BEFORE THE MARINE EMPLOYEES' COMMISSION
STATE OF WASHINGTON

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMAN AND HELPERS OF AMERICAN LOCAL NO. 117,	)	MEC CASE NO. 9-84
Union,	)	DECISION NO. 9 - MEC
v.	)	
WASHINGTON STATE FERRIES,	)	FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER
Employer.	)	

William H. Song, Attorney at Law, appeared on behalf of Grievant, Edmond Stewart.

Kenneth Eikenberry, Attorney General, by Robert M. McIntosh, appeared on behalf of Washington State Ferries.

INTRODUCTION

This matter came on for hearing before David Haworth, Chairman of the Marine Employees' Commission. The hearing was held on April 18, 1985 and May 9, 1985. Commissioners Stewart and Kokjer read the transcript of the hearing, the exhibits entered as evidence and the briefs of the parties. The parties' positions and the issues in this case are summarized below.

GRIEVANT'S POSITION

Grievant Stewart contends that as the more senior of two employees filling temporary storekeeper positions with WSF, he was entitled to be called first for any temporary work.

He also argues that he is entitled to permanent status as a storekeeper as of July 1, 1984 because WSF had two permanent storekeeper positions which were vacant at the time. The two temporary storekeepers (Grievant and Penni Baker) worked more than the total number of hours for one permanent storekeeper.

The Grievant also contends that he timely raised the "permanent employee" issue even though it was not mentioned on grievance forms.

WSF's POSITION

WSF contends that neither the contract nor past practice establish seniority rights for temporary employees. WSF also argues that the "permanent employee" issue was not timely raised and thus was not properly before the MEC. It also argues that WSF is not obligated to offer Stewart a permanent position because neither the agreement nor past practices require WSF to hire the most senior temporary employee. WSF is not obligated to fill a vacant permanent position and in this case, it would have been impractical to fill the permanent positions.

ISSUES

1) Did WSF violate the collective bargaining agreement when it laid off Mr. Stewart and retained a less senior temporary employee?

2) Did the Union properly raise the question of whether Grievant should have been classified as a permanent employee?

3) Did the Employer violate the collective bargaining agreement by classifying Grievant as a temporary employee?

The Commission having reviewed the files and records herein and being fully advised in the premises now enters the following:

FINDINGS OF FACT

1. Grievant, Edmond Stewart, was initially hired by the Employer on March 20, 1984 as a temporary storekeeper, replacing an injured permanent storekeeper who was on leave.

2. Temporary employees are initially hired by dispatch from the Union. The Union normally sends out one person to fill a temporary position, usually the first person on the union's list.

3. Mr. Stewart was hired to work at and laid off from a succession of temporary jobs during the next 13 months at both the Eagle Harbor and Seattle store facilities. His work involved both special duties related to relocation of the electrical shops inventory and regular storekeeper tasks. Periods worked were as follows:

    - March 20 to August 17, 1984
    - August 27 to September 7, 1984
    - September 24 to October 12, 1984
    - November 7 to November 14, 1984
    - November 20, 1984
    - November 26, 1984 to April 12, 1985

His total employment was some 238 days, with 167 days of that period occurring from July 1, 1984 through April 12, 1985 when there were 205 working days.

4. No formal evaluations of Mr. Stewart's performance were made and he received no comments regarding his performance prior to his layoff.

5. Another temporary employee, Ms. Penni Baker, was hired by WSF on July 23, 1984, four months after Mr. Stewart. Ms. Baker also worked intermittently during the period over which Mr. Stewart was employed, also at a series of temporary assignments as a storekeeper. During the period July 1, 1984 to April 12, 1985 she worked approximately 110 days.

6. Penni Baker was employed from August 20 through August 24, 1984, and from September 7 from September 24, 1984, while Mr. Stewart was on layoff status.

7. When Mr. Stewart was hired in March, 1984 there were five storekeepers employed by the Ferry system in permanent positions. On June 30, 1984, two of these storekeepers, the Leadmen, retired. Thereafter, no more permanent storekeepers were hired.

8. When Mr. Stewart was laid off on April 12, 1985, he was paid for his accumulated vacation leave based on a March 20, 1984 hire date.

9. Mr. Stewart filed a grievance on September 28, 1984 alleging that "he was layed off out of seniority," because Ms. Baker had worked as a temporary storekeeper from August 20-24, 1984 and September 7-24, 1984 and he had not.

10. Although his grievance form did not mention his claim that he should have been classified as a permanent employee, the issue was raised in the second and third step meetings between labor and management. At the grievance hearing before the Commission, Mr. Stewart also argued that he should have been classified as a permanent employee as of July 1, 1984.

11. WSF had notice of Stewart's claim that he was entitled to permanent employee status at the time of the second step in grievance procedures. Furthermore, WSF had approximately three weeks to prepare a response to the claim.

12. The agreement does not mention seniority rights of temporary employees.

13. The 1980-1983 WSF/Metal Trades Bargaining Agreement (Ex. 2) contains no definition of the requirement for permanent employee status. It is silent on the application of seniority to both hiring of new employees and layoff with the exception of filling of vacant leadmen positions by the senior

journeymen in that craft.

14. Testimony concerning the parties' past practices with regard to filling permanent positions with temporaries varied. Although some witnesses indicated that, in their experience, the most senior temporary employee filled an empty permanent position, there was also testimony that other permanent positions were not filled by the most senior. At best, the testimony establishes that sometimes the most senior temporary employee would be hired to fill the permanent positions, but that there was no requirement that WSF do so. There is no clear precedent regarding past practice in applying seniority as a basis for hiring or promotion in this bargaining unit.

CONCLUSIONS OF LAW

1. The Marine Employees' Comission has jurisdiction over the parties and the subject matter.

2. The issue of whether Mr. Stewart should be classified as a permanent employee is properly before the Commission. The arbitrator may define the issues to be resolved when the parties do not agree by looking at the documents filed, past discussions of the parties, etc. (Elkouri p. 189).

3. With regard to hiring of employees and filling vacancies:

   "Except as restricted by statute or the collective bargaining agreement, management retains the unqualified right to hire or not to hire" (Elkouri & Elkouri, P. 466) and

   "It is generally recognized that in the absence of contract provision limiting management rights in regard to filling vacancies, … it is management's right to determine whether a vacancy exists and whether and when it shall be filled." (Elkouri & Elkouri, p. 478)

4. The contract between WSF and the Teamsters did not place limitations on management rights to hire or to fill a vacancy. Nor does the contract afford temporary employees seniority rights in layoffs.

5. Mr. Stewart is not entitled to a permanent storekeeper position.

6. The Metal Trades Bargaining Agreement provides no guidance on the application of seniority in filling positions with the exception of Leadmen and provides no definition or requirements for permanent employment status.

7. Under Article XXVII—Management Rights, the parties recognized the exclusive right of the employer to manage its business including among other things, "the right to direct the work force."

8. With regard to the application of past practice:

> "In the absence of a written agreement, past practice, to be binding on both parties, must be (1) unequivocal; (2) clearly enunciated and acted upon; (3) readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both Parties." (Celanese Corp. of America, 24 LA 168, 172 (1954), cited in Elkouri & Elkouri, p. 391).

9. The testimony failed to establish a past practice with respect to Mr. Stewart's right to be classified as a permanent employee or any seniority rights for layoff purposes while working as a temporary employee.

10. The Employer did not violate the Metal Trades Bargaining Agreement when it laid off Mr. Stewart and Ms. Baker worked.

11. The Employer was correctly exercising its management rights in continuing to classify Mr. Stewart as a temporary employee.

Based on the foregoing Findings of Fact and Conclusions of Law the Marine Employees' Commission enters the following:

ORDER

NOW THEREFORE, IT IS HEREBY ORDERED that the Union's requests to reinstate Mr. Stewart as a permanent employee as of July 1, 1984 with back pay for all periods of layoff and all accrued benefits, and its alternative request that Mr. Stewart be granted back pay for all periods out of seniority layoff, with reinstatement of all benefits based on his March 20, 1984 hire date, are DENIED.

Dated this 3rd day of December, 1985.

MARINE EMPLOYEES' COMMISSION

/s/ DAVID P. HAWORTH, Chairman

/s/ LOUIS O. STEWART, Commissioner

/s/ DONALD KOKJER, Commissioner