

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION  
OF THE PACIFIC,

Complainant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 9-05

DECISION NO. 437 - MEC

DECISION AND ORDER

**APPEARANCES**

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

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

**NATURE OF THE PROCEEDING**

On August 10, 2004, the Inlandboatmen's Union of the Pacific brought this matter before the Marine Employees' Commission by filing a complaint charging unfair labor practices, MEC Case 9-05. The IBU charges WSF with unfair labor practices within the meaning of RCW 47.64.130(1)(a) and (e) by interfering with, restraining or coercing employees in the exercise of rights and refusing to bargain collectively with representatives of employees.

IBU is alleging that Washington State Ferries unlawfully and unilaterally implemented video surveillance and unlawfully included the Washington State Patrol in the discipline process, that these actions on WSF's part constitute a unilateral change in the terms and conditions of employment.

MEC Case 9-05 alleges that WSF, acting on their own behalf made a decision to install hidden videotape monitoring cameras for surveillance in each of the four (4) car/truck ticket selling tollbooths located on the south side of Pier 52 at Colman Dock without bargaining.

In addition it is alleged that WSF's decision to include the Washington State Patrol officers in the investigation and disciplinary process for the WSF ticket sellers charged with misconduct is unprecedented.

John P. Sullivan, a Commissioner of the Marine Employees' Commission, conducted a hearing in this matter on November 22, 2004, pursuant to RCW 47.64.130, 47.64.280 and chapter 316-45 WAC. The hearing was limited to the allegations that WSF unlawfully and unilaterally implemented video surveillance and included the Washington State Patrol in the discipline process. The due date for submission of post-hearing briefs in MEC Case 9-05 was extended to February 10, 2005 at the request of counsel.

#### **RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION**

The Hearing Examiner considered the following records in deciding the issue:

1. The complaint charging unfair labor practice, filed on August 6, 2004.
2. WSF's Motion for Deferral to Arbitration, filed November 4, 2004.
3. Order requesting response from IBU to WSF's Motion for Deferral, dated November 5, 2004.
4. WSF's Answer to the complaint, filed on November 8, 2004.
5. IBU's Response to Motion for Deferral to Arbitration, filed on November 12, 2004.
6. MEC's Order Substituting Examiner and Responding to WSF's Motion for Deferral to Arbitration, dated November 17, 2004. The Order reads as follows:

Having reviewed WSF's Motion for Deferral to Arbitration and IBU's Response, Examiner Sullivan orders the scheduled November 22, 2004 hearing in Case 9-05 to proceed on those allegations that WSF unlawfully and unilaterally implemented video surveillance and included the Washington State Patrol in the discipline process. WAC 316-45-150(6).

Any remaining allegations included in the IBU's complaint, Case 9-06 will be deferred to arbitration.

7. The official hearing transcript and seven (7) exhibits accepted into evidence.
8. Administrative and/or judicial notice is taken of the CBA, June 1, 1999 through June 30, 2001, which remains in force to the present pursuant to RCW 47.64.170(7).

### **THE ISSUES**

Did WSF commit an unfair labor practice when it installed video surveillance cameras in the Colman Dock auto ticket booths without bargaining with the IBU?

Did WSF commit an unfair labor practice by unilaterally changing the investigative and discipline process when it involved the Washington State Patrol in the ticket seller allegations?

### **POSITIONS OF THE PARTIES**

#### **Inlandboatmen's Union of the Pacific**

WSF had installed a hidden videotape monitoring system in the four ticket sellers' tollbooths without notifying the IBU. There had been no bargaining with the IBU and this is a mandatory subject of bargaining.

Washington State Patrol was wrongly made a participant in WSF disciplinary process and procedures for the four ticket sellers.

#### **Washington State Ferries**

WSF's investigation indicated that there was suspected criminal activity—the theft of public funds by the ticket sellers at the automobile ticket tollbooths. There are four located on the south side of Pier 52 on Colman Dock.

WSF notified the Washington State Patrol, who in turn informed the King County Prosecutors. WSF followed the advice and instructions of both above noted personnel regarding the installation of a videotape monitoring system in the ticket sellers' booths. The decision of when and where to arrest the four ticket sellers, to interrogate them, and to ultimately have three of them fingerprinted and booked into King County jail was WSP's, not WSF's. The Washington State Ferries Code of Conduct was followed in regards to the guaranteed rights to due process and federal constitutional and state constitutional rights of the four ticket sellers who were arrested on June 6, 2004.

### **FINDINGS OF FACT**

1. On December 6, 2003, Dennis Duff, Seattle Terminal Supervisor learned that a passenger, Barbara Scalone, was questioning the fare she was charged for her car to travel on the 10:30 a.m. ferry from Pier 52 at Colman Dock in Seattle to Bremerton. Mr. Duff inspected the receipt and concluded that the fare was correct but Mr. Duff noted that the receipt was handwritten and was an old type that had been discontinued as of June 2002. The signature on the handwritten receipt was not legible. Ms. Scalone told Mr. Duff that she went to the far right ticket-selling booth on the south side of Pier 52 to purchase her ticket and that the ticket seller advised that her cash recording machine, i.e., POS was not working.

2. Kathy Booth of WSF Internal Control contacted another passenger who had received one of the handwritten receipts with a signature that was not legible in August when departing Seattle in his car. The passenger said that the ticket seller was in a booth on the south side of Pier 52 at Colman Dock, and that the booth was on the right side as you approached the four booths.

3. WSF conducted an investigation of these incidents that included Steve Rodgers, Terminal Manager for the South Region; Dennis Duff, Seattle Terminal Manager; Kathy Booth, Internal Revenue Control; Melissa Johnson, Revenue Control and Collection Program Manager. They were all suspicious of the use of the discontinued receipts from June 2002, which indicated the possibility of theft of WSF public funds by the ticket sellers in the four booths at Pier 52.

4. Executive Order E1026.00, issued by the Secretary of Transportation Douglas MacDonald for Washington State on May 12, 2003, sets out notification requirements for reporting the loss of public funds or property.

### III. Procedures

#### A. Loss of Public Funds or Assets

Report any loss of public funds or assets to the WSDOT Audit Office (360) 705-7003 as soon as discovered by any WSDOT employee.

In the event of a suspected criminal act, **immediately** contact the Washington State Patrol or Local Law Enforcement.

Department of Transportation instructions regarding suspected criminal acts remained the same throughout Sid Morrison's tenure as Secretary of Transportation (January 1993 to March 2001) and Douglas B. MacDonald's (April 2001 to date).

5. WSF has two types of investigations regarding funds belonging to WSF. One is a policy process concerning overages and shortages. This is a daily process used when an overage or shortage is found in a ticket seller's funds. The money is traced to see if it was misplaced, or a deposit was in error, or the math was wrong. Mishandling cash is merely a violation of the Code of Conduct. It is not an illegal activity. This is an internal investigation and is normally never reported to law enforcement. The other investigation takes place when WSF personnel are suspicious that a theft might have occurred. WSF personnel make an initial investigation and

pursuant to the Secretary of Transportation's Executive letter and RCW 43.09.185, "Loss of Public Funds" are required to notify the WSP and local law enforcement personnel. They have no discretion in this matter. WSF personnel then follow the directions of WSP in the future and continued ongoing investigation.

6. Melissa Johnson contacted Lieutenant Craig Miller of the WSP Criminal Investigation Division and notified him of the suspected theft of public funds by WSF ticket sellers at the auto tollbooths at Pier 52.

7. After WSF contacted the Washington State Patrol, they followed the instructions and directions of the WSP. WSF's videotape cameras were not available at the time. WSP directed WSF as to where they could buy the type of video cameras needed for surveillance and whom WSF should hire to install the videotape surveillance cameras.

8. The videotape camera monitoring system was installed near the end of March 2004. The four ticket sellers' tollbooths on the south side of Pier 52 have windows on all four sides. Steve Rodgers described it, "[a]round the whole tollbooth area is glass. It is more of a fishbowl effect." Viewing is open to the public. A regular automobile's sight line would be almost level with the countertop inside the tollbooth.

9. There were two covert videotape cameras for surveillance installed in each of the four tollbooths. One camera looked straight down inside the tollbooth showing the POS, point-of-sale device or machine, the cash drawer and the tollbooth side window next to the car driver. This camera showed everything that the customer could see in the tollbooth. The second camera was above and facing down on the customer's vehicle to see if the vehicle pulled away after a valid transaction.

10. The WSP viewed some of the videotapes from the surveillance. The WSP advised WSF it was a serious matter and they wanted to bring in the King County Prosecutor's Office to have a joint meeting. Melissa Johnson attended the meeting with WSP, as well as the subsequent meeting with WSP and King County Prosecutors Office, who had a deputy prosecutor and a senior-level trial attorney present. The two prosecutors said they had talked with Prosecutor Norm Maleng about this case. WSP and the two prosecutors advised WSF to continue the videotape surveillance to document the information for WSP's use.

11. Melissa Johnson met with the WSP and the two King County Prosecutors a week or two later. WSP determined when the ticket sellers would be arrested—June 6, 2004 and where—Pier 52 at Colman Dock in Seattle (WSF property), as well as where the interrogation would take place. The four ticket sellers were arrested by the WSP, handcuffed and then interrogated by the WSP. The four parties arrested were Ms. Richelle Gregory, Ms. Dana Clark, Mr. Jesse Eaton and Mr. Romaine Jackson.

12. On June 6, 2004, Terminal Manager Steve Rodgers handed each of the arrested parties a letter (Ex. 1) captioned: "Re: Notification of Leave Due to Conduct Violations." The body of the letter reads as follows:

The purpose of this letter is to inform you that Washington State Ferries has obtained substantial information indicating you have committed violations of Washington State Ferries Code of Conduct . . . Due to the seriousness of these allegations and that the substantiation of any of these allegations will lead to immediate termination, you are notified effective June 6, 2004 you will be placed on administrative leave until further notice.

13. Paul Martin was the terminal agent in Edmonds in 1999. The Edmonds Police Department installed video cameras for surveillance in the agent's office and discovered shortages in his safe; he was charged with theft of funds. He turned himself in to the Edmonds Police and was terminated.

14. Irene Bower was a ticket seller at the Port Townsend terminal in 2003. The Washington State Patrol had installed video cameras for surveillance. It turned out that Ms. Bower was short of funds in her working fund. The Whidbey Island Sheriff's Department conducted an investigation. Ms. Bower was charged and suspended; she never returned to work at WSF.

15. Mr. Dennis Conklin worked for WSF as an OS and an AB for a number of years prior to becoming the IBU Business Agent in April 1991, and in April 2004, IBU's Regional Director (his current position). Mr. Conklin testified that he did not object to WSF's use of video cameras for surveillance in the Paul Martin and Irene Bower cases.

16. Mr. Steve Rodgers testified that he started working for WSF in 1972 as a ticket taker, then as a ticket seller in 1974 and terminal supervisor in 1980. He further testified that video camera surveillance has been used at WSF's terminals from 1971 to the present time as the occasions warrant. He was unaware of any objections to such surveillance by any IBU representatives.

### **CONCLUSIONS OF LAW**

On the basis of the record before it, the findings of fact and the analysis, the Marine Employees' Commission makes the following conclusions of law:

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 subject matter (RCW 47.64.280). This case is properly before the Marine Employees' Commission for decision.



3. It is an unfair labor practice for the Ferry System “[t]o 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 with bargaining with the representative of the affected employees. *See e.g. IBU v. WSF*, 183-MEC (1997) (hiring procedure); *MEBA v. WSF*, 358-MEC (2002) (travel time practice).

4. Where the decision at issue was made not by the employer but by another entity and the employer had no discretion in their response and the response was consistent with the employer’s practice in these cases, there is no duty to bargain over the decision.

5. Here, WSF terminal personnel had no discretion in their response to evidence of theft. They were duty bound when they suspected theft of WSF funds, to notify Washington State Patrol or local law enforcement. In this case they notified the WSP to complete the required investigation.

6. The Washington State Patrol ordered the installation of the hidden video surveillance cameras in the ticket sellers’ tollbooths, not Washington State Ferries. WSF did not violate any obligation to its collective bargaining responsibility in these circumstances.

7. Even if the decision were made by the WSF, I find that the *Colgate Palmolive* case does not require the employer to bargain in this set of circumstances. In that case, the National Labor Relations Board found a duty to bargain in part relying on the employees’ privacy concerns:

*Further, as the judge finds, the use of surveillance cameras in the restroom and fitness center raises privacy concerns which add to the potential effect upon employees. We agree that these areas are part of the work environment and that the use of hidden cameras in these areas raises privacy concerns which impinged upon the employees' working conditions. The use of cameras in these or similar circumstances is unquestionably germane to the working environment.*

8. The video cameras were situated so as to record only that which was plainly and routinely visible from automobiles passing through the gates and, as such, does not impinge on employees' privacy concerns. In a similar situation, the Supreme Court affirmed that video surveillance of a box office does not impinge on an individual's privacy concerns. *Cowles v. Alaska*, 543 U.S. 1131 (2002) (declining to accept certiorari over an Alaska Supreme Court decision). The U.S. Supreme Court with its denial of certiorari, in effect, did not disapprove the lower Courts' rulings. This reduced privacy interest combined with the fiduciary nature of the ticket sellers' work and the Ferry System's obligation to safeguard State funds, leads me to the conclusion that no bargaining was required in this situation.

9. There was no issue raised at hearing as to a demand for or a refusal to bargain over the effects of the installation of video cameras in this instance.

10. As to whether the WSF committed an unfair labor practice by reporting the suspected theft and cooperating in the Washington State Patrol's investigation, I find no duty to bargain.

11. Once WSF reported the suspected theft of funds to law enforcement, WSP carried out its duty of investigating a possible crime. From as early as the 1970's to the present, WSP has conducted investigation of WSF employees when notified regarding missing funds.

12. At the hearing on November 22, 2004, there was no testimony presented that the WSP was in any way engaged in WSF disciplinary proceedings. WSF conducted its disciplinary process, the Loudermill hearing in September 2004, without any participation from the WSP.

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**ORDER**

1. The unfair labor practice charges, as limited for hearing, are dismissed.
2. Attorney fees are denied.
3. The IBU’s remaining charges related to alleged termination without just cause of Richelle Gregory, Dana Clark, Jesse Eaton and Romaine Jackson will be resolved within the grievance process. (On March 7, 2005, the IBU filed requests for grievance arbitration with the MEC for the each of the above individuals—Cases 34-05, 35-05, 36-05, 37-05.)

**RECONSIDERATION**

Pursuant to the provisions of RCW 34.05.470, any party may file a petition for reconsideration of MEC’s unfair labor practice ruling 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.

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If no petition for reconsideration is filed in a timely fashion, the Marine Employees' Commission will issue a second Order, which will state that this Order has become final and binding in accordance with RCW 47.64.280. That second Order will start the period running for any appeal to the Washington State Superior Court, pursuant to RCW 34.05.542 and 34.05.514.

DATED this 8th day of April 2005.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SULLIVAN, Hearing Examiner

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ ELIZABETH FORD, Commissioner