STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION OF THE PACIFIC, Complainant, v. WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, FERRIES DIVISION, Respondent.	CONSOLIDATED CASES MEC CASE NO. 19-06 and MEC CASE NO. 17-08 DECISION NO. 572 - MEC DECISION AND ORDER

APPEARANCES

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

Robert McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Department of Transportation, Ferries Division (WSF).

PROCEDURAL BACKGROUND

On January 27, 2006, the Inlandboatmen's Union of the Pacific filed a Complaint Charging Unfair Labor Practices with the Marine Employees' Commission. The IBU's complaint, MEC 19-06, charged Washington State Ferries with violating RCW 47.64.130 by 1) choosing to implement only certain provisions of the 2001-2003 collective bargaining agreement (CBA) rather than all of it; and 2) failing to abide by the terms of the settlement reached on January 9, 2006 in MEC Case 2-06 (concerns doctor's verification of sick leave for claims of five days or less). The parties reached agreement on the issues contained in Case 19-06 on October 30, 2006; however, the state payroll system presented obstacles to implementing the retro vacation award. The IBU and WSF continued efforts to resolve the issues.

On April 4, 2008, the Inlandboatmen's Union of the Pacific filed a related Complaint Charging Unfair Labor Practices with the Marine Employees' Commission. That complaint, MEC 17-08, charged Washington State Ferries with violating RCW 47.64.130 by 1) failing to correct errors in initial retro-leave payments or fulfill the annual leave credit provision of the

agreement in MEC 19-06; 2) incorrectly accruing leave based on cumulative hours worked rather than years of continuous employment; 3) rescinding its agreement to use 173.33 as the denominator when prorating part-time leave accruals and declaring it would use 174 instead; 4) failing to remove terminal agents (non-bargaining unit members) from the retro-vacation award; and 5) failing to develop a process to allow members to utilize their retro-vacation. Through the parties' settlement discussions, IBU and WSF were able to resolve all but Count 2 of MEC 17-08.

On December 24, 2008, the MEC consolidated Cases 19-06 and 17-08 for purposes of hearing. WSF filed its answer to the complaints on April 15, 2009. A hearing was conducted by Chairman John Swanson on September 14, 2009, on Count 2 of MEC Case 17-08, the one remaining unresolved issue from the two complaints.

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

1. The IBU's complaint charging unfair labor practices, dated January 27, 2006.
2. The IBU's complaint charging unfair labor practices, dated April 4, 2008
3. WSF's answer to the complaints, dated April 15, 2009.
4. Transcript and Exhibits from September 14, 2009 hearing.
5. Complainant IBU's post-hearing brief, dated November 13, 2009.
6. Respondent WSF's post-hearing brief, dated November 12, 2009.

ISSUES

Did WSF commit an unfair labor practice by unilaterally changing the method of calculating vacation accrual for on-call and part-time employees?

RELEVANT CONTRACT PROVISIONS

PREAMBLE

The Rules contained herein constitute an Agreement between the State Of Washington, (hereinafter referred to as the "Employer"), and the Inlandboatmen's Union Of The Pacific, Marine Division Of The International Longshore And Warehouse Union, (hereinafter referred to as the "Union"), governing wages, hours and other conditions of employment of employees as classified. All of the following Rules shall apply to the entire Agreement uniformly. Should any Rules in the subsequent Appendices, which by this reference are incorporated herein, modify these rules, such subsequent Appendices shall take precedent and apply only to those employees and/or conditions covered by the Appendix.

Emphasis added.

RULE 1 DEFINITIONS

SPECIFIC DEFINITION: Unless the context of a particular section of this Agreement clearly dictates otherwise, the following terms shall have the following meanings:

1.01 AGREEMENT

The term "agreement" shall refer to the present contract, of which this section is a part, as it presently exists between the Employer and the Union.

1.02 EMPLOYEE

The term "Employee" includes all persons in the service of the Employer classified in this Agreement.

1.06 TERMINATION

The term "termination" shall be the ending of an employee's employment with the employer.

1.15 PART-TIME EMPLOYEE

The term "part-time employee" shall be an employee who may or may not be working on a year around basis, and is not guaranteed forty (40) hours of straight time pay per week. The employee should be scheduled to work the greatest number of hours per work week based on their hire date as according to the appropriate Appendix and its Rules. The part-time employee may work, on a daily basis, any additional non-scheduled hours at the applicable rate of pay. When requested by a part-time employee, their schedule will include at least two (2) consecutive days off each work week.

Emphasis added.

1.16 ON CALL EMPLOYEE

The term "on call employee" shall be an employee who may or may not be working on a year around basis, and who is not guaranteed forty (40) hours of straight time pay per week. The employee will be assigned work based on their date of hire and availability.

1.26 CONTINUOUS EMPLOYMENT

"Continuous employment" shall be broken by resignation, discharge, termination or written notice of layoff of six (6) months or more.

Emphasis added.

RULE 5 – NON-DISCRIMINATION

5.01 The parties will not discriminate against any employee for activity, or lack thereof, on behalf of or membership in the Union. Neither the Employer nor the Union will discriminate against any employee or applicant for employment because of race, creed, sex, age, color, or national origin, in a manner which is in violation of applicable state or federal laws. This non-discriminatory policy shall be applicable to upgrading, demotions or transfer, layoff or termination, rates of pay or forms of compensation, recruitment or advertising and selection for training, including apprenticeship.

RULE 6 SCOPE

6.01 This Agreement shall apply to all unlicensed employees assigned to the Deck, Terminal, Information Department and Shoreside maintenance who are employed at the Department of Transportation's Washington State Ferries (WSF) and shall apply to all vessels and facilities of the WSF engaged in the transportation of passengers, automobiles, and freight on Puget Sound and adjacent inland waters, the Straits of Juan de Fuca, and the waters adjacent to the San Juan Islands and ports in British Columbia.

6.02 **The parties agree that the provisions of this Agreement constitute the complete agreement between the parties. Any letter or memorandum of understanding applicable to the parties shall be listed in the Appendix of this Agreement (Appendix "F") as a letter or memorandum of understanding that is in effect for the term of this agreement or a term specifically less than the term of the agreement. A letter or memorandum of understanding not listed shall be null and void. Letters or memorandums of understanding added to the agreement during its term shall specifically state the duration of the letter or memorandum of understanding not to exceed the term of the agreement. Also, it is expressly understood and agreed upon that no term or provision of this Agreement may be amended, modified, changed, or altered except by a written agreement executed by the**

parties. This clause does not constitute a waiver by either party of its duty to bargain pursuant to RCW 47.64.

Emphasis added.

RULE 18 – VACATIONS

18.01 Each employee with a minimum of **six (6) continuous months' employment shall** receive one (1) working day of vacation leave, with full payment for each month of **completed employment** up to and including twelve (12) months. Additional bonus days of vacation leave will be credited for satisfactorily completing the first two (2), three (3), four (4), five (5), seven (7), nine (9), eleven (11), thirteen (13), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), twenty-six (26), twenty-eight (28) and thirty (30) **years of continuous employment**. **Employees will accrue vacation leave according to the rate schedule in Subsection 18.02.**

Emphasis added.

18.02 Vacation leave, in accordance with the above, will be credited on the following basis:

6 months	9 years
6 working days	22 working days
7 months	11 years
7 working days	23 working days
8 months	13 years
8 working days	24 working days
9 months	14 years
9 working days	25 working days
10 months	16 years
10 working days	26 working days
11 months	18 years
11 working days	28 working days
12 months	20 years
12 working days	29 working days
2 years	22 years
13 working days	30 working days
3 years	24 years
15 working days	31 working days
4 years	26 years
17 working days	32 working days
5 years	28 years
20 working days	33 working days
7 years	30 years
21 working days	34 working days

18.05 **Each employee's anniversary date shall be twelve (12) months after entering service of the Employer.**

18.11 **Vacation credits as set out in Section 18.01 shall be prorated and credited on a monthly basis.**

18.12 **Vacation accruals for part-time and on call employees will be computed on an hourly basis (treating eight (8) hours as one (1) working day), based on the ratio of hours worked to normal straight time hours worked by scheduled employees during those periods.**

19.04 Establishing Seniority:

2. **It is understood and agreed that the "date of hire" will be used, prior to an employee attaining seniority as provided in 19.04 1, for all non-year around assignments.** Further, it is agreed that the employee's date of hire may be adjusted from time-to-time resulting from the employee's non-availability to work. Provided the Employer substantiates the employees non-availability by certified U.S. Mail, and the employee does not respond or state he is available for assignments within fifteen (15) calendar days.

Emphasis added.

FINDINGS OF FACT

On the basis of the evidence and the record of the proceedings, the Hearing Examiner hereby makes the following findings of fact.

1. In 2005, Michael Beck issued an interest arbitration decision, which included a retroactive vacation award for IBU members.

2. During implementation of Mr. Beck's award, IBU learned that WSF was using a separate accrual chart (not included in the parties' contract) based on hours worked, rather than using calendar years of service to determine the rate of vacation accrual for part-time and on-call employees.

3. The parties do not dispute that part-time employees earn a reduced vacation in a given pay period based on actual hours worked. This dispute (ULP) deals with the calculation or interpretation of "continuous employment." Rule 1.26. WSF has for some extended period of time defined and calculated part-time and on-call employees "continuous employment" for vacation purposes based on hours worked.

The parties have not agreed to or negotiated any change in Rule 1.26. Rule 1.26 is explicit in what constitutes continuous and has clear and unambiguous language as to how continuous employment is interrupted. Any change in Rule 1.26 is a mandatory subject of negotiations. Nothing in the record reflects that WSF or the IBU has proposed changes or negotiated changes in Rule 1.26 or its application related to part-time employees on their vacation credits.

4. For part-time and on-call employees, WSF has determined placement on the vacation accrual chart in Rule 18.02 by calculating the ratio of actual hours worked to 2,080 (normal straight time hours in a year), rather than by the employee's years of continuous employment.

5. Rule 18.01 specifies that employees with a minimum of 6-months' continuous employment earn 1-day of vacation leave for each month of completed employment, up to and including 12 months.

6. Rule 18.02 shows the rate at which IBU members accrue vacation leave (from 6 months to 30 years) or move up the vacation accrual ladder, depending on the length of continuous employment.

7. Continuous employment under the contract refers to an employee's continuous years of unbroken service to WSF. Under to Rule 1.26, "continuous employment" is broken by resignation, discharge, termination or written notice of layoff of 6 months or longer.

8. An employee's anniversary date is 12 months after entering the service of WSF. Rule 18.05.

9. Rule 18.12 provides for proration of vacation accrual for on-call employees.

DISCUSSION

A careful and complete review of the record in this case and the clear and unambiguous language in Rule 1.26 and Rules 18.01 and 18.02 can only lead to one conclusion. Vacation credits (working days earned for vacation purposes) are earned based on an employee's months and years of "continuous employment." "Continuous employment" can only be broken by resignation, discharge, termination or written notice of layoff of six (6) months or more. Rule 1.26.

There is no provision in the CBA or specifically in Rule 18.01—18.02 which remotely suggests that years of "continuous employment" are calculated on hours worked. There is also

nothing in Rule 1 that modifies or mitigates the specific unambiguous definition of Rule 1.26 "Continuous Employment."

There is no evidence in the record that IBU or WSF has attempted to modify or change the language in either Rule 1.26 or the language in Rule 18.01 or 18.02.

It is also evident in the present record that anyone—either the Union or an affected part-time employee would have difficulty determining how or by what formula accruals were being calculated for their individual accumulated vacation credits (working days of earned vacation.)

Testimony supports the conclusion that reported vacation entitlement during any bi-weekly period reported on an employee's payroll report is confusing to even the most knowledgeable employees, as apparent in testimony of both Jay Ubelhart and Dennis Conklin.

The Union and the Employer agree that a part-time employee's "continuous employment" credited vacation can be reduced (pro-rated based on the language in Rule 18.12.

The Examiner, in review of the evidence and the record does not find any evidence to confirm WSF's position, i.e., a part-time employee who has worked at WSF, been available to work, worked half-time for 11 years would only earn eleven and one half (11½) working days, and then because of half-time worked, would only be credited with five and three quarters (5¾) working days of vacation.

There is no contract language which can be interpreted to support WSF's application of working days earned by part-time/on-call employees. The unilateral, difficult to calculate contract interpretation by WSF, along with recognized inconsistent application of vacation credits, is not based on "continuous employment." WSF's unilateral change in the definition of continuous employment is a change in a mandatory subject of negotiations and was not bargained with or agreed to by the parties to the CBA.

Rule 6.02, a provision proposed by the Employer and agreed to in the CBA, cancels any reliance the Employer has on any past practice related to the vacation accruals and particularly any practice unilaterally implemented and not implemented in a way understood by either the employees involved or the Union leadership.

The standardization of basic contract terms has produced a logical and inevitable extension of the principle of assigning definition of words and terms like dictionary definitions unless the parties have specifically agreed to a different interpretation. In this case, the definition of "continuous employment" is without ambiguity.

Learned Counsel are both very knowledgeable and cognizant that specific language prevails and is controlling over general language. Even without the language in Rule 6 to change the definition of Rule 1.26, continuous employment requires negotiations between the parties because vacations are a mandatory subject of negotiations between WSF and IBU. Continuous employment cannot be unilaterally changed, modified, altered or eliminated as applied to vacations without negations.

CONCLUSIONS OF LAW

On the basis of the record before him the findings of fact and contractual and legal analysis, the Hearing Examiner makes the following conclusions.

1. The Marine Employees' Commission has jurisdiction over the parties and the subject matter pursuant to RCW 47.64.280 and 47.64.130.

2. The parties' 2007—2009 Collective Bargaining Agreement was in full force and effect during the time covered by this matter. The case is properly before the Marine Employees' Commission.

3. No evidence of procedural issues was raised regarding the matter.

4. WSF has made a unilateral change in the definition and application of "continuous employment" regarding part-time and on-call employees' vacation credits (working days earned).

5. This change by WSF was never discussed or negotiated with the IBU, in violation of RCW 47.64.130 (e).

ORDER

1. The Employer WSF unilaterally implemented a change in the definition of Rule 1.26 Continuous Employment as the rule applies to earned days of vacation, in violation of RCW 47.64.130 (e).

2. Vacation credits (working days) of vacation are to be awarded to part-time/on-call employees calculated as defined in Rule 1.26 based on continuous employment, not on hours worked.

3. The parties are directed to meet after receipt of this decision and determine when the retroactive vacation calculations for affected employees will commence.

4. In determining the retroactive application of earned vacations for part-time/on-call employees, the parties will in good faith consider whether WSF was applying vacation credits based on its expectation or belief that it was doing so with the Union's acceptance of WSF's practice.

5. MEC will retain jurisdiction over this Decision and Order until its implementation.

RECONSIDERATION

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration 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. A petition for reconsideration is not a prerequisite for seeking judicial review.

DATED this 8th day of December 2009.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Hearing Examiner

Approved by:

/s/ PATRICIA WARREN, Commissioner

/s/ JOHN COX, Commissioner