STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration Before
John R. Swanson

INLANDBOATMEN'S UNION OF THE PACIFIC, Grievant, v. WASHINGTON STATE FERRIES, Respondent.	MEC CASE NO. 39-05 DECISION NO. 537 - MEC DECISION AND AWARD

APPEARANCES

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

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

ISSUE

Did Washington State Ferries (WSF) violate the Collective Bargaining Agreement (CBA) when it paid Jerry Reinhardt 16 hours of straight time pay for touring watches worked on October 1, 2006 and on November 2 and 3, 2006?

It is understood that if the CBA was in fact violated, all those employees falling under the umbrella of the unfair labor practice filed by the Inlandboatmen's Union of the Pacific (IBU) would be similarly treated.

If the CBA was violated, what is the appropriate remedy?

NATURE OF THE PROCEEDINGS

In September of 2004, IBU members were assigned K, L and M touring watches on the Friday Harbor/Anacortes scheduled run. The K, L and M crews had been on a scheduled run that began and ended (tied-up) in Friday Harbor. Some time after the beginning of the schedule and after bids had been circulated, the ferry was required to tie up in Anacortes. This tie-up in Anacortes took place when the K, L and M crews could not get back to their home port, Friday Harbor.

This obviously required the employees involved to be away from home and in Anacortes where restaurants and other accommodations were unavailable. Employees were only able to access limited accommodations on the vessel. The union filed grievances under the CBA and also an unfair labor practice (ULP), claiming a violation of the CBA and a ULP over a unilateral change in the tie-up (home) port without bargaining with the union.

The ULP was held in abeyance pending the arbitration proceedings before the MEC. The parties were provided the initial (August 6, 2007) and continued hearing (September 26, 2007) to submit all relevant evidence, testimony, exhibits and necessary preparation time to respond to any procedural or pertinent information necessary to complete the record. On December 7, 2007, both parties submitted post-hearing briefs to complete the record.

RELEVANT CONTRACT PROVISIONS

RULE 29 – WORKING CONDITIONS (GENERAL)

29.01 When a crew is required to deliver a vessel to a point other than its relieving terminal, time will be continuous until the crew is returned to its normal relieving terminal provided that the members of such crew take the first ferry en route to the relieving point.

Prior application of Rule 29.01: During the 1990's, WSF experienced a similar need to change a tie-up location of a vessel operating on the Point Defiance-Tahlequah route. In that

instance, WSF approached the IBU, advised it of the pending change, and the union and WSF agreed the provision of Rule 29.01 would not be applied in that instance.

In another situation, when the tie-up for the vessel on the Vashon route was changed due to construction, WSF used a relieving crew to bring the vessel to Seattle. In that case, Rule 29.01 did not come into play either.

It is unclear from the record whether the provisions in Rule 29.01 were expressly bargained, amended or there was a clear waiver.

RECORD BEFORE THE ARBITRATOR

The MEC has the following record before it:

1. Request for Grievance Arbitration, filed March 28, 2005.
2. Notice of Scheduled Settlement Conference held June 9, 2005.
3. Notice of Continued Settlement Conference held July 14, 2005.
4. Notice of Scheduled Hearing, March 8, 2006—cancelled.
5. Notice of Continued Hearing, October 25, 2006—cancelled.
6. Notice of Continued Settlement Conference held March 2, 2007,
7. Notice of Continued Hearing, July 12, 2007—cancelled.
8. Notice of Continued Hearing, August 6, 2007.
9. Notice of Continued Hearing, September 26, 2007.
10. The IBU and WSF Collective Bargaining Agreement for the period July 1, 2003 through June 30, 2005.
11. Transcript of the hearing conducted on August 6 and continued on September 26, 2007.
12. Exhibits accepted into evidence from both parties during the two days of hearing.

13. Post-hearing briefs from both WSF and IBU, filed December 7, 2007, completing the record.

POSITIONS OF THE PARTIES

WSF contends that Rule 29.01 is not applicable to this situation for several reasons:

First, WSF advised the IBU and the employees that the tie-up location for the vessel ILLAHEE might well change. WSF did so before the new bid package occurred. Thus, the union and employees had reason to inspect the bid package when they received it to see if the tie-up location had, in fact been changed.

Second, WSF sent out a bid package, which reflected the new tie-up location at Anacortes. Thus, when the affected employees exercised their bid, they had reason to know that they were bidding on a new tie-up location. And, in fact, one employee elected to bid another vessel for precisely that reason.

Third, Rule 29.01 does not apply in this kind of situation. The only time it has been applied in the past was in situations where a vessel was taken off its regular route to another route, or to some other location such as a shipyard. Furthermore, the express language uses the word “deliver” and the plain meaning of that word is not applicable to a change in the tie-up locations pursuant to a bid.

Fourth, the MM&P arbitration held that the employees were entitled to detention time, which is not found in the IBU agreement, but were not entitled to overtime penalties sought by the union in that instance. Also, unlike here, WSF was required to obtain prior approval before implementing a new schedule, and instead acted unilaterally.

Fifth, the IBU labor agreement does not require the WSF to obtain permission of a scheduling committee in order to change the tie-up location of a vessel in connection with the

bidding process. Thus, when the WSF changed the location regarding Point Defiance-Tahlequah case, it merely informed the union, and Rule 29.01 did not apply.

The IBU's position is that Rule 29.01 is directly applicable to this situation for the following reasons:

First, Rule 29.01 is precisely applicable to this situation. The intent of the provision is to compensate employees who are stranded at a location which is different from the one where they started their watch. Moreover, the express language of that provision requires payment of continuous time where, as here, the vessel is delivered to a point other than the relieving terminal, i.e., Friday Harbor.

Second, the only way WSF can avoid the application of Rule 29.01 is by obtaining a waiver from IBU. There would have to be an express agreement by IBU to waive application of its terms. This is confirmed by the prior case of the vessel operating on the Point Defiance-Tahlequah route where just such an agreement was obtained.

Third, the IBU specifically informed the Captain of the ILLAHEE that it could not make such a change without approval of the union. They did so at a meeting which occurred on August 17, 2004. That was five days after the bid package went out.

Fourth, knowledge of the change in the tie-up location cannot be reputed to the employees based on the bid package alone because some of the employees have no recollection of seeing it, whereas others who did see it believed WSF would continue to use the Z-crew, so it would have no impact on them.

Fifth, the provision of sleeping quarters is not remedial of a contract violation which has occurred in this situation. On the contrary, it imposed undue hardship on the crew in terms of the location, living arrangements and separation from family for an extended period of time.

Sixth, the changing of the tie-up location constituted a fundamental change in the character of the job, and thus required a system-wide bid pursuant to the terms of Appendix A, Rule 1.04 Vessel Shift Changes. Since this did not occur, Rule 29.01 must apply.

FINDINGS OF FACT

1. WSF and the IBU are parties to a collective bargaining agreement covering deck personnel employed aboard its vessels.

2. WSF operates the vessel ILLAHEE on its San Juan inter-island run. Historically and by agreement, WSF has used the port of Friday Harbor as a tie-up location for that vessel at the conclusion of its daily operations.

3. In the late summer of 2004, WSF closed one of the slips at Friday Harbor for construction related activity. Initially, WSF continued to use Friday Harbor as the tie-up location. It hired a Z-crew to baby-sit the vessel during the construction process.

4. In late summer, WSF informed the IBU that the tie-up location for the ILLAHEE might change to Anacortes due to the continuing construction in Friday Harbor. The IBU objected, and made no agreement on how that contingency would be handled from a contractual standpoint.

5. On August 12, 2004, WSF mailed a bid package to the IBU and all the deck hands per customary procedure. The package reflected a tie-up slip for the ILLAHEE at Anacortes, consistent with prior discussions; however the same document showed a relief-point as Friday Harbor.

6. On September 19, 2004, WSF implemented a Fall Schedule consistent with that bid. Thereafter, WSF proceeded to change the tie-up location of the ILLAHEE from Friday Harbor to Anacortes. WSF did not implement a bumping bid in connection with this change.

7. The deckhands working aboard the ILLAHEE "touring watches"[1] K, L and M were directly and adversely affected by the change in tie-up location.

8. The affected employees were forced to spend the nights of their two-week schedule in Anacortes, and could not return home to Friday Harbor. This was because by the time the ILLAHEE returned to Anacortes, the last boat for Friday Harbor had departed.

9. WSF provided the employees with sleeping quarters in Anacortes aboard the vessel. But, galley accommodations were minimal, stores and restaurants in Anacortes were distant from the terminal and were unavailable to the crew. The employees involved were unable to be home with their families as they would have been if they tied-up in Friday Harbor.

10. WSF paid the touring watch employees straight time for the sixteen (16) hours of the two work shifts and nothing for the eight-hour period between the shifts when they were on board the vessel, but did not physically work.

11. The IBU contested that payment and insisted that the CBA was violated and Rule 29.01 was applicable. Under that provision, the employees would be paid for the entire 24-hour tour, at double time for the two eight-hour work shifts and straight time for the rest period.

12. A grievance was filed by IBU member Reinhardt contesting the manner of payment. Thereafter, other grievances were filed on the same circumstances and subject as well. Similar grievances were filed by the deck officers of the ILLAHEE—the Masters, Mates and Pilots (MM&P) under their collective bargaining agreement.

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[1] A touring watch consists of two work shifts totaling 16 hours separated by a rest period of 8 hours.

CONCLUSIONS OF LAW

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

1. WSF has aggressively pursued the timeliness issue regarding the filing of IBU's grievances in this matter, but at all times during the processing of the MM&P's grievance, WSF has implied that the resolution of IBU's grievance may be resolved by the arbitrator's decision in the MM&P grievance. At no time can the arbitrator in this case find the issue of timeliness being an issue until the actual hearing taking place. The record supports a conclusion that WSF and IBU agreed to hold the grievances in abeyance until such time as MM&P's grievances were decided in arbitration.

Because the text of the MM&P contract was different, they made no ad hoc agreement to be bound by the arbitrator's decision.

2. On October 3, 2005, an arbitral decision was issued under the MM&P contract. Arbitrator Gaunt found that under Section 8.03 of that agreement, deck officers were entitled to either be relieved at the same terminal where they commenced their shift or be paid for hours when they were off duty, pursuant to the "detention pay" provision which is unique to that agreement.

3. Arbitrator Gaunt made three further findings which are relevant to this case. First, the change from Friday Harbor to Anacortes was a change in the relieving terminal as opposed to a mere change in tie-up location. Second, that the provision of sleeping quarters was not the exclusive remedy in that contract. Third, that the deck officers were not entitled to the overtime penalties sought by the MM&P over and above detention pay. [2]

[2] There is no Rule 29.01 in that MM&P collective bargaining agreement.

4. The record is clear with respect to the MM&P scheduling committee's authority. If the MM&P would have not objected or had accepted the schedule change, it may have impacted or affected IBU's grievance or ULP in the present case.

DISCUSSION

The first question I must consider is whether Rule 29.01 is applicable to this situation. It is also necessary to determine the effect of the MM&P's objection to WSF's change of the ILLAHEE's home port.

Let me begin by noting that the thrust of Rule 29.01 is remedial in nature. It is intended to compensate employees for hardships sustained when the vessel is moved per its terms. Those terms are broad and plenary.

They call for the payment of continuous time when a vessel is "delivered to a point other than its relieving terminal." Prior to the September bid, the relieving terminal was Friday Harbor. Thereafter, a temporary tie-up point was Anacortes. Thus, the ILLAHEE was moved "to a point other than its relieving terminal." That move constitutes a "delivery" based on the plain meaning of the term. If the intent was to limit the application of this provision to certain types of moves as the employer suggests, i.e., off route, shipyards, etc. or to not have it apply in situations such as the one involved here, then the language must reflect that fact, whereas here it does not.

I also reject the premise that the providing of sleeping quarters is the exclusive remedy under these specific circumstances.

Finally, as a matter of fundamental equity, I am mindful of the fact that while the employees in question suffered hardship as a result of this change, the WSF derived an economic

benefit from the discontinued use of the Z-crew. For these reasons, I find Rule 29.01 is applicable.

The second question I must consider is whether there has been an effective waiver of Rule 29.01 in the context of this case. WSF presents two arguments on point. The first argument is that the bid package which was sent out to employees on August 12, 2004 provided sufficient notification that the tie-up point would change. The problem with that argument is the record seems to reflect that the bid package in question continued to reflect Friday Harbor as the relief location. As a result, the employees could logically assume that they would continue to end their shifts in Friday Harbor, and the Z-crew would take over as before. In the alternative, the employees could assume that if the tie-up point did move to a point other than Friday Harbor, and they ended their shifts in Anacortes with no way to get home, then they would be entitled to continuous pay under Rule 29.01 since Friday Harbor was listed as relieving terminal.

The second argument is that WSF properly informed the union that the tie-up location might change. The problem with this argument is the unions objected to this change and the IBU did not agree to waive the provisions of Rule 29.01 in that instance. By contrast, the weight of evidence in this case indicates that the union did agree to waive the provision in the 1990's in a similar case of the vessel operating on the Point Defiance-Tahlequah route. In sum, I find no agreement to waive application of Rule 29.01.

The third question deals with the significant input necessary to change schedules contained in "VIII. Hours of Employment and Assignment" of the Masters, Mates and Pilots' collective bargaining agreement with WSF. It is clear, in order to change vessel schedules, agreement with the MM&P is a major factor. In this case, disagreement between the parties to change schedules took place. WSF chose to unilaterally change the vessel to tie up in Anacortes

in spite of MM&P's disagreement. This unilateral change by WSF, which it determined necessary, requires the payment of the applicable and required negotiated provisions in both the MM&P and IBU collective bargaining agreements.

The fourth question I must consider is whether penalty pay should apply over and above continuous pay, based on the terms of the original grievance. My analysis of all the facts in the case and a finding of mistakes or culpability on both parties conclude an answer of no. Furthermore, I make no finding of fact on whether the limitations imposed on employees as a result of the situation in Anacortes during the eight (8) hour rest period qualify as hours of work under FLSA for overtime purposes.

AWARD

Based on the record and evidence presented, I find WSF violated Rule 29.01 when it directed the ILLAHEE to tie-up each night in Anacortes instead of Friday Harbor, without paying continuous time to the IBU members on the K, L and M watches until they returned to Friday Harbor. I hereby order WSF to compensate the affected employees for the eight (8) hour rest period at the straight time rate for each night the ILLAHEE was at tie-up in Anacortes.

DATED this 25th day of January 2008.

MARINE EMPLOYEES'COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved by:

/s/ JOHN SULLIVAN, Commissioner

/s/ ELIZABETH FORD, Commissioner