BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before Commissioner David E. Williams

INLANDBOATMEN'S UNION OF THE PACIFIC on behalf of MARK WORTHY, MARK DESDIER and JEANENE DOMKE,	)	MEC Case No. 9-99
Grievants,	)	DECISION NO. 222-MEC
v.	)	DECISION AND AWARD
WASHINGTON STATE FERRIES,	)	
Respondent.	)	

Schwerin, Campbell and Barnard, attorneys, by Elizabeth Ford, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by David Slown, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries

THIS MATTER came on regularly before David E. Williams, of the Marine Employees' Commission (MEC), arbitrator, on July 2, 1999, when the Inlandboatmen's Union of the Pacific (IBU certified that the grievance procedures in the IBU/WSF collective bargaining agreement (CBA) were utilized and exhausted.

The arbitrator conducted a hearing on September 23, 1999.

This matter, with agreement of the parties, having come before the authorized arbitrator for hearing and disposition, and the parties having been fully heard for the record, and good cause appearing therefor, such arbitrator hereby returns the following decision and award:

FACTS

Inlandboatmen's Union of the Pacific and the Washington State Ferries are parties to a dispute relative to interpretation and application of the collective bargaining agreement between them as it relates to hours of work.

To facilitate presentation of underlying and material facts describing the basis for their dispute, the parties placed a written stipulation, in evidence as Exhibit 1. That stipulation reads as follows: In the interest of the efficiency of the arbitration of the above referenced matter, the parties stipulate to the following facts:

1. The grievance of Mark Worthy, Mark Desdier and Jeanene Domke are properly before the Commission in arbitration.

2. Mark Worthy's regularly scheduled shift for the period of October 25 through October 28, 1998 was as follows:

- October 25, 1998: 14:50 - 22:50
- October 26, 1998: 04:55 - 12:55
- October 27, 1998: 12:55 - 20:55
- October 28, 1998: 04:55 - 12:55

Between October 25 and October 28, 1998, Mr. Worthy was re-assigned to the Hiyu on a 16:00 to 00:00 daily schedule. Mr. Worthy was not paid overtime as the result of this re-assignment.

3. Mark Desdier's regularly scheduled shift for the period of October 25 through October 28, 1998 as follows:

- October 28, 1998: 12:55 - 20:55
- October 29, 1998: 04:55 - 12:55

On October 28 and 29, 1998, Mr. Desdier was re-assigned to the Hiyu on a 08:00 to 16:00 daily schedule. Mr. Desdier was not paid overtime as the result of this re-assignment.

4. Jeanene Domke's regularly scheduled shift for the period of October 25 through October 28, 1998 as follows:

- October 25, 1998: 14:50 - 22:50
- October 26, 1998: 04:55 - 12:55
- October 27, 1998: 12:55 - 20:55
- October 28, 1998: 04:55 - 12:55

Between October 25 and October 28, 1998, Ms. Domke was re-assigned to the Hiyu on a 16:00 to 00:00 daily schedule. Ms. Domke was not paid overtime as the result of this re-assignment.

The underlying provisions of the applicable collective bargaining contract cited by the union, in presenting the grievance, read as follows:

CONTRACT PROVISIONS IN ISSUE

RULE 1 – DEFINITIONS

. . .

1.11 YEAR AROUND POSITIONS. The term "year around positions" or "year round assignments" is eighty (80) hours of scheduled straight time work within a two (2) week work period, which is expected to exist, during periods of the lowest level of scheduled service

. . .

1.17 TOURING WATCH. A "touring watch" is a watch to which the employee is assigned where they are on duty for two successive work shifts not to exceed a total of sixteen (16) working hours separated by a minimum of six (6) hours off between watches during a maximum period of twenty-seven (27) hours. The overtime provisions of this Agreement shall apply if these watches are varied.

. . .

1.21 TWO WEEK WORK SCHEDULE. The term "two week work schedule" is fourteen (14) consecutive calendar days in which an employee is scheduled working days and days off.

. . .

RULE 11 - MINIMUM MONTHLY PAY AND OVERTIME

. . .

11.02 When work is extended fifteen (15) minutes or less beyond the regular assigned work day, such time shall be paid at the overtime rate of one quarter (1/4) of an hour. Should work be extended by more than fifteen (15) minutes, the time worked-beyond the regular assigned work day, shall be paid at the overtime rate in increments of one (1) hour. Such extended work shifts shall not be scheduled on a daily or regular basis.

11.03 Employees called to work prior to commencing their regular scheduled shift shall receive the overtime rate of pay in increments of one (1) hour for early call-out. Early call-outs shall not be on a daily or regularly scheduled basis.

POSITIONS OF THE PARTIES

As noted, the facts, as stipulated, describe the employees' work schedules, at the base of parties' dispute regarding appropriate interpretation of their collective bargaining contract.

Specifically, IBU urges that grievants' regularly scheduled two week period was in conformity with the contractual components numbered 1.11 and 1.21. In the union's view; however, the case is governed dispositively by the contract's section 11.02 and 11.03 because, "in the middle of regularly scheduled two week period the Ferry System has come in and said 'no,' we're going to move your shift to a different time and we're not going to pay you overtime for it." The contention

then, is that, contractually, the grievants are entitled to overtime pay under, and throughout, the instant circumstances, where the changes in hours of work were effected, during the course of the specific 80 hours which they were scheduled to work, originally. The union refers to bargaining history and practice in support of that contention.

In the course of his opening statement for the employer, counsel registered the following acknowledgment:

> [D]uring the preparations for this case Ms. Ford made it known to me that two of the grievants, Ms. Domke and Mr. Worthy, actually did not get notified of this change in schedule on Sunday. And I made very diligent inquiries to see if there was any evidence to the contrary and have not found any. And frankly, I discussed this with management and they are of the position that if in fact these people came to work at their normally without ever being notified and there's -- they were just due to start a four day period of touring watch which was proceeded by four days off. So it's very possible that they could have been unreachable or were just were not reached on the weekend for a variety of reasons. And I have no reason to think they didn't come in and report to work at their normal time as Ms. Ford has indicated. And if the evidence does support that conclusion Ferries would agree that those two individuals are entitled to overtime of two hours on Sunday the 25th because in fact they came to work at 2:50 in the afternoon and they had to work until midnight. And whether or not there was work for them to do, if you report to your workplace at the time you've been told to be there, clearly you're at work. So, we would stipulate that two hours of overtime for each of those grievants is appropriate.

That recorded "stipulation" ought to be, and is, accepted in accord with the conclusion that it embodies and is, therefore, made a part of the award set forth below.

The position of the employer is that the stipulated changes in hours of work were in consequence of, and a necessary response to, an authentic emergency, relative to its obligations, as a public carrier, occasioned essentially by the serious mechanical breakdown of one of the vessels in the fleet concerned and that none of the grievants were required thereby to work more than eight hours in any given day. The employer urges that it did not depart from the operative contract and cites what it regards as favorable "past practice" with respect to situations comparable to the one at base in this arbitration and refers especially to an earlier decision of the Marine Employees' Commission which, in its view, is likewise supportive of its position here. Aside from counsel's concession set forth hereinabove, the employer contends that it owes nothing to the grievants, in the circumstances.

THE ISSUES

At the start of the hearing of this matter, the parties agreed as follows as to the issues to be decided, viz:

> Did the Ferry System violate the collective bargaining agreement by refusing to pay overtime to Mark Worthy, Jeanene Domke, and Mark Desdier on October 25 through October 28?

DISCUSSION

The scope and duration of proven problems in maintaining essential continuity in the operation of the ferry system constituted a genuine crisis, i.e., not a contrived and questionable, one for the purpose of generating managerial avoidance of accountability, to the grievants, under the controlling collective bargaining agreement.

The provisions of that collective bargaining agreement cited by the grievants (1.11, 1.17, 1.21, 11.02 and 11.03) do not foreclose expressly, inferentially or otherwise, responsible and essential reaction to an authentic emergency of the kind and grade involved in these proceedings. While, as the IBU suggests, Rule 18, in the relevant agreement, may not be "germane" precisely, it does reflect the altogether sensible notion that, on occasion, if not always, a fully bona fide emergency will necessarily require unusual tactics in dealing therewith, effectively.

Relative to the scenario here, helpful reference can be had from the Elkouris' treatise (5th ed., p. 732) where it is noted that:

> Arbitrators appear to be generally inclined to allow management a great deal of flexibility, where it is possible to do so under the agreement, in making unscheduled and emergency changes in the work schedule if made in good faith and for reasonable cause. Even where the agreement in some respect limits management's right or imposes some obligation upon management in regard to making changes in the work schedule, the limitation or obligation may be held inapplicable if there is an emergency, an act of God, or a condition beyond the company's control.

There does not seem to be sufficient reason in the testimonial record, or advanced by written argument, why the inclination reported by one of the main references in arbitral matters should not be influential and determinative here. On the contrary, the principle, if not the precise ingredients,

is fairly comparable to that enunciated by the MEC in Decision 135, which involved the same parties participating in the instant case.

It is sometimes possible, in a matter of the instant variety, to fill in a "gap" in contractual language by examination of an acceptance of the parties' agreeable past practice over a probative term. In this matter, the union and the employer are not in agreement about whether there has been such a material and jointly acceptable practice over a substantial period of time. The matter of practice, then, cannot be described factually in such a fashion as to constitute a basis, or the grounds, for shaping an award.

The union refers to bargaining history as supportive of its position. Apparently contract language was proposed, in negotiations, by the IBU representatives, whereby the employer, "couldn't change the 80 schedule without paying us overtime or early call-out." Discussion with the employer's agent ensued, as to whether such a change, in the contractual content, was necessary to attain the union's spoken objective. Eventually, the proposal was "pulled off the table," by the union side, "to resolve the contract." When the inquiry relates to the place of bargaining history, in labor arbitration, reference to a respected text is helpful when it offers a reliable guide as to the arbitral consensus. (See Fairweather, Practice and Procedure in Labor Arbitration, 207-210 (2d ed. 1983.) Illustrations of that consensus is the case of American Machine and Founding Company, 4ALAA ¶68,697 (Justin, 1950), and the following abstract from the arbitrator's decision there:

> The union raised the question during the negotiations leading to the present contract. It was then bargained out. It cannot be "bargained in" by way of an arbitration, under guise of interpreting or construing other contract clauses, however related.

(See Fairweather, p. 208)

That view is applicable and applied here.

This case certainly presents a legitimate issue, with respect to which, each side has made valid points thereby presenting a close question as to appropriate disposition, but the breakdown of the ferry, in its proven context, posed a dire situation quite beyond the employer's reasonable expectations, i.e., a genuine emergency. The ultimate test, then, is whether, as a credible and realistic factor, the employer should have anticipated the particular breakdown and all the

consequences thereof. (See Zach-Block, Labor Management in Negotiation and Arbitration 70-72 (1983.) In response to that test, it is found therefore, that, given the respective burdens of proof and persuasion, the award herein ought to be as follows:

AWARD

For the reasons summarized hereinabove, the grievances before the arbitrator in these proceedings are denied except for the payments of two hours' overtime to grievants Domke and Worthy as specified voluntarily by counsel for the employer in his opening statement.

DATED this _____ day of December 1999.

MARINE EMPLOYEES' COMMISSION

_____
DAVID E. WILLIAMS, Arbitrator

APPROVED BY:

_____
HENRY L. CHILES, JR. Chairman

_____
JOHN P. SULLIVAN, Commissioner