

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC on behalf of
MATT WILLIAMS and
JOHN DICKSON,

Grievants,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 8-04

DECISION NO. 401 - MEC

DECISION AND AWARD

APPEARANCES

Dennis Conklin and Stuart Downer, Union Representatives, appearing for the Inlandboatmen's Union of the Pacific, Matt Williams and John Dickson.

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

NATURE OF THE PROCEEDING

On August 14, 2003, the Inlandboatmen's Union of the Pacific, Puget Sound Region (IBU) brought this matter before the Marine Employees' Commission (MEC) by filing a request for grievance arbitration, MEC Case No. 8-04.

MEC Case 8-04 concerns IBU's claim that WSF denied Matt Williams and John Dickson, crewmembers on a WSF vessel, penalty pay for clean-up of seagull excrement, in violation of Rule 30.05 of the IBU/WSF Collective Bargaining Agreement (CBA).

IBU has certified that the grievance procedure in the IBU/WSF CBA were utilized and exhausted. IBU also certified that the Arbitrator's decision shall not change or amend the terms,

conditions or application of said collective bargaining agreement, and that the Arbitrator's award shall be final and binding.

John P. Sullivan, a Commissioner of the Marine Employees' Commission, conducted a hearing in this matter on December 2, 2003, pursuant to RCW 47.64.150 and 47.64.280, Chapter 316-02 and 316-65 WAC.

RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION

The Arbitrator considered the following record in making the Findings of Fact and Conclusions of Law and Decision and Award in this case.

1. The Notice of Scheduled Settlement Conference and Hearing, issued by the MEC on August 29, 2003, which includes a copy of request for grievance arbitration, Case 8-04.
2. The official hearing transcript (December 2, 2003) and eight exhibits accepted into evidence.
3. Post Hearing brief of the IBU dated January 14, 2004.
4. Post-hearing brief of the WSF dated January 16, 2004.

APPLICABLE CONTRACT LANGUAGE

The IBU/WSF Collective Bargaining Agreement, April 1, 1983—June 30, 1985:

RULE 30-PENALTY PAY (General)

30.01 Penalty pay shall be at the straight time rate of pay and shall be paid in addition to whatever rate of pay (straight-time or over-time) is being paid when penalty work is performed. Except for the items specified below, penalty time shall be paid for time actually worked with the minimum payment of one-half (1/2) hour and in one-half (1/2) hour increments thereafter.

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30.06 When required to clean-up excrement and /or vomit.

Rule 30 is the same in both the 1983-1985 and the 1999-2001 IBU/WSF contracts.

Rule 30.06 in the earlier contract has been changed to Rule 30.05 in the latter version on the same subject and reads as follows:

30.05 When required to clean up excrement, and/or vomit as well as blood: One-half (½) hour minimum. The clean-up of blood does not include the emptying of sanicans in the women's rest rooms but requires that employees actually must clean or remove blood spillage or bloody items that are otherwise not in lined containers and where there is actual physical contact with the spillage or bloody items.

From the current 1999-2001 IBU/WSF contract:

RULE 1-DEFINITIONS

SPECIFIC DEFINITION: Unless the context of a particular section of this Agreement clearly dictates otherwise, the following terms shall have the following meanings:

The CBA then goes on to list specifically Rules 1.01 to and including Rule 1.26, following Rule 1.26 there is a separate concluding paragraph that is unnumbered that reads as follows:

OTHER DEFINITIONS AND TERMS. Unless the context of a particular section in question indicates otherwise, all other words and terms used in this agreement shall be given their common and ordinary meaning.

ISSUE

The parties, WSF and IBU, Mr. Williams and Mr. Dickson, stipulated and agreed that WSF has for years paid penalty pay to deck crewmembers for the clean-up of dog poop and horse poop, as well as human excrement. The parties have further stipulated and agreed that the issue for a decision in this case is whether the word excrement, in Rule 30.05 of the parties' collective bargaining agreement, includes bird droppings/excrement.

If so, are ABs Williams and Dickson entitled to penalty pay for their clean-up of bird droppings/excrement on July 28 and 29, 2002?

POSITIONS OF THE PARTIES

Position of the IBU

The 1983-1985 CBA, Rule 20.01 spells out the rate of the penalty pay which is in one-half (½) hour increments at the straight time rate. Penalty pay is payable pursuant to Rule 30.06, “When required to clean-up excrement and/or vomit.”

Rule 30.01 of the 1999-2001 CBA is identical to that rule in the earlier CBA; however, Rule 30.06 in the 1983-1985 CBA has a slight addition and has been changed to Rule 30.05, “When required to clean-up excrement and/or vomit as well as blood”

The CBA states, if you clean up excrement, you get penalty pay. The CBA does not differentiate between the species that caused it. There is no exception in the CBA and there is no attempt to clarify how much or how little excrement you clean up. When you have cleaned up any excrement, you receive penalty pay, and bird droppings are excrement.

The 1983-1985 CBA was the first to contain “When required to clean up excrement.” During those negotiations there were discussions between WSF and IBU that was specific about clean-up of bird feces on the weather decks.

For the past 20 years, the CBAs have been clear and unambiguous—if you clean up excrement, which is a health hazard, you receive penalty pay.

Position of WSF

It has been the custom and practice for over 20 years that the deck watch never requests or seeks penalty pay for the normal routine weekly clean-up of the weather decks, which at times includes bird droppings or excrement. Deck crewmembers have not claimed or received penalty pay for this normal routine work.

WSF is not aware of any health hazards associated with the normal routine weekly cleaning of the weather decks of bird droppings or excrement.

Penalty pay has been paid for clean-up of dog excrement, horse excrement and human excrement. There have been incidents preapproved by the Master or Chief Mate where penalty pay was specifically authorized for clean-up of large accumulations of bird excrement.

FINDINGS OF FACT

1. On July 28 and 29, 2002, AB Williams and AB Dickson were employed on the ferry HYAK which was on the Seattle/Bremerton route.

2. The HYAK is one of four super class ferries. There are 24 passenger and vehicle ferries in the Washington State Ferries' fleet, which carry 23 million passengers.

3. ABs Williams and Dickson were working on the promenade deck where passengers can walk. The deck is outside, exposed to the elements and is also identified as the weather deck.

4. Certain areas of the vessel are assigned to crewmembers for clean-up. Cleaning the promenade/weather deck was part of the normal assigned weekly routine for Williams' and Dickson's watch.

5. On both July 28 and 29, 2002, ABs Williams and Dickson worked cleaning up bird droppings or excrement from the promenade/weather deck and put in for ½ hour of penalty pay for each day. They were denied the penalty pay.

Both pay orders read as follows: "Soogie bird droppings on prom deck employee request P.T." The line below reads: "Disputed by Master – do not pay. AB" The initials A.B. stand for Captain Al Birkland who was the Master of the HYAK on July 28 and 29, 2002.

6. AB Williams' testimony that he and Dickson were directed by the vessel's Chief Mate to go up to the promenade deck and clean up the bird excrement on the deck, bulkheads,

handrails, benches and windows was undisputed. They used brushes, hoses and paint scrapers. The excrement was thick and runny in some areas and in other areas, thick and hard, requiring the use of paint scrapers to break it free and remove it.

7. It is the WSF policy to pay penalty pay if preapproved by the Master or Chief Mate “when required to clean up” a large concentration of bird droppings/excrement in the areas used by passengers. Such clean-up would amount to a special project beyond the normal routine cleaning that is done every week.

DISCUSSION

Pete Jones

Peter Jones, worked for WSF for 34½ years, starting in 1966 and retiring in December 2002. During his service, he worked in all unlicensed deck department positions. He has been an IBU union officer since 1980; at his retirement he was Regional Director of the IBU.

As a union official, Mr. Jones participated in negotiating six contracts between the IBU and WSF, including the April 1, 1983—June 30, 1985, which was where Rule 30.06, “when required to clean up excrement and/or vomit” first appeared.

Mr. Jones testified that while he was working in the fleet from 1985 to 1997, he was not aware of any ABs or OSs that were paid penalty pay for their routine cleaning of the promenade/weather deck. Pete Jones never requested or sought penalty pay for this type of work.

Matt Williams

Mr. Williams is an AB Seaman who has been employed by WSF for ten years. His standing orders include housekeeping, which is basically cleaning and maintenance of the vessel which is done weekly in his assigned area and includes the promenade/weather deck.

Until July 28 and 29, 2002, Mr. Williams had never cleaned up such a large amount of bird droppings/excrement, which he was directed to do by the Chief Mate. Mr. Williams described this assignment as a special project, not the normal routine weekly clean-up.

Mr. Williams testified that prior to July 28 and 29, 2002, he had not put in for penalty payment, after soogieing exterior decks in his normal routine weekly cleaning that included cleaning bird droppings or excrement.

John Ross

John Ross has been an AB with WSF for five years. His normal routine weekly duties included being assigned to clean up the promenade/weather deck. This normal clean-up was done with hoses and brushes. At times there were bird droppings or excrement on the promenade/weather decks.

In his five years with WSF, AB Ross never requested penalty pay for this routine cleaning of the promenade/weather decks.

In May 2003, the ferry KCLICKITAT was in Eagle Harbor, WSF maintenance yard for the annual US Coast Guard inspection. Part of the inspection included dumping the life jackets from the overhead lockers to the deck below a distance of about 12 feet. The life jacket had been stored since the last annual USCG survey. Dried bird excrement was on the tarps and life jackets and it was like a dust in the air when the life jackets were dropped to the deck below.

AB Ross described the scene of the dried excrement dust as follows. “It was in the air, on the deck, in my hair, in my underwear. I mean it was all over. It was inside my coveralls . . .”

The Mate on the vessel told Mr. Ross and his working partner Finn Livingston “that he would put in for penalty pay for dealing with the hazardous material, fecal matter, guano, bird

excrement.” Finn Livingston talked with the H & R Port Captain Saffle who said the two of them would be paid the penalty pay.

In 2002, at another annual USCG inspection, AB Ross had the same thing happen to him which occurred on the KLICKITAT in May 2003, and he was also paid penalty pay.

These two incidents were the only times he received penalty pay for cleaning up bird excrement. He never requested any penalty payment for the normal weekly clean-up of the promenade/weather deck that he had been doing for five years.

Finn Livingston

Finn Livingston has been working for WSF for almost 27 years in various jobs on the ferries, presently as an AB Relief.

AB Livingston said that during the annual USCG inspection for the KLICKITAT in May 2003, the Mate signed his pay order for penalty pay. The Master of the KLICKITAT talked to H & R Port Captain Saffle and Mr. Livingston was paid an hour of penalty time as was AB Ross.

AB Livingston testified that it was normal routine to weekly clean the promenade/weather deck every week and it was normal to find bird droppings on the weather decks, and this was normal during the roughly 27 years he worked on the passenger and vehicle ferries. He further testified that he never claimed penalty pay for this normal routine cleaning of the weather decks.

In addition, AB Livingston was not aware of anyone who had been paid penalty pay for that sort of routine weekly cleaning of the weather decks.

James Garner

James Garner, an AB with WSF for 11½ years, testified that on November 15, 2003, he was ordered by the Mate on the vessel on which he was serving to remove a safety hazard on the

car deck where passengers would walk. He remedied this safety hazard by cleaning up the bird feces on the car deck and in the spring line work area where the mooring line or spring line was required to be rigged or placed to tie up the vessel.

AB Garner filled out his request for penalty pay for ½ hour on November 30, 2003, which stated, “7) Penalty pay clean-up bird feces in spring line working area.” He was paid the penalty time.

He also indicated he had been paid for cleaning up bird feces in the past, but could not identify any specific dates.

Dennis Conklin

Dennis Conklin worked in the WSF fleet in the deck department for eleven years, from 1979 to February 15, 1991 when he became Business Agent/Patrolman for the IBU and has continued in that position to the present time. He did not testify that he had ever requested or been paid penalty time for the normal routine weekly cleaning that included bird droppings, or excrement from the promenade/weather deck that he and his watch were assigned to clean weekly.

Captain James Malde and Captain Tim Saffle

Captain James Malde is the South Region Port Captain and Captain Tim Saffle is the H.R. Port Captain and both serve on the pay audit team along with their other duties.

Captain Malde has been with WSF for 30 years and Captain Saffle for 28 years. Both Captains started out as Ordinary Seamen in the deck department and advanced through the unlicensed and licensed departments. They have sailed on all the ferry routes and the majority of the different types of vessels. Captain Malde has been a Port Captain since 1995 and Captain Saffle a Port Captain since 1999.

Captains Malde and Saffle both testified that it is a normal weekly routine for the crew or watch on each vessel to clean the promenade/weather deck area, as assigned, every week, and that at times there are bird droppings or excrement on the deck. They also testified that it has not been the practice or policy of WSF for at least 30 years to pay penalty time for this routine weekly cleaning of the decks.

Both Captains served on the four-person pay audit team who, every two weeks, have a day and a half to review between 1200 and 1500 pay orders. They pointed out that a single pay order could be missed, which may be an explanation for why AB Garner was paid. They have routinely denied requests for penalty pay for routine normal weekly cleaning of the promenade/weather decks, since this is the normal standard work the ABs and OSs do as part of their standing orders.

Mark McElwaine

Mark McElwaine, a licensed Master Mariner, and WSF's Fleet Safety Coordinator testified on the subject of workplace safety. He testified that bird droppings or excrement, in modest amounts are generally not regarded by safety professionals as presenting significant health risks. He consulted with WSF Industrial Hygienist, the Center for Disease Control (CDC) and several different state health departments and they recommend no specific precautions for clean-up of bird droppings or excrement in small amounts. He recommended, "soogieing" the deck, which would be washing the deck with brushes, mops and soap and water for cleaning such deposits.

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ANALYSIS

Custom and Past Practice

Each passenger-car ferry in the WSF fleet is assigned a deck watch to clean certain areas of the vessel by using a hose and turkhead brushes to wash down or soogie, at least every week, the promenade/weather deck, which would also include cleaning any bird droppings or excrement that happen to be on the decks.

This custom and practice has been followed for over the past 20 years.

Since this weekly cleaning of the exterior decks was the standing order, and part of the normal routine cleaning by the deck watch, they did not request or seek payment of penalty time for this cleaning until the present claim by ABs Williams and Dickson in 2003.

A simple definition of binding past practice on the parties is as follows:

A past practice binding on the parties may be defined as one which is directly, repeatedly and consistently associated with a specific condition and must have been practiced with such regularity, consistency and constancy as to disclose a definite, distinct pattern mutually accepted in the past by the parties.
Campbell Plastics Corp., 51 LA 705, 706 (Cahn 1968).

Had a past practice been developed? The tests of a binding past practice are rather simple.

1) Has the practice existed over an extended period of time, so that employees could reasonably expect the outcome? In this case, the practice continued for at least 20 years. That is a sufficiently long period of time. 2) Has the practice been clear and unequivocal? In this case the practice has been followed clearly and without exception. There were no requests for penalty payment for the normal routine weekly cleaning of the promenade/weather deck. 3) Has the practice been accepted by both parties? This weekly cleaning of the promenade/weather deck has been done with no request for penalty pay for 20 years until this present grievance.

Is there a binding past practice? The past practice of the parties demonstrates that the deck watch cleaning the promenade/weather deck had not requested or sought penalty pay for this normal routine weekly cleaning and the original intent of the parties was not to pay penalty pay for this type of cleaning of exterior decks.

The 1983-1985 contract, Rule 30.06, “When required to clean up excrement and/or vomit” remained the same to the present time without variance, but with the addition of the subject of blood.

Past practice can attain the status of contract rights and duties as noted:

Past Practice

However, this does not end the matter since it is well recognized that the contractual relationship between the parties normally consists of more than the written word. Day-to-day practices mutually accepted by the parties may attain the status of contractual rights and duties, particularly where they are not at variance with any written provision negotiated into the contract by the parties and where they are of long standing and were not changed during contract negotiations.

Metal Specialty Co., 39 LA 1265, 1269 (Volz 1962).

The above *Metal Specialty Co.* decision was cited with approval in *Dallas Power & Light Co.*, 87 LA 415, 418 (White 1985) at page 418:

In view of the above cited holding in *Warrior and Gulf* and the well established arbitration standards for determining the existence of controlling past practices, as illustrated by the *Metal Specialty* case, it must be concluded . . . not only can be said to have attained the status of a contractual right, but is to be considered, “equally a part of the agreement although not expressed in it.”

As noted in WSF’s brief, it is further clear that a past practice of long duration is highly probative of the intent of the parties:

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There would have to be very strong and compelling reasons for an arbitrator to change the practice by which a contract provision has been interpreted in a plant over a period of several years and several contracts. There would have to be a clear and unambiguous direction in the language used to effect such a change.

Webster Tobacco Co., 5 LA 164, 166 (Brandschain, 1946).

Webster's New World Dictionary and Thesaurus (1996) defines the following words as follows:

Require = to order
Order = an authoritative command
Direct = to order, command
Instruct = to order, or direct
Excrement = waste matter excreted from the bowels

Thesaurus:

Excrement = excretion, stool, fecal matter, offal, droppings, discharge, manure, urine, effluvium, feces, sweat, perspiration, excreta, poop.

AB Williams testified that the Chief Mate of the HYAK ordered him and his fellow deck watch members to clean up this big special project on the promenade deck area. He described the condition of the area as having bird droppings or excrement on the promenade deck, benches, bulkheads, windows and handrails. He further described the bird droppings or excrement as in some areas thick and runny and in other areas hard like it was baked on and it came off in chunks.

AB Williams described the scene on the promenade deck, "It was an absolute mess." requiring the deck crew to work July 28 and 29, 2002 to clean the "messy area."

Captain Saffle testified the Master of the HYAK called him regarding the request of AB Williams and AB Dickson for penalty pay to clean the promenade deck for July 28 and 29, 2002. The Master did not think this was appropriate and further he did not think it was in the CBA. He recommended the request be denied.

The work done on the promenade deck on July 28 and 29 2002 was a big special project, not the normal routine weekly cleaning of the promenade deck area that had been ongoing without any request for penalty pay for over 20 years and had become “custom and past practice.” It had become, “**Equally a part of the agreement although not expressed in it.**” *Dallas Power*, 87 LA 415, 418. It was part of both the 1983-1985 CBA and the 1999-2001 CBA.

It was not the crews’ “custom and past practice” to seek penalty pay for this normal routine weekly cleaning of the promenade deck and exteriors.

Penalty pay is paid for cleaning up human excrement, horse excrement and dog excrement. This has been WSF policy for many years.

WSF states its policy, when there is a large concentration of excrement to clean up, is to preapprove for penalty pay before the cleaning begins. There was a large concentration of excrement on the promenade deck on July 28 and 29, 2002, which could also be identified as a big project or a special project. This was in fact preapproved when the Chief Mate ordered the clean up which took two days to complete. This work would qualify for penalty pay.

If the deck watch members did not do a proper job of washing down, scrubbing and soogieing during the normal weekly routine clean-up of the promenade/weather decks, the Bosun, 2nd Mate, Chief Mate or even the Master would tell the deck watch that they had missed some areas. This situation would not qualify for penalty pay.

The past practice of not seeking penalty pay by any deck crewmembers for the normal routine weekly cleaning of the promenade/weather deck has continued for more than 20 years. The deck area usually included some bird droppings or excrement. This practice was well known to the deck crews. AB Williams’ grievance is the first that has been filed regarding Rule 30.05 and the phrase “when required to clean-up excrement.” His grievance is not for the normal

routine weekly cleaning of the promenade/weather deck, but for a large concentration of bird droppings or excrement that was a special project or big project ordered to be cleaned up by the Chief Mate.

The “past practice” of not seeking payment for the normal routine weekly cleaning of the promenade/weather deck meets the requirement for a “binding past practice” as defined in *Metal Specialty Co.*, 39 LA 1265, 1269 (Volz 1962) and *Campbell Plastics Corp.*, 51 LA 704, 706 (Cahn 1968).

What is binding past practice when there is no written agreement that spells out the past practice? The description of a binding past practice is met by the history of the normal routine weekly cleaning of the promenade/weather decks without the payment of penalty pay for this work.

The large concentration of bird droppings or excrement AB Williams found on the promenade/weather deck on the HYAK on July 28 and 29 was cleaned up on orders of the Chief Mate, and by his orders he thus preapproved this big or special project for penalty pay which is in accord with the policy of WSF.

If there is not a written agreement on a past practice, then for the past practice to be binding on the parties, it must be unequivocal, clearly enunciated and acted on, and readily ascertainable over a reasonable period of time as a fixed practice and a policy accepted by both parties.

CONCLUSIONS OF LAW

On the basis of the record before it, the findings of fact and the contractual and legal analysis, the Marine Employees’ Commission makes the following conclusions of law regarding MEC Case 8-04.

1. The parties' 1999-2001 contract remains in full force and effect past its stated expiration date by operation of law (RCW 47.64.170).

2. The Marine Employees' Commission has jurisdiction over the parties and the dispute (RCW 47.64.280). The case is properly before the Marine Employees' Commission for decision.

3. Rule 30 – Penalty Pay (General) states that penalty pay shall be paid “when required to clean up excrement.” This phrase first appeared in the WSF/IBU CBA in the 1983-1985 and has continued through to the present contract between the same parties and is the 1999-2001 which is still in effect, remaining the same for over 20 years.

4. During the past 20 years, the deck watch on all ferries have had a “custom and practice” of not seeking penalty pay when doing the normal routine weekly cleaning of the promenade/weather deck exterior which usually has some bird droppings or excrement in the area.

5. The past practice of not seeking penalty pay for the normal routine weekly clean-up of the promenade/weather deck exteriors is a past practice that is “equally a part of the agreement although not expressed in it.”

6. The phrase, “when required to clean up excrement,” is a latent ambiguity as described in *Midwest Rubber Reclaiming Co.*, 69 LA 198, 199 (Bernstein 1977):

The law recognizes the existence of two types of ambiguities in contracts. The first type is the ‘patent ambiguity’ in which language is unclear on its face—a mere reading of the contract discloses the confusion. However, there is also the category of the ‘latent ambiguity,’ where the language appears clear on its face but becomes unclear when an effort is made to apply it to a given situation.”

It is necessary to look at past practice to determine the meaning in the work place of the phrase, “when required to clean up excrement.”

7. On July 28 and 29, 2002, the Chief Mate ordered ABs Williams and Dickson and the rest of the deck watch to clean a large concentration of bird droppings/excrement off the promenade/weather decks, thereby preapproving the work for penalty pay. Williams, Dickson and the remainder of the deck watch are entitled to one-half (1/2) hour penalty pay for each day, July 28 and 29, 2002. That was all Williams and Dickson requested.

8. Normal routine weekly clean-up of bird droppings or excrement usually found on the weather decks does not entitle crewmembers to penalty pay.

AWARD

1. The grievance is granted. Within three (3) pay periods from the receipt of this Award, Washington State Ferries is directed to compensate the deck watch on the HYAK penalty pay for July 28 and 29, 2002.

2. WSF is to pay each member one-half (1/2) hour at the straight time pay, which is the penalty pay rate “when required to clean-up excrement.”

3. Such compensation shall be computed and paid on the basis of each employee’s straight time hourly rate of pay. Each member of the deck watch shall receive one-half (1/2) hour of straight-time for each of the two days.

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4. Based on Grievant Williams' testimony, the HYAK deck-watch members on July 28 and 29, 2002 consisted of the following:

Matt Williams, AB

Derrick Kant, OS

John Dickson, AB

Charles Hargrett, OS

Blair Holbrook, AB

Scott Chess, QM

Quincy Kerber, OS

DATED this _____ day of February 2004.

MARINE EMPLOYEES' COMMISSION

JOHN SULLIVAN, Arbitrator

Approved by:

JOHN SWANSON, Chairman

JOHN BYRNE, Commissioner