

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INTERNATIONAL ORGANIZATION
OF MASTERS, MATES AND PILOTS,

Complainant,

v.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, FERRIES
DIVISION,

Respondent.

MEC CASE NO. 19-08

DECISION NO. 550 - MEC

DECISION AND ORDER

APPEARANCES

Singleton, Gendler & Terrasa by *Jennifer Stair*, Attorney, appearing for the International Organization of Masters, Mates and Pilots (MM&P).

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

NATURE OF PROCEEDING

On May 27, 2008, the International Organization of Masters, Mates & Pilots filed a complaint charging the Washington State Ferries with violating RCW 47.64.130 by unilaterally implementing the return of Captain Tim Saffle to the fleet and allowing him to exercise his seniority by bumping into the fleet without following the terms of the collective-bargaining agreement.

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

The Hearing Examiner considered the following records in deciding the issues.

1. The MM&P's complaint charging unfair labor practices dated May 27, 2008.
2. WSF's Answer to the complaint filed July 11, 2008.

3. The official hearing transcript, one Joint Exhibit, one WSF Exhibit and five MM&P Exhibits.
4. Post-hearing brief of Complainant MM&P.
5. Post-hearing brief of Respondent WSF.

ISSUE

Did WSF commit an unfair labor practice by unilaterally returning Captain Saffle to the fleet and permitting him to return to his previously held assignment without negotiating with the Union?

FINDINGS OF FACT

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

1. The WSF and the MM&P are parties to a collective bargaining agreement governing the terms and conditions of certain employees of the WSF.
2. The parties stipulated to the admission of Joint Exhibit 1, which contains the history of the language contained in Section 20.09. With the exception of the 1995—1997 agreement, the language stated:

Any Deck Officer who has established seniority when elected or appointed to a full-time Union position, or when transferred to a position in Management, shall retain his/her seniority status throughout his/her term, or terms, of office, or throughout his/her employment in Management.

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3. During the term of the 1995—1997 agreement, the language of Section 20.09 included this additional language:

Seniority shall be frozen for a Deck Officer in the Port Captain's position, after holding that position for three (3) calendar years. If a Deck Officer returns to the fleet after the three (3) year period, the Deck Officer shall be allowed to bump into any position their license and seniority will allow. If a Deck Officer accepts any management position above Port Captain, the Deck Officer shall not accrue seniority as a Deck Officer and will not be allowed to return to the fleet. The current Port Captains are grandfathered for the time served prior to the effective date of this agreement.

4. Sometime in late March, 2008, Captain Tim Saffle informed Steve Rodgers, Director of Marine Operations for the WSF, of his intention to leave his management Port Captain position and return to the fleet.

5. The delegate committee is an elected group of MM&P members who are charged with negotiating and interpreting the contract.

6. Rodgers asked other ferry system employees and looked into personnel records to determine how similar situations had been treated in the past. His research showed a number of management and union officials who had returned to the fleet, but none within the past ten years. He produced a letter dated March 12, 1991 from Captain D. R. Schwartzman resigning his management position and requesting reinstatement to his previous position as Regular Relief Master (WSF Ex. 1).

7. Lee Anderson, Chairman of the delegate committee, spoke to Captain Schwartzman. Schwartzman told Anderson they created a position for him.

8. Several other examples were offered of employees returning to the fleet from management positions. None of those examples were recent. All of the testimony offered was hearsay.

9. Captain Saffle informed the delegate committee of his intention to return to his previously held assignment. The delegate committee researched and discussed the matter and informed Captain Saffle they did not believe the contract permitted him to return to his previously held position.

10. On April 28, 2008, Rodgers wrote a letter to Captain Michael Murray, an official in MM&P (Union Ex.1). The letter followed a conversation between Rodgers and Murray which took place during the course of contract negotiations. The letter informed Murray of Saffle's "desire to return to his previously held position" and cited Section 20.09. The letter also stated:

The contract language is silent as to how an employee returns from union office or management, so I reviewed past practices and found the common tradition is for the officer to return to their previously held assignment. I have therefore informed Captain Saffle he is to return to his previously held assignment as Master on the Point Defiance/Tahlequah "C" watch effective June 22, 2008.

11. In early May, Saffle and Terry Haffie, Marine Operations Resource Manager, began contacting bargaining unit employees, starting with the incumbent Master on the Point Defiance/Tahlequah "C" watch.

12. On May 8, Saffle and Haffie contacted Captain Al Furst and notified him he was being bumped out of his position on Vashon "G". Furst had received no advance notice that there was going to be a bump. He requested additional information and time (24 hours) to make his decision. That request was denied, but he was given the information and until the end of his shift to make his decision.

13. Addendum G of the collective-bargaining agreement covers the process used for seasonal bids. (Neither party submitted Addendum G or the collective-bargaining agreement into evidence.)

14. The contract has specific language covering the rights of union members returning from special projects, from temporary positions, return after medical leave, and filling a vacated position. It contains no language covering the voluntary return to the fleet from a management position.

15. Employees Jim Siburg, Greg Griffith, Al Furst, Greg Faust, Chris Curcio, Mike Sax, Dennis Hausdorf, Kelvin Sallette, Brett Wheeler and John Pelland were impacted by the bid.

ANALYSIS

Duty to Bargain

The WSF, in its post-hearing brief, contends there is no obligation to bargain over individual job placements. The issue before the Hearing Officer involves the retention and application of seniority under the collective-bargaining agreement. Seniority is clearly a mandatory subject of bargaining. The Commission rejects the WSF's contention there is no bargaining obligation.

Deferral to the Grievance Arbitration Process

The WSF contends this matter should be adjudicated through the collective-bargaining agreement's grievance and arbitration provisions. However, it did not enter into the record a copy of the agreement nor cite any specific contractual provisions under which a grievance could or should be filed. Finally, it did not argue how the grievance procedure could resolve the issue of bargainability. The Commission rejects the WSF's request this matter be deferred.

Past Practice

The WSF argues that while the agreement contains no specific language addressing how a return to the fleet from a management position is implemented, there is a longstanding past

practice of allowing employees in management positions who return to the fleet to “bump back” into the fleet. The Union contends no enforceable past practice exists.

The party arguing past practice has the burden of proof. In order to be upheld, it must be shown the past practice is mutual, verifiable, and readily ascertainable over a reasonable period of time.

The entire case of the WSF is built on hearsay. There are no recent examples of similar situations occurring at least within the past ten years. With the exception of WSF Exhibit 1, there is no documentation of any kind. WSF Exhibit 1 shows Captain Schwartzman’s request to return to the fleet and his intention to bump back to his previously held position, it does not show whether or not that happened. It is unclear from the testimony whether any of the examples raised involved a bump back to a previously held position. In fact, there is conflicting anecdotal testimony about positions being created and about return to different positions than those held at the time of departure.

The Commission finds the WSF did not meet its burden of proof and failed to prove a current binding past practice exists.

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CONCLUSIONS OF LAW

On the basis of the record before her, the findings of fact and analysis, the Hearing Examiner makes the following conclusions of law:

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 for decision.
3. It is an unfair labor practice for the WSF to refuse to bargain concerning a mandatory subject of bargaining.

ORDER

The charge filed by the MM&P, MEC Case 19-08, is sustained. The WSF is hereby ORDERED to, upon request, meet and negotiate concerning the manner by which management officials utilize their seniority in a voluntary return to the fleet.

The WSF is further ORDERED to restore Jim Siburg, Greg Griffith, Al Furst, Greg Faust, Chris Curcio, Mike Sax, Dennis Hausdorf, Kelvin Sallette, Brett Wheeler and John Pelland to their positions held before it unilaterally implemented Tim Saffle’s return to the fleet.

The WSF is finally ORDERED to make any of the named employees whole in any lost wages and/or benefits suffered as a result of the WSF’s unilateral implementation.

The MM&P’s request for attorney’s fees and costs is denied.

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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 31st day of October 2008.

MARINE EMPLOYEES' COMMISSION

/s/ PATRICIA WARREN, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ JOHN COX, Commissioner