

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

ROBERT O'HARA,)	
)	
Complainant,)	MEC CASE NO. 2-90
)	
v.)	DECISION NO. 65-MEC
)	
WASHINGTON STATE FERRIES)	EXAMINER'S DECISION AND
and INLANDBOATMEN'S UNION)	ORDER FOLLOWING REMAND
OF THE PACIFIC,)	OF DECISION NO. 53
)	
Respondents.)	
_____)	

Robert O'Hara, pro se, appearing for and on behalf of the complainant.

Kenneth Eikenberry, Attorney General, by Patricia Nightingale, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

Hafer, Price, Rinehart and Schwerin, attorneys, by John Burns, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

INTRODUCTION AND BACKGROUND

Robert O'Hara, an Able Bodied Seaman, has been employed in the Deck Department of Washington State Ferries (WSF) since 1981. He is a member of the Inlandboatmen's Union of the Pacific (IBU) which represents the unlicensed seamen in the WSF Deck Department. On March 2, 1990, O'Hara filed a complaint against both WSF and IBU, charging certain unfair labor practices pursuant to RCW 47.64.130. MEC assigned the matter to Commissioner Louis O. Stewart to act as examiner. Following due notice and hearing, Hearing Examiner Stewart entered Examiner's Decision No. 53 on July 13, 1990, dismissing O'Hara's complaint.

On August 7, 1990, O'Hara filed a Petition for Review of Examiner's Decision No. 53, challenging certain findings of fact therein and

complaining that Examiner Stewart's excusing of IBU following its presentation at the hearing "did undermine . . . (his) ability to support the burden of proof . . ." After reading and considering the entire record, the Commission entered Decision No. 58-MEC on September 11, 1990, ordering Examiner Stewart "to re-open the hearing for testimony which will resolve the issue raised in Point #2 of the Petition for Review." (Note: Examiner Stewart excused himself from consideration of the petition for review of his own work, and did not participate in the decision.)

ISSUE

"Point #2" in the Petition for Review reads as follows:

- 2) Re: Finding # 6 There has arisen a previously not conceived question as to exactly when, if ever, the "Agreement" became a legal contract between the IBU and WSF.

Finding of Fact No. 6 in Decision No. 53 reads as follows:

6. Transfer of full-time deck hands to part-time work is governed by Rule 21.15 in the WSF/IBU collective bargaining agreement . . . , as follows:

RULE 21 - SENIORITY AND ASSIGNMENTS

. . . .

21.15 Full-time employees may bid for a part-time shift without loss of seniority provided the employee demonstrates that retaining full-time work would create an extreme hardship. Hardship status shall require Employer and Union agreement. (emphasis added)

POSITIONS OF THE PARTIES

Complainant

O'Hara contended in the original case that he was unjustly denied a right to transfer from a full-time position (40 hours/week) to a part-time position (32 hours/week). WSF Port Captain Mecham had approved the transfer, but then had rescinded his approval after IBU objected, citing recent amendment to Rule 21.15 in the renewal of the WSF/IBU agreement. In Point #2 of his Petition for Review, O'Hara questioned whether the WSF/IBU Agreement as amended during renewal negotiations was a "legal contract," presumably at the time of transfer and IBU's objectives and Port Captain Mecham's rescission. Because Port Captain Mecham rescinded his approval of O'Hara's transfer from a full-time position to a part-time position on the basis of IBU's refusal to agree, pursuant to Rule 21.15, it follows by implication that if the new language in Rule 21.15 was not in full force and effect, IBU's objection may be invalid and, therefore, that Mecham's rescission of his approval of said transfer may be invalid.

Washington State Ferries

WSF argues that the 1987-89 WSF/IBU Agreement (Exhibit 1 of original April 30, 1990 hearing) became valid with the ratification by IBU, and by the signatures of Transportation Commissioner Albert Rosellini on 9/29/89 and of IBU President Burrill Hatch and IBU Regional Director Larry Mitchell on 6/26/89. WSF also argues and provides certain case law in support of the theory that an agreement seriously entered into by two parties constitutes a contract binding upon the parties. Further, when the Transportation Commission ratified agreements between WSF and all of the employee unions by Resolution 383 on November 15, 1990, it thereby made all those agreements effective on July 1, 1987, retroactively.

WSF also asserts that Complainant O'Hara only raised a question of whether IBU had ratified the 1987-1989 Agreement and "(t)he issue of whether the contract was properly executed on behalf of WSF was subsequently raised during the hearing by the Commissioner (Examiner Stewart)," thereby implicitly questioning whether ratification by the Transportation Commission was outside the scope of O'Hara's Petition for Review and the Remand by MEC.

Inlandboatmen's Union of the Pacific

IBU contended that, because IBU was dismissed from the case by the Examiner, IBU is no longer a party to the case and need not file a response to O'Hara's petition. However, IBU did appear and participate in the hearing ordered by the Remand.

IBU argues that the remand by MEC to Examiner Stewart goes to the issue of whether or not the WSF/IBU contract was "legally executed." IBU argues that "legally executed means signed." IBU asserts that "if the Union signs an agreement, the Employer relies on the signature whether or not there's been a ratification" IBU argues that "there's no need to hear evidence regarding ratification, because that's not at issue in the remand."

IBU also demanded that O'Hara pay witness fees and duplication costs caused by service of a subpoena on IBU Regional Director Larry Mitchell.

Having conducted the hearing ordered by Decision No. 58-MEC, and having read the entire record of the original proceedings and of the current remand proceedings, Examiner Stewart now enters the following findings of fact, conclusions of law, and order.

FINDINGS OF FACT

1. On or about October 6, 1989, WSF Port Captain Jerry Mecham approved Complainant O'Hara's request for transfer from a full-time (40 hours/week) at Winslow to the part-time (32 hours/week) "C" watch-Port Townsend. O'Hara began work on the 32-hour/week Port Townsend watch on October 10, 1989 and worked three days on that watch, at which time Mecham informed O'Hara that, because of new language in the WSF/IBU agreement, and IBU's disagreement with O'Hara's statement of hardship, Mecham had to rescind his approval of the transfer. O'Hara went back to his 40-hour/week watch at Winslow.

2. Transfer of full-time deck hands to part-time work was governed by Rule 21.15 in the 1985-1987 WSF/IBU collective bargaining agreement, as follows:

RULE 21 - SENIORITY AND ASSIGNMENTS

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21.15 Full-time employees may bid for a part-time shift without loss of seniority.

3. Rule 21.15 was amended in the 1987-1989 WSF/IBU agreement to read as follows:

RULE 21 - SENIORITY AND ASSIGNMENTS

.

21.15 Full-time employees may bid for a part-time shift without loss of seniority provided the employee demonstrates that retaining full-time work would create an extreme hardship. Hardship status shall require Employer and Union agreement. (Emphasis added)

Examiner's Decision No. 53 recognized this amended Rule as governing at the time of the O'Hara transfer.

4. Ratification of IBU bargaining agreements is governed by By-Law XV, Puget Sound Region, Inlandboatmen's Union of the Pacific, as follows:

XV. Voting on contract ratification shall be done only by members, full book and permit in good standing, directly involved in that contract. (Emphasis in original.)

5. The IBU ratification vote on the 1987-89 agreement, dated 5/1/89, was as follows:

Total Yes.....	306
Total No.....	84
Challenged.....	7
Void.....	<u>20</u>
Total Ballots Received...	417
Per cent Yes.....	78.7
Per cent No.....	21.5

6. The 1987-1989 WSF/IBU Agreement was signed on behalf of IBU by President Burrill Hatch and Regional Director Larry Mitchell, both on 6/26/89.
7. The 1987-1989 WSF/IBU Agreement was approved as to form by Robert M. McIntosh, Assistant Attorney General on 9/22/89, and signed by Albert Rosellini, Vice Chairman, Washington State Transportation Commission on 9/29/89.
8. Ratification of WSF collective bargaining agreements is governed by RCW 47.64.170(3), as follows in pertinent part:

47.64.170 Collective bargaining procedures.

. . . .

(3) . . . Any meeting of the transportation commission, during which a collective bargaining agreement is subject to ratification, shall be open to the public.

9. The WSF/IBU Agreement was ratified by the Washington State Transportation Commission by adoption of Resolution 383 on November 15, 1990 in public session.

10. The effective date of WSF collective bargaining agreements is governed by RCW 47.64.190(1), as follows:

47.64.190 . . . Effective date of agreements and arbitration orders. (1) No negotiated agreement or arbitration order may become effective and in force until five calendar days after an agreement has been negotiated or an arbitration order entered for each and every ferry employee bargaining unit. . . .

11. All seven WSF 1987-1989 collective bargaining agreements were signed by then Transportation Commission Vice Chairman Albert Rosellini on September 29, 1989. Each of the seven WSF agreements was signed by the respective union representative(s) prior to that date.

12. Retroactivity of WSF collective bargaining agreements is governed by RCW 47.64.170(7), as follows:

47.64.170 Collective bargaining procedures.

. . . .

(7) Until a new collective bargaining agreement is negotiated, or until an award is made by the arbitrator, the terms and conditions of the previous collective bargaining agreement shall remain in force. The wage and benefits provisions of any collective bargaining agreement, or arbitrator's award in lieu thereof, that is concluded after July 1st of an odd-numbered

year shall be retroactive to July 1st. It is the intent of this section that the collective bargaining agreement or arbitrator's award shall commence on July 1st of each odd-numbered year and shall terminate on June 30th of the next odd-numbered year to coincide with the ensuing biennial budget year, as defined by RCW 43.88.020(7), to the extent practical. (Emphasis supplied.)

13. The words executed and execution are defined by Black's Law Dictionary, 5th Ed., as follows:

Executed. Completed; carried into full effect; already done or performed; signed; taking effect immediately; now in existence or in possession; conveying an immediate right or possession. Act or course of conduct carried to completion. Term imparts idea that nothing remains to be done. The opposite of executory. See also Execution.

Execution. Carrying out some act or course of conduct to its completion. Northwest Steel Rolling Mills v. Commissioner of Internal Revenue, C.C.A. Wash., 110F.2d 286, 290. Completion of an act. Putting into force the completion, fulfillment, or perfecting of anything, or carrying it into operation and effect.

Execution of contract includes performance of all acts necessary to render it complete as an instrument and imparts idea that nothing remains to be done to make complete and effective contract. Travellers Ins. Co. v. Chicago Bridge and Iron Co., Tex. Cir. App., 442 S.W. 2nd 888, 895. . . .

14. Witness fees in King County at this time are \$10.00 per day. The record is silent as to whether the subpoenaed witness(es) demanded the fee at the time the subpoena(s) was/were served.

Having reviewed the petition for review, the Commission's remand order, the positions of the parties, the statement of issues, and

the foregoing findings of fact, Examiner Stewart now enters the following conclusions of law and order.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission (MEC) has jurisdiction over the parties and this subject matter. (Chapter 47.64 RCW; particularly RCW 47.64.130 and 47.64.280).
2. In order to determine whether a collective bargaining agreement is "legally executed," MEC must determine whether or not the agreement has been ratified by the parties.
3. The effective date for each WSF collective bargaining agreement is the latest of:
 - (a) The effective date as and if designated in the collective bargaining agreement; or
 - (b) The later of the dates of ratification of the respective parties; or
 - (c) The later of the dates of signatures by the respective parties; or
 - (d) Five calendar days after an agreement has been negotiated or an arbitration order entered for each and every ferry employee bargaining unit; or
 - (e) July 1st of the odd-numbered year.

The date of ratification by the Transportation Commission, November 15, 1990, is the date on which the WSF/IBU 1987-1989 collective bargaining agreement was executed.

4. The wage and benefit provision become effective retroactively on July 1, 1987. RCW 47.64.170(7).
5. The transfer provisions of Rule 21.15 do not fall within the wage and benefit provision of the WSF/IBU Agreement and, therefore, may not be retroactive with those provisions. RCW 47.64.170(7).
6. Retroactive application of the 1987-1989 WSF/IBU bargaining agreement may not nullify an otherwise valid transfer which was approved after the signature dates but before the new agreement was executed. See Philadelphia Federation of Teachers, Local No. 3, v. Board of Education of the School District of Philadelphia. Pa Supreme Court (1974) 88 LRRM 2163.
7. The interpretation of Rule 21.15 from the 1987-1989 agreement in Examiner's Decision No. 53 was in error. Rule 21.15 of the 1985-1987 WSF/IBU agreement (See Finding of Fact No. 2, supra.) was still in effect as of October 6-10, 1989 (RCW 47.64.170(7)); therefore the IBU disagreement with O'Hara's transfer was invalid, and Port Captain Mecham's rescission of the transfer must be declared null and void.
8. Because more than a year has elapsed since O'Hara last worked on "C" watch-Port Townsend, and conditions pertaining to the care and custody of his teen-aged son may have changed, O'Hara should be given a choice of assignment, i.e., whether he still desires to work on the Port Townsend run or continue to work at his present assignment.
9. IBU Regional Director Larry Mitchell is entitled to a witness fee of \$10.00, plus reproduction of exhibit cost, if Mitchell made such demand on O'Hara at the time the subpoena was served. RCW 2.40.020.

This examiner, having held the hearing as ordered by the Marine Employees' Commission and having re-read the entire original record of MEC Case No. 2-90 and the additional record in connection with the remand order, now enters the following decision and order, under the authority of WAC 316-45-150.

DECISION AND ORDER

1. Examiner's Decision and Order No. 53 is in error and should be and is hereby reversed.
2. The necessity that IBU agree to Robert O'Hara's transfer to "C" watch-Port Townsend and Port Captain Jerry Mecham's rescission of said transfer in October 1989 were invalid and are each hereby declared null and void.
3. Washington State Ferries shall immediately offer Robert O'Hara an opportunity to resume his assignment to "C" watch-Port Townsend or transfer to another watch working out of Port Townsend suitable to Robert O'Hara. Robert O'Hara shall not be compelled to accept the transfer if his conditions have changed since October 1989.
4. Complainant O'Hara shall immediately pay IBU Regional Director Larry Mitchell the sum of \$10.00 plus reproduction cost of subpoenaed records, provided that the demand for such fee was made at the time O'Hara's subpoena was served on Mitchell.
5. This order shall not be construed as binding on WSF or IBU with regard to any other complaint based upon the renewal of 1987-1989 WSF collective bargaining agreements. Such additional complaints, if any, shall be considered on their own merits.

6. Pursuant to WAC 316-45-350 the foregoing findings of fact, conclusions of law, and order are subject to review by MEC on its own motion, or at the request of any party made within twenty days following the date of entry of this order. In the event no timely petition for review is filed, and no action is taken by the commission on its own motion within thirty days following the date of entry of this order, the foregoing findings of fact, conclusions of law, and order shall automatically become the findings of fact, conclusions of law, and order of MEC and shall have the same force and effect as if issued by that Commission.

Dated this 13th day of December, 1990, at Olympia, Washington.

/s/ LOUIS O. STEWART, Examiner