas vacation last year by WSF, there is insufficient evidence of record in support of that submission.

11. Under the circumstances summarized hereinabove, IBU had a right to rely on WSF's 1997 allowance of "Christmas off" to 52, of those people for whom IBU is the bargaining agency.

12. Therefore, complementary to the provisions of WAC 316-02-005, and complementary to the relevant statutory objective, the Commission finds that WSF's proposed and unilateral departure in 1998, from that allowance of "Christmas off" to 52, of those represented by IBU, is in derogation of the collective bargain made, approved and recorded by all concerned, including the Commission, in December of 1996 (MEC Case 8-96).

13. The qualifications expressed in the noted 1996 agreement of the parties were not imposed then, and should not be imposed now in 1998, to reduce the allowance of Christmas time off below 52 people, provided however, that the parties must recognize the vessels concerned must be manned to an extent allowing them to sail.

14. The granting of "Christmas off" to 52 employees should not be avoided on the ground that vacations, in that quantity, may require overtime pay to others, by WSF.

15. Relative to the foregoing findings, it is noted that the parties will have an opportunity to resolve any residual problems as to the subject of vacation allowances by further bargaining now and in their upcoming general contract negotiations. They are encouraged to follow that course.

Accordingly, on the foregoing findings of fact, the Commission now makes the following conclusions of law:

CONCLUSIONS OF LAW

1. The complaint of unfair labor practice herein was filed timely, as was the answer thereto.

2. The Commission has jurisdiction over the parties and the subject matter of this action.

3. Among the fundamental principles of labor law, in the various jurisdictions across the nation, is the proposition that an employer, without notice, cannot, unilaterally effect a change in conditions of employment in the face of a collective bargaining relationship with an established union composed of its employees concerned.

4. An additional precept embodied in the labor law arena holds: "When conduct is both a breach of contract and an unfair labor practice there are two remedies available and both may be used." 4 Jenkins, Labor Law §23.14, p. 265.

Thus, the NLRB has found frequently that an employer's departure from a collective bargaining agreement, may constitute an unfair labor practice, e.g., Cope and Local 1076, Laborers Union, 322 NLRB 140 (1996) where in its decision, the Board said:

> The foregoing collective bargaining agreement provides, *inter alia*, for the payment of certain contractual wage rates to unit employees and for the monthly payment by the Respondent of moneys into fringe benefit funds established for the benefit of unit employees of the Respondent. Since about June 15, 1992, the Respondent has failed and refused to pay unit employees contractual wage rates and, since about July 1, 1992, has failed and refused to submit monthly payments into the fringe benefits funds for its unit employees.

> By the acts and conduct described above, the Respondent has been failing and refusing to bargain collectively with the limited exclusive collective-bargaining representative of its unit employees, and has thereby engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

5. For an additional example of a breach of a labor contract serving as the base for a finding of unfair labor practices, reference is made to Gateway Hotel Corp., 286 NLRB 91 (1988), regarding vacation pay. *See also* Kan Kan Foods, Inc. and UFCW, Local 770, 288 NLRB 73 (1988), where it was found that the employer's unilateral change of a contractual shift system was unlawful.

6. Another decision, which may be regarded as particularly applicable here, is VM Industries Inc. and Local 6, 291 NLRB 2 (1988), where the Board held that a refusal to bargain occurred when an employer breached its contract with the union by declining to honor the terms of an arbitration award which was returned against it in accord with the agreed process. In the instant matter, the 1996 order of the Commission is comparable to that arbitration award because, as noted, it was accorded the Commission's approval and served as the express and recorded basis for disposition of MEC Case No. 8-96.

7. In any case, the Commission has found, not infrequently, that a breach of collective bargaining contract effected by unilateral deviation from its terms by a party thereto amounts to a refusal to "bargain in good faith" as by the governing statute required. That doctrine is applicable here. No need to abandon that underlying concept has been demonstrated by either party here. While conceivably, the Commission could defer such cases to the arbitrators, it has not done so as a matter of settled policy.

8. In 1996, in MEC Case No. 8-96, the parties effected a written and enforceable settlement as to the standard for determining how many of WSF employees represented by IBU would be granted "Christmas off," by way of vacation, in 1997.

   That settlement was received, approved and recorded by the Commission in effecting agreeable dismissal of said Case No. 8-96, and is binding officially on the parties and each of them.

Under such settlement, as administered by the WSF, without objection from IBU, 52 people "got Christmas off in 1997."

9. Under the foregoing circumstances, the said agreement should be regarded as contemplating that at least 52 employees of WSF, represented by IBU, will be granted Christmas 1998 off, by seniority, under the agreements of the parties as to vacation allowances.

Therefore, the employer's unilateral determination that only 40 of such employees will be allowed such time off constitutes a refusal to bargain which, by RCW 47.64.130(e) is prohibited.

10. By way of remedy for such refusal to bargain, with respect to vacations, WSF shall allow not less than 52 members of the IBU bargaining unit off on Christmas of 1998.

ORDER

In accord with the foregoing findings, discussion and conclusions, it is hereby ordered that the claim of unfair labor practice herein ought to be and hereby is granted, and it is further ordered, by way of remedy for such violation that, relative to vacations, WSF grant Christmas off, by seniority, to no less than 52 of its employees represented by IBU, subject only to the requirement that the WSF have sufficient manning to allow its vessels to sail.

DATED this _____ day of December 1998.

_____

HENRY L. CHILES, JR, Chairman.

_____

JOHN P. SULLIVAN, Commissioner

_____

DAVID E. WILLIAMS, Commissioner