STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before Chairman John D. Nelson

INLANDBOATMEN'S UNION OF THE PACIFIC on behalf of SUE MOSER, Grievant, v. WASHINGTON STATE FERRIES, Respondent.	MEC Case No. 21-02 DECISION NO. 327 - MEC DECISION AND AWARD

APPEARANCES

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

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

NATURE OF THE PROCEEDING

This matter came on regularly before John D. Nelson of the Marine Employees' Commission (MEC) on May 9, 2001 when the Inlandboatmen's Union of the Pacific (IBU) filed a request for grievance arbitration on behalf of Sue Moser, asserting that Washington State Ferries (WSF) denied Ms. Moser vacation pay at the rate to which she was entitled by the extant collective bargaining agreement (CBA) and the past practice of the parties.

IBU has certified that the grievance procedures in the IBU/WSF CBA have been utilized and exhausted. IBU has also certified that the Arbitrator's decision shall not change or amend the terms, conditions or application of said CBA, and that the arbitrator's award shall be final

and binding.

The arbitrator conducted a hearing in this matter on April 1, 2002. Briefs were timely filed by both parties on June 5, 2002.

The parties' agreement as to the parameters of the dispute to be resolved by the Arbitrator is binding on them and on him. Such agreement is accepted, therefore, as the test for determining the rights, in the material circumstances of the parties here, including those of Ms. Moser.

THE ISSUE

As an on-call Terminal Department employee, Ms. Moser was subject to the contractual pay based upon the classification in which she was assigned to work. Moser's bid entitled her to work at the Edmonds terminal as an on-call employee. When working her bid position, she would be paid one of three rates under the contract depending upon what job she had been called to perform. The three job classifications under the CBA are Ticket Seller, Ticket Taker and Terminal Attendant. Of these three classifications, the Ticket Seller, coded 705 under the payroll codes, pays the highest hourly rate while Terminal Attendant, coded 730 pays the lowest hourly rate. During the period of April 18, 20, and 21 of 2001, Moser was called to work at the Edmonds terminal and assigned Ticket Seller duties. She was appropriately paid at the Ticket Seller rate for her time worked. The issue in this case involves the proper rate of pay for time claimed as vacation following Moser's assignment to the Ticket Seller duties. Testimonial and documentary evidence was presented concerning interpretation of the CBA, particularly Rule 20.10 as well as Rule 2.01 of the terminal appendix to the CBA. Evidence of the parties' practice was also presented.

POSITIONS OF THE PARTIES

Position of IBU

This issue, according to IBU, is controlled by Rule 20.10 of the CBA which states as follows: "Vacation pay shall be computed on the basis of the straight time rate in effect at the time the vacation is taken . . . ." Any tension between the CBA rule and Rule 2.01 of the terminal appendix must be resolved by looking at past practice, which IBU maintains favors the granting of pay rate according to the assignment as of the last day worked prior to the taking of vacation time.

Position of WSF

This issue, according to WSF, is controlled by the clear language of Rule 2.01 of the terminal appendix B of the CBA which states as follows:

> **2.01** Terminal employees shall be assigned for payroll purposes to one of the classifications listed in Rule 19 and shall be paid at the specified rate for such classification for work performed therein and for paid time off to which they are entitled under the provisions of this Agreement. An employee working outside of regular classification on any day shall be paid for the entire shift at the rate of the highest classification to which the employee is assigned during such shift subject to the following exceptions:
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> A. Regularly assigned relief personnel (covering vacations, days off, etc.) who relieve Terminal employees shall be assigned to the highest classification worked and shall be paid at that rate for all work performed.
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> B. An employee required to work in a higher classification for the purpose of providing breaks will be paid at the pay equal to the higher classification in one-hour increments. If more than four (4) hours are worked in the higher classification then payment will be at the higher rate for the whole shift. All regularly scheduled traffic shifts that provide seller break relief will be identified in the terminal schedules prior to bidding.

While WSF agrees that there may be some past practice of treating this issue in accordance with the IBU's position, it maintains that such practice is at best spotty, and totally irrelevant when analyzed along with the clear and unmistakable language of Rule 2.01.

DISCUSSION

Sue Moser has been employed by WSF since 1999 and at the time of the action giving rise to the grievance she was employed as an on-call employee assigned to the Edmonds terminal. As such, she would be assigned to terminal attendant duties, or to selling or taking tickets depending upon the need of the Edmonds terminal. In the time preceding the filing of the grievance, Moser worked in all of the pay classifications covered by the Terminal agreement at Rule 19. She worked approximately 70% of her time as a ticket taker; 20% as a ticket seller and the remainder of time, or about 10% as a traffic or terminal attendant.

On April 18, 2001 Moser commenced an assignment as a ticket seller, which she continued to perform on her next two shifts worked, April 20 and 21, 2001. Following this assignment, Moser took vacation time for the following three workweeks. Because the payroll worksheets cover a two-week period, Moser's worksheet for the last two weeks in April showed the three shifts that she actually worked as a ticket seller and the following week as vacation time, but paid at the classification rate for ticket seller. The terminal agent evidently prepared this worksheet.

Upon return to work in May 2001, Moser noticed that her payroll worksheet, prepared in her absence, contained the classification for terminal attendant, which is the rate for which Moser was paid to compensate her for her next two week vacation period. Moser, after consulting with the terminal agents, submitted a corrected payroll sheet for the May 1-15, 2001 period, wherein she claimed the rate for the ticket seller classification. This payroll request was denied.

That confusion existed over the appropriate pay rate for Moser's vacation time can be seen in the different rates which she was paid, initially receiving the ticket seller rate, or pay code 705 for her first week of vacation, and then upon submitting the following pay order evidently prepared by a different terminal agent, receiving the terminal attendant rate or pay code 730 for the following period of vacation covering the period May 1-15, 2001. One basis for this confusion appears to be a practice or interpretation, to which the parties agree, treating deck department employees in the manner that the IBU maintains should apply to the Moser situation. That practice makes pay for vacation purposes based upon the straight-time rate of the last shift the employee worked. While WSF concedes this method for computing deck department vacation pay, it strenuously argues that employees in the terminal department must be paid in accordance with the provision of the terminal annex Rule 2.01.

Rule 2.01 was evidently negotiated when the terminal department was separated out of the deck department, apparently occurring in sometime between 1993 and 1997. The Appendix B rules, of which Rule 2.01 is part, were negotiated to apply to the terminal and information department, were designed to cover the conditions unique to those terminal and information department employees. It is clear that Rule 2.01 did not apply and was never intended to apply to the deck department employees.

IBU presented evidence of a past practice, which was permitted over the objection of WSF. The WSF contention does not deny the contents of the past practice evidence, but contends that the practice is irrelevant to the issues presented herein. Thus, in the case involving Lisa Diederichs, the issue was settled prior to hearing when no management official was available to attend the settlement conference and the issue was resolved by granting the IBU's position. WSF's counsel signed that settlement. IBU contends that because the settlement had

no reservation as to its lack of precedential value, it must be considered as establishing a practice. IBU further contends that Sheila Moen raised a similar issue when she filed a grievance in 1996. That matter was resolved in favor of the grievant, who was assigned to the deck department.

Both parties argue the legitimacy of the past practice as applied to this particular case. Thus IBU contends that the resolved grievance of Diederichs which contained no reservation as to its value as precedent makes it clear that the parties intended to look upon this as the new requirement under the contract. WSF to the contrary, says that no past practice can be attributed to this incident because it came about as a settlement that involved no conscious granting of precedent, and was formulated when it became impossible for WSF management to be present at the conference. WSF further argues that any practice to the contrary is irrelevant because of the clear contractual language of Rule 2.01. By implication, WSF would further argue that the Sheila Moen grievance has no value as precedent because there the grievant was assigned to the deck department, which WSF concedes, enjoys the practice that IBU would like to extend to the terminal department.

Both parties argue their respective points well. The more compelling argument, in the opinion of the arbitrator, is that advanced by WSF. While noting an agreement and practice as to the application of Rule 20.10 as applied to deck department personnel, it is altogether clear that the Rule 2.01 of the terminal and information department appendix was negotiated to deal with situations unique to the terminal and information departments. There is no language in Rule 2.01 that would require payment for vacations to be based upon the last shift worked prior to vacation. The practice, even if it were more prevalent or clear, could not overcome the language of Rule 2.01. The position that WSF takes as to the assigned payroll code applicable to on-call

terminal employees seems logical and consistently applied. It of course allows for a different rate to apply to employees who bid into longer-term positions.

Finally, and most importantly, the Arbitrator is not permitted to change or amend the terms, conditions, or applications of the collective bargaining agreement under applicable law. RCW 47.64.150

While it may be easier for both parties to administer a single rule which would apply to all covered employees, that is a decision for the parties to make within their collective bargaining process. As matters now stand, Rule 2.01 of the Appendix B to the agreement is binding on employees in the terminal and information departments. WSF has designated on-call terminal employees as terminal attendants for payroll purposes. Sue Moser was paid properly under the contract when she claimed her vacation for the period of May 1-15, 2001.

WSF contends that the proper classification for on-call terminal department employees is the payroll code 730, or terminal attendant. It is of course true, that if an employee is assigned to one of the other two positions of ticket taker or ticket seller, he or she would get the higher pay benefit of that assignment. When vacation pay is calculated, WSF maintains that the pay code 705, or terminal attendant would be the proper designation.

FINDINGS OF FACT

1. WSF and IBU are parties to a collective bargaining agreement covering all deck department and terminal and information department employees.

2. Sue Moser, an on-call terminal department employee worked at the Edmonds Terminal.

3. On April 18, 20 and 21, 2001, Moser was assigned ticket seller duties.

4. Ticket seller is paid a higher hourly rate than ticket taker or terminal attendant, all of which are classifications in which Moser has worked.

5. Following her work shift on April 21, 2001, Moser applied for and was granted vacation time for the following three weeks.

6. For the payroll period April 16 through April 30, 2001, Moser was paid at the payroll code 705 (ticket seller) rate.

7. For the remainder of her vacation time, payroll period May 1-15 Moser was paid at the 730 (terminal attendant) rate.

8. WSF classifies on-call, unassigned terminal department employees at the 730-payroll code or terminal attendant classification.

9. Moser objected to the vacation rate of pay that was paid to her for the May 1-15, 2001 period. When WSF refused to change the hourly rate, Moser grieved, and IBU brought the present proceeding.

10. At some previous time, all deck department, terminal and information department and terminal agents were covered under the same collective bargaining agreement. Presently terminal and information department employees are subject to Appendix B Terminal and Information Department Rules.

On such findings of fact, the Arbitrator now reaches the following:

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW.

2. There is in place a contract between IBU and WSF covering terminal department employees, including on-call employee Sue Moser. Rule 20.10 has been interpreted by the

parties to provide for vacation time to be computed on the basis of the straight time rate in effect at the time the vacation is taken.

3. In Appendix B to the agreement, Rule 2.01 sets forth the manner in which rates of pay are established in the terminal department.

4. WSF has determined that for payroll purposes, on-call terminal department employees are classified as terminal attendants.

5. Rule 2.01 of the Appendix B also provides for employees working outside of their regular classification to be paid according to the highest classification to which the employee is assigned during such shift.

6. The practice of the parties regarding vacation pay for deck employees is not controlling as to terminal department employees.

7. The practice of the parties cannot change the terms of the collective bargaining agreement in this case. Particularly, the Rule found at 2.01 in Appendix B permits the WSF to classify on-call terminal employees as terminal attendants unless such employee is assigned to a higher classification.

8. Rule 2.01 of Appendix B modifies Rule 20.10 of the collective bargaining agreement with respect to on-call terminal employees.

9. WSF did not violate the collective bargaining agreement when it refused Moser's request for vacation time calculated at the ticket seller rate.

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AWARD

The grievance of IBU to award vacation pay to Sue Moser calculated at the ticket seller rate for the May1-15, 2001 payroll period is denied.

DATED this ____ day of July 2002.

MARINE EMPLOYEES' COMMISSION

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JOHN NELSON, Arbitrator

Approved By:

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JOHN SULLIVAN, Commissioner

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JOHN BYRNE, Commissioner