STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, Complainant, v. WASHINGTON STATE FERRIES, Respondent.	MEC CASE NO. 34-04 DECISION NO. 484 - MEC DECISION AND ORDER

APPEARANCES

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

Rob McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries (WSF).

NATURE OF PROCEEDING

On February 11, 2004, the International Organization of Masters, Mates and Pilots (MM&P) filed a complaint charging the Washington State Ferries (WSF) with committing an unfair labor practice within the meaning of RCW 47.64.130 by interfering with, restraining or coercing employees in the exercise of rights; and refusing to bargain collectively with representatives of employees concerning their members parking on the new dock at the Clinton Terminal while on duty. MM&P alleged that prior to new construction on the dock, it was the custom and practice for MM&P members to park their cars on the dock while on duty. Since completion of dock construction, MM&P members have been denied permission to park on the dock.

On November 21, 2003 MEBA and the IBU jointly filed a complaint, MEC Case 26-04, which also charged WSF with an unfair labor practice over union members being restricted from parking on the newly constructed dock or terminal. On February 13, 2004, at MM&P's request, Case 34-04 was consolidated with Case 26-04.

Following consolidation of Cases 26-04 and 34-04, the parties participated in settlement conferences on February 17, March 24 and July 15, 2004. The following individuals were present for those settlement discussions:

- Jay Ubelhart, IBU
- Mario Micomonaco, MEBA
- Steven Ross, Local Counsel for MM&P
- AAG David Slown, Counsel for WSF

During the March 24, 2004 settlement conference, the parties agreed to hold the cases in abeyance while WSF negotiated with the Port of South Whidbey to use the Humphrey Road parking lot for WSF employee parking. The Humphrey lot is less than 660 feet from the end of the dock at extreme water's edge. WSF counsel negotiated the following arrangement with the Port of South Whidbey:

> The parties to these two cases agree to resolve these cases as follows:
> 1. Humphrey Lot: The WSF shall provide use of thirty (30) parking spots without charge to employees at the Humphrey Road parking lot adjacent to the Clinton Terminal for use by MEBA, IBU and MMP represented employees as long as the Port of South Whidbey operates the area of the lot as a parking lot.

(Ex. 19.)

The above arrangement became part of a settlement agreement, eventually accepted by MEBA and the IBU, but not by the MM&P. MM&P members continued to park at a privately owned

parking lot alongside the shore end of newly remodeled Clinton dock where they were charged a $3/day parking fee.

MEBA withdrew its complaint on February 3, 2005 and IBU withdrew on August 9, 2005. MM&P proceeded to this hearing.

On March 29, 2006, designated Hearing Examiner John P. Sullivan conducted a hearing for MM&P's complaint, Case 34-04.

RECORD BEFORE THE MARINE EMPLOYEES COMMISSION

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

1. MM&P's complaint charging unfair labor practices, filed February 11, 2004 (MEC Case No. 34-04).

2. Joint MEBA and IBU complaint charging unfair labor practices, filed November 21, 2003 (MEC Case No. 26-04).

3. WSF's Answer to the Complaints (34-04 and 26-04), filed January 20, 2005.

4. The official hearing transcript and twenty (20) exhibits, accepted into evidence.

5. Post-hearing brief of Complainant MM&P.

6. Post-hearing brief of Respondent WSF.

7. Administrative and/or judicial notice is taken of the MM&P/WSF collective bargaining agreement for June 1, 1999 through June 30, 2001, which remains in force to the present time, pursuant to RCW 47.64.170.

ISSUE

Did WSF commit an unfair labor practice by refusing to bargain with the MM&P regarding MM&P members parking on the Clinton dock once construction was completed?

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. The contract is silent regarding parking.

2. The WSF operates a terminal on Whidbey Island in the town of Clinton, Washington.

3. An aerial photo of the old WSF dock at Clinton taken in 1988 shows that the dock runs generally west to east, with the west end on the shore side and the east end open to the water. (Ex. 1.)

4. Between 1988 and 1990, approximately 10 cars parked were permitted to park on the southern-most lane which was then known as "lane 6." MM&P, MEBA and the IBU members parked in this area while on duty on the ferries and at the terminal.

5. In 1988, The Washington State Department of Transportation (DOT) applied for a Shoreline Development Permit for improvements to the Clinton dock. The WSF sought to make certain changes to provide for bus access and to increase the width of the pedestrian walkway. On September 8, 1988, Island County Hearing Examiner Michael Bobbink conducted a public hearing on the application. In his decision, issued on September 22, 1988, granting the permit, the hearing examiner found, among other things, "[t]hese changes will result in the elimination of employee parking on the Ferry dock." (Ex. 2.) Based on the WSF testimony, the hearing examiner also found as follows:

> The employee parking currently located on the dock will be replaced. The Department's Representative indicated at the Hearing that the Department was purchasing a parcel near the head of the Ferry dock for the purpose of replacing the employee parking currently taking place on the dock.

(Ex. 2 at 2.) The WSF never purchased the parcel of land referenced in the decision.

6. Beginning on or about July 2, 1990, Island Transit began dropping riders off using the southern-most lane formerly used for employee parking. As the result the lanes were re-numbered and employee parking was moved to northern-most lane, now lane number 6.

7. This parking situation continued until construction began on the Clinton dock in 1997. As of the beginning of construction, all employee parking on the dock was eliminated. The WSF provided no replacement parking. There is no evidence of a demand to bargain at or around 1997; there is no evidence that a grievance was filed; and there is no evidence that an unfair labor practice was filed. Indeed, I find no evidence of any discussion between the Union and the WSF regarding this situation in or about 1997.

8. In 2003, the construction on the Clinton dock was at the point of completion. Captain Terry Moore, a 20-year Captain with the WSF, raised the question of when parking on the dock would resume. On September 9, 2003, the WSF issued a Fleet Advisory, advising employees that "[e]mployee Parking is Not Available at Clinton Dock." (Ex. 6.)

9. On May 23, 2002, February 11, 2003 and October 28, 2003, Capt. Demeroutis sent letters to Mike Manning requesting bargaining on the issue of employee parking on the new Clinton dock. Mr. Manning did not respond.

10. As the result, on October 28, 2003, Capt. Moore filed a grievance with the MM&P regarding parking being denied to licensed masters and mates on Clinton Terminal. Shortly after October 28, 2003, four or five of the MM&P delegates and Capt. Moore met with Capt. Tim Saffle at WSF headquarters at Pier 52 regarding resuming parking on the Clinton dock. The

parties did not resolve the matter. On February 11, 2004, the MM&P filed this charge of unfair labor practices.[1]

ANALYSIS

In deciding whether an employer has violated its duty to bargain in circumstances like those presented here, the Commission must decide whether the employer has made a unilateral change in a mandatory subject of bargaining. *See IBU v. WSF*, 429-MEC (2004). Here, it is not disputed that parking benefits are mandatory subjects of bargaining. The contested issue in this case is whether there was a change to an established past practice allowing employees free parking on the dock. We have held repeatedly that the party asserting a unilateral change has the burden to show either a contractual provision or "a clear and consistent practice." *IBU v. WSF*, 429-MEC (2004). Furthermore, a past practice must be "unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed practice or policy accepted by both parties." *IBU v. WSF*, 183-MEC (1997).

Here, there is no doubt that WSF employees on duty were parking on the Clinton dock prior to 1988**.** Between 1988 and 1990, there is no dispute that parking was provided on the dock, albeit in a different location. However, in 1997 the WSF ceased to allow MM&P represented employees to park on the dock. There was no dispute that this was the case. The union, though, believed this was a temporary cessation of parking. The WSF did not share this view. Unfortunately, the parties never sat down and discussed it in 1997. Instead, six year later the union filed a grievance and, several months later, this unfair labor practice. Given this history, the practice cannot be said to be consistent or, in the Commission's words "readily ascertainable over a reasonable period of time as a *fixed* practice . . . accepted by both parties."

[1] The status of Ms. Moore's grievance is unclear from this record.

The union argues that it reasonably believed that this was a temporary hiatus in the existing practice and that the hiatus does not extinguish the pre-existing practice. While this argument has some appeal, the Commission finds no authority to support this notion, nor was any cited to us in briefs. Additionally, there is practical value to encouraging the parties to deal with issues as soon as they arise and discouraging the litigation of an issue that occurred many years before. Had there been evidence of the parties having agreed to or discussed taking a hiatus in an existing practice or had the hiatus been shorter than six years, the Commission might conclude differently. The Commission finds no such evidence in this case.[2]

While the Commission finds that there was no unilateral change in an existing practice in this case the Commission also finds, in 2002 and 2003, the MM&P made three requests to Mr. Michael Manning, WSF Labor Relations Manager, to bargain with WSF on the subject of employee parking on the new Clinton dock. Mr. Manning never replied. In this Commission's view, the utter failure to respond to the union's repeated requests to meet on this issue constitutes an unfair labor practice.

CONCLUSIONS OF LAW

On the basis of the record before him, 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] It is true, as contended by the union, that the WSF agreed to specific language in its contract with FASPAA allowing certain parking privileges. This, however, does not suggest that there existed a binding practice allowing employees to park on the dock; it suggests the opposite. The fact that the parties negotiated certain parking privileges implies that they believed that the benefit did not already exist as a matter of binding past practice.

2. The parties' 1999-2001 contract remains in full force and effect past its stated expiration date by operation of law (RCW 47.64.170). The case is properly before the Marine Employees' Commission for decision.

3. It is an unfair labor practice for the Ferry System "to refuse to bargain collectively with the representatives of its employees." RCW 47.64.130(1)(e). This prohibits the employer from making unilateral changes in mandatory subjects of bargaining without bargaining with the representative of the affected employees.

4. There is no current, binding past practice requiring the WSF to provide on-dock parking to MM&P represented employees.

5. Then WSF did not commit an unfair labor practice by failing to provide MM&P-represented employees with on-dock parking at the Clinton Terminal

6. The WSF did commit an unfair labor practice by failing to respond to MM&P's repeated requests to bargain over the issue of employee parking on the new Clinton Dock.

ORDER

The charge filed by the International Organization of Master, Mates & Pilots, MEC Case 34-04, is dismissed as to the allegation that the WSF made an unlawful, unilateral change in on-dock parking privileges for MM&P-represented employees. The charge is sustained as to the allegation that the WSF refused to respond to its requests to meet and discuss this issue. The WSF is hereby ORDERED to, upon request, meet and discuss the issue of parking for MM&P-represented employees at the Clinton Terminal.

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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 10th day of August 2006.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SULLIVAN, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ ELIZABETH FORD, Commissioner