

IN THE MATTER OF THE ARBITRATION BETWEEN

INLAND BOATMEN'S UNION OF	)	
THE PACIFIC,	)	ARBITRATOR'S OPINION
	)	AND AWARD
UNION,	)	
	)	
and	)	JOHN ROSS TERMINATION
	)	GRIEVANCE
STATE OF WASHINGTON,	)	
	)	
EMPLOYER.	)	
_____	)	

BEFORE: JOSEPH W. DUFFY  
ARBITRATOR  
PO BOX 12217  
SEATTLE, WA 98102-0217

REPRESENTING THE UNION: ROBERT H. LAVITT  
SCHWERIN CAMPBELL BARNARD IGLITZIN &  
LAVITT, LLP  
18 WEST MERCER ST., SUITE 400  
SEATTLE, WA 98119

REPRESENTING THE EMPLOYER: MORGAN DAMEROW  
ASSISTANT ATTORNEY GENERAL  
7141 CLEANWATER DRIVE SW  
OLYMPIA, WA 98504

HEARING HELD: JUNE 12 & 25, 2014  
SEATTLE, WA

## OPINION

### Introduction

Inland Boatmen's Union of the Pacific ("Union" or "IBU") represents a bargaining unit of workers employed by the Washington State Department of Transportation, Ferries Division ("Employer" or "WSF"). The Employer and the Union ("Parties") submitted this dispute to arbitration under the terms of their July 1, 2011 through June 30, 2013 collective bargaining agreement ("Agreement"), a copy of which they introduced into the record as a joint exhibit. (J1)

This arbitration arose from a grievance filed by the Union on approximately June 19, 2013 on behalf of the Grievant, John Ross, contesting the termination of his employment by the Employer. (E15) The Parties selected me to arbitrate this dispute from a panel of arbitrators provided by the Federal Mediation and Conciliation Service.

The hearing took place at the Employer's offices at 2901 Third Ave., Seattle, WA on June 12 and 25, 2014. At the hearing, both Parties agreed that the grievance is properly before me for a final and binding decision on the merits. (TRI-6:6-10<sup>1</sup>) The Parties also agreed that I should retain jurisdiction for sixty (60) days, subject to extension, to aid in the implementation of the remedy, if a remedy is awarded. (TRI-7:9-21)

The hearing proceeded in an orderly manner. The attorneys did an excellent job of presenting the respective cases. Both Parties had a full opportunity to call witnesses, to submit documents into evidence and to make arguments. Witnesses were sworn under oath and subject to cross-examination by the opposing Party. A court reporter transcribed the hearing and made copies of the transcript available to the Parties and to me.

The Parties submitted one joint exhibit (J1), twenty-six Union exhibits (U1-U26) and sixteen Employer exhibits (E1-E16) into the record. A total of eight witnesses testified at the hearing, including the Grievant (Deck Hand Bonnie Phillips, Second Mate Erick Hoskins, Captain William Michael, Director of Operations Steven Rodgers, Chief Mate Brett Bartanen, Captain John Tullis, IBU Business Agent Jay Ubelhart and the Grievant, Mr. Ross).

At the close of the hearing, the Parties elected to submit closing briefs electronically to me and to each other on July 29, 2014. (TRII-114:10-15) The Parties later extended the deadline

---

<sup>1</sup> The transcript is in two volumes, each of which is numbered from page one. Therefore, I have cited volume I as TRI-(page number): (line number) and volume II as TRII-(page number): (line number).

by mutual agreement. I receive the briefs by the revised deadline and then closed the record on August 26, 2014.

#### Issue for Decision

At the hearing, the parties did not agree on a statement of the issue and they left it to me to frame the issue based on their proposals. (TRI-6:11-TRI-7:8) The union proposed the following issue statement:

Did the Employer violate the collective bargaining agreement's just cause protection when it terminated the employment of John Ross? (TRI-6:13-16)

The Employer proposed the following issue:

Did the Employer have just cause to terminate Mr. Ross? (TRI-6:18-21)

The proposed issue statements are close in substance, and both refer to the just cause standard. Therefore, I have adopted the following issue statement:

Did the Employer have just cause to terminate the Grievant's employment? If not, what is the appropriate remedy?

#### Background

The Grievant went to work for the Employer on May 27, 1998. At the time of his termination, he worked as a relief Able Bodied Seaman ("AB"). (see TRI-147-TRI-153)

On April 5, 2013, certain events occurred on board the ferry Spokane during the 9:10 p.m. sailing from Kingston to Edmonds, WA that led to the Grievant's employment termination. At the time, the Grievant was off-duty and out of uniform and came on the ferry in his personal motor vehicle as a passenger. After he drove onto the ferry, he left his vehicle and talked with two co-workers. During those conversations, the Grievant allegedly made certain offensive comments to both co-workers, as well as offensive comments about a passenger that may or may not have been heard by the passenger and her male companion. The Grievant also allegedly engaged in offensive physical conduct with a female co-worker during that same incident. The Grievant stated during the investigation and testified at the hearing that he was in an alcoholic blackout at the time and he has no recollection of the events.

The co-workers reported what they observed to management and an investigation followed. The Grievant continued to work until he went to the fact-finding meeting on April 26.

At the fact-finding, the Grievant submitted a request for FMLA, so that he could go into an in-patient alcoholism treatment program. (U19-20; TRI-60-TRI-65) The Grievant entered in-patient alcoholism treatment on April 26 and successfully completed the program. (U21, U22, U23)

After completing the treatment program, the Grievant returned to work on May 28 and 29. The record indicates some confusion existed about whether he should have worked those days. (TRI-160:19-25)

On June 7, 2013, the Employer held a pre-disciplinary meeting with the Grievant and his Union representative. (U24) The Employer then terminated the Grievant's employment effective June 11, 2013. (E14)

The Union filed a grievance over the termination, and, when the Parties could not resolve the dispute in the grievance procedure, this arbitration followed. (E15)

### Discussion

#### The Just Cause Standard

The Agreement provides in Rule 19.10 that seniority under the Agreement shall terminate if an employee is "discharged for cause." (J1, p. 32) A provision of this type, although found within the seniority provision and not set out separately in a contract term devoted to discipline and discharge, is generally understood in labor arbitration to require an employer to follow just cause principles when terminating the employment of an employee.

The terms just cause, cause and sufficient cause, as well as other similar terms, often are used interchangeably in the collective bargaining context. The terms have developed a specific meaning in labor arbitration based on numerous arbitration decisions issued over many years under many different collective bargaining agreements in a wide range of industries and employment settings.

Arbitration decisions often refer to the "seven tests" of just cause developed by Arbitrator Carroll R. Daugherty. (see *Enterprise Wire Co.*, 46LA359 (Daugherty;1966); *Moore's Seafood Products, Inc.*, 50LA83 (Daugherty;1968)) The seven tests have been widely used and also criticized. (see *1989 Proceedings of the National Academy of Arbitrators*, Chapter 3, p. 23) Leading arbitrators have taken issue with mechanical or automatic application of the seven tests except where the parties have specifically agreed on that approach.

In a 1947 arbitration decision, Arbitrator Harry Platt made the following observation about cause as applied by labor arbitrators in termination cases:

It is ordinarily the function of an Arbitrator in interpreting a contract provision which requires "sufficient cause" as a condition precedent to discharge not only to determine whether the employee involved is guilty of wrongdoing and, if so, to confirm the employer's right to discipline where its exercise is essential to the objective of efficiency, but also to safeguard the interests of the discharged employee by making reasonably sure that the causes for discharge were just and equitable and such as would appeal to reasonable and fair-minded persons as warranting discharge. To be sure, no standards exist to aid an Arbitrator in finding a conclusive answer to such a question and, therefore, perhaps the best he can do is to decide what reasonable man, mindful of the habits and customs of industrial life and of the standards of justice and fair dealing prevalent in the community ought to have done under similar circumstances and in that light to decide whether the conduct of the discharged employee was defensible and the disciplinary penalty just. (*Riley Stoker Corp.*, 7LA764 (Platt;1947))

Generally, a common understanding has developed in the field of labor/management relations that just cause requires: 1.) Notice to the grievant of the rules to be followed and the consequences of non-compliance; 2.) Proof that the grievant engaged in the alleged misconduct; 3.) Procedural regularity in the investigation of the misconduct, and; 4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate. (see Hill & Sinicropi, *Remedies in Arbitration, 2nd Ed.* (BNA Books; 1991) p.137-145) I have, therefore, considered the facts of this case against the cause/just cause standard as that term is commonly understood in the field of labor/management relations.

### The Charges

The termination letter that the Employer issued to the Grievant described the charges on which the Employer based the termination as follows:

Code of Conduct Rule #6 – Criminal (or Disorderly) Conduct  
*Conviction of a felony crime, or engaging in immoral and/or illegal activities on ferry system property. Your conduct of reaching through a co-workers work vest from behind and “thrusting” up against her while intoxicated is a violation of policy, unruly and disorderly conduct. The victims claimed fear and retribution for not reporting the actions as criminal, but at a minimum your behavior was immoral.*

Code of Conduct Rule #11 – Discrimination or Harassment

*Failure to abide by state law or WSF policies regarding illegal discriminatory practices or violation of WSF's sexual harassment policy (Secretary's Executive Order Number E 1014.03 Discrimination & Freedom from Sexual Harassment Policy Attachment 3). Your conduct and behavior aimed at co-workers and passengers while intoxicated constitutes discrimination and/or harassment. Your actions towards Ms. Phillips and Mr. Hoskins constitute discrimination and/or harassment within the workplace.*

Code of Conduct Rule #13 – Threats or Acts of Violence

*Use of obscene language when addressing customers or employees. Your obscene language in addressing co-workers and other passengers while intoxicated constitutes an act of violence. Furthermore, your unwanted physical contact with a co-worker is interpreted as an act of violence (Violence Free Workplace Attachment 4).*

Code of Conduct Rule #14 – Discourtesy to Others

*Acts of discourtesy aimed at co-workers, customers or supervisors. Your overall behavior towards co-workers and passengers while intoxicated constitutes discourtesy toward others. (E14, p. 3) (Italics in original)*

1.) Notice to the grievant of the rules to be followed and the consequences of non-compliance.

No dispute exists that the Employer has clear rules that prohibit sexual and racial harassment and discrimination, and rules that require courteous and professional behavior toward passengers. In addition, the Code of Conduct has been negotiated with the Union. (TRI-161:18-TRI-162:2)

The record shows that the Grievant received copies of the Employer's policies and rules as well as training on those rules and policies. (E8, E9, E10, E16) Accordingly, the Grievant knew or had reason to know the Employer's rules and policies concerning equal employment, non-discrimination and sexual harassment.

Therefore, I find that the notice requirement of the just cause standard has been met.

2.) Proof that the grievant engaged in the alleged misconduct.

On April 5, 2013, Bonnie Phillips worked as an OS1 aboard the ferry Spokane during the 9:10 p.m. sailing from Kingston. She wrote a statement, dated April 9, 2013, the text of which reads as follows:

I Bonnie Phillips was working OS1 aboard the Spokane on April 5, 2013 in Kingston.

On the 21:10 sailing out of Kingston, John Ross (AKA J.R.) was the last car loaded. He swerved his car at me laughing.

He parked his car got out and walked over to me, at this point I could tell he was drunk. I could smell it and at one point he mentioned he had been drinking.

Upon talking to him he made comments like;

1. How it's bad that you're married.
2. How's my mother and she's a hot lady.
3. How crazy I was to come back to D watch, D watch is the most hated watch in the fleet. D watch is full of nothing but asses, he will never ever work D watch.
4. He told me to look at a passenger's big butt. When the passenger walked by he said loudly, "look at the ba-dunka-dunk".
5. He started calling the 2<sup>nd</sup> Mate Erick Hoskins a sexy bitch, telling me "I know you like that Sexy Bitch".
6. He stepped behind me and grabbed my traffic vest. He pulled me towards him pushing his body against mines and smelled my hair. He told me, "I smelled so good".

Erick started to walk towards us and JR started to call Erick a bitch, also complaining about something to do with parking then I walked away at that point.

I Bonnie Phillips am truthfully making this statement. (E4)<sup>2</sup>

Mr. Hoskins wrote a statement in the form of an email message, dated April 11, 2013<sup>3</sup>.

The text of the statement reads as follows:

Around 21:10, I Erick Hoskins 2<sup>nd</sup> Mate on the Spokane was finishing loading the vessel. After clearing the vessel and being underway, I noticed Bonnie Phillips talking with John Ross, who was aboard parked in one of the center lanes in the tunnel. As I approached JR, he was standing behind Bonnie and I can slightly

---

<sup>2</sup> At the hearing, Ms. Phillips was not asked to authenticate her statement. The Employer proposed that the statement is offered to show the foundation for the investigation of the incident, but Ms. Phillips' testimony at the hearing should be the primary evidence of what happened to her. The parties agreed that the statement would be admitted to show that the Employer considered the statement during the investigation. I have included the statement in my analysis in order to show that her testimony is generally consistent with the statement she gave near the time of the events. (TRI-107:17-TRI-108:16)

<sup>3</sup> The subject line of the email mistakenly refers to the date of the event as April 3, 2013.

hear him saying “sexy beast” a couple of times, and to find out later, he was saying “sexy bitch.

Eventually Bonnie left and JR was abusive with his words. He stated that if I was going to continue to work for King County Water Taxi at Pier 50, and he saw my vehicle parked at Pier 52. He will personally have my ass fired from WSF, so what are you going to do, go in and play the race card? I noticed JR had been drinking and his voice was really loud. JR kept bringing up race that made me feel offended.

He also mentioned Derrick Fant, saying that Derrick parks at Pier 52 to attend Seahawks games in the past. He’s with some of his brothas wearing all that bling bling. At that point I started to end conversation with JR, and directed him back into his vehicle. Then he stated, the reason why your not working Captain for KC, because and proceeded to point at the backside of my hand to indicate the color of my skin. I walked away feeling totally violated!!!

Later Bonnie Phillips told me that he was saying rude and out of line gestures, also, she told me that JR grabbed her from behind and put his penis on her butt and stated “she smells good”

I make this statement truthfully in good faith. (U1)

Both Ms. Phillips and Mr. Hoskins testified at the hearing.

Ms. Phillips testified that on April 5 she worked on the 9:10 sailing from Kingston, helping to guide the vehicles onto the ferry. She testified that as one of the last cars came onto the ferry she was in the tunnel, meaning the center of the vessel. She testified that the car started to come out of the assigned lane into the lane where she was standing and she had to move out of the way. She testified that when she recognized the Grievant they both laughed and she went over to his car and they talked briefly.

Ms. Phillips had been married for about a year at that time, and she testified the Grievant said something to the effect that “it’s too bad you’re married.” She testified the Grievant then mentioned her mother who also works for WSF. She testified the Grievant referred to her mother as a “MILF”.<sup>4</sup> She testified that the comment about her mother “pissed me off” and she told the Grievant to change the subject. Ms. Phillips testified that she found the comment about her mother offensive. (TRI-23:14-22; TRI-49:10-13)

---

<sup>4</sup> Ms. Phillips testified as follows: Q. Okay. So you used the phrase MILF a couple times. What do you understand that to mean? A. Mother I would like to fuck. (TRI-22:22-24)

Ms. Phillips testified that the Grievant turned his attention to a female passenger who was nearby and made comments about the passenger's butt and also made gestures. Ms. Phillips testified the passenger either ignored the Grievant or may not have heard him because of the noise on the vessel. Ms. Phillips testified she told the Grievant to stop making the comments because the Grievant was speaking loudly and facing the passenger and Ms. Phillips was concerned that the passenger or her male companion might hear the Grievant.<sup>5</sup> (TRI-24:3-TRI-26:4)

Ms. Phillips testified about the Grievant's comments concerning Mr. Hoskins as follows:

Q. So you said Mr. Ross saw Mr. Hoskins, and the conversation turned to him. How did that develop?

A. He said, "Look at that sexy beast."

And I was like, "Who are you talking about?"

And he started pointing toward Erick's direction. And he referenced to, "I know you like that kind."

And I asked him what that meant because Erick is African American. My husband is African American. So that's how I took it, you know, I'm into that kind, what kind is he? I mean, I thought all humans were the same. So that kind of offended me a little bit.

And then Erick kind—there was a little bit more chit-chat. Erick kind of starts to walk toward us because on the boat, you know, we're pulling out of the dock. At that point, his sexy beast turned to sexy bitch, and it kind of started to get louder. Erick is getting closer. (TRI-26:24-TRI-27:15)

Ms. Phillips testified further as follows:

....And at that point, he grabbed me from behind. You know, he put his hands between my vest and my shirt. He pulled me towards him, and, with one thrust, pushed, you know, his body into mine, you know, rubbed the back of his, you know, his face in the back of my neck and told me that I smelled good.<sup>6</sup> (TRI-28:8-13)

---

<sup>5</sup> Mr. Hoskins testified that comments about the female passenger occurred after Ms. Phillips walked away. His testimony recounts the comments as similar to the comments Ms. Phillips described. I did not find this inconsistency about when the Grievant's comments about the passenger occurred to be significant. The possibility exists that the Grievant made the comments in the presence of both Ms. Phillips and Mr. Hoskins separately. (TRI-63:3-TRI-64:19)

<sup>6</sup> A report on KIRO7 stated that an off-duty deck hand whom the report did not identify by name grabbed a female deckhand from behind and "grabbed her breasts." Ms. Phillips testified that the news report was inaccurate in that he did not grab her breasts and she called the station to try and correct the story when she learned about it. (TRI-33:21-TRI-34:9; E14)

Ms. Phillips testified that the Grievant then said to Mr. Hoskins: "I'm tired of people like you being able to use the black card." At that point, Ms. Phillips walked away. (TRI-28:19-21)

Ms. Phillips testified that the Grievant's physical conduct toward her was unwelcome. (TRI-32:22-TRI-33:3) She testified that after the Grievant grabbed her, her reaction was:

Um, I didn't know what to think. I was—I didn't know whether to be mad. I didn't know, you know, to slap him or to cry or just—I didn't know what to think really at that point. I was just—I didn't know what I should do, you know. (TRI30:1-5)

Mr. Hoskins testified that after he supervised the loading of the vessel he walked into the tunnel toward where the Grievant and Ms. Phillips were standing. He testified that as he approached them he heard the Grievant state "you sexy beast" or "you sexy bitch". He testified that he found this reference offensive. (TRI-99:8-24) He testified that he also noticed the Grievant behind Ms. Phillips, grabbing her from behind, which Mr. Hoskins thought was odd. He testified that Ms. Phillips walked away and he began a conversation with the Grievant. (TRI-58)

Mr. Hoskins testified that the Grievant said to him that the Grievant would "have your ass fired" if Mr. Hoskins parked at WSF parking lot when working for King County Water Taxi. (TRI-59:4-8; TRI-94:10-TRI-95:11) Mr. Hoskins testified that the Grievant began "ranting things" and made racial comments Mr. Hoskins found offensive, such as mocking the jewelry worn by some African Americans, including Mr. Fant, and telling Mr. Hoskins he would never be a Captain with King County Water Taxi because of his race. Mr. Hoskins testified that during this conversation the Grievant was "trying to sound like he was black." (TRI-58-TRI-64) He also testified that in the same conversation the Grievant used the term "niggas" when talking about black employees. Mr. Hoskins testified that he considered the "niggas" reference not to be the same as the use of the "n-word", which Mr. Hoskins would consider a personal attack. (TRI-101:14-25) Mr. Hoskins testified that he found the Grievant's comments "not appropriate at that time or any time." (TRI 60:24-25)

In his testimony, Mr. Hoskins summarized his reaction to the Grievant's comments, in part, as follows:

And so that's why I said I was more like in disbelief with what I'm hearing, what Bonnie was telling me. And it was just like, you know, totally uncalled for anybody to display any type of actions and words like that, especially a person

that works for WSF. There should have been a level of still—you still have got to keep a certain level of professionalism wherever you are.<sup>7</sup> (TRI66:21-TRI-67:3)

The Grievant testified that he has no memory of the interactions with co-workers on the ferry Spokane on April 5, 2013. He testified that he was in an alcohol-induced blackout at the time. (TRII-53:8-19)

The evidence in the record establishes that on April 5, 2013, the Grievant made offensive sexual and racial comments to co-workers and made a derogatory reference to a passenger that the passenger may or may not have heard. The Grievant also made inappropriate and offensive physical contact of a sexual nature with Ms. Phillips. Although the testimony of Ms. Phillips and Mr. Hoskins varied somewhat from their written statements, I did not find that those variations undermined their credibility. Both witnesses testified in a calm and forthright manner and neither expressed any rancor toward the Grievant. They both had positive interactions with the Grievant in the past and neither had any apparent history of conflict with the Grievant.

In the closing brief, the Union contended that the Employer mistakenly believed that the Grievant grabbed Ms. Phillips' breasts, as reported in the June 1 news story. Mr. Rodgers stated in his testimony that he did not learn until this hearing that the Grievant did not grab Ms. Phillips' breasts. (TRI-200:11-16) Mr. Rodgers testified, however, that grabbing a co-worker from behind and thrusting at her in a sexual manner clearly violates the Employer's policy and rules related to sexual harassment. (TRI-164-TRI-165) I agree with that conclusion.

The events of April 5, 2013 took place while the Grievant was off-duty and out of uniform. Nevertheless, a clear connection to the Employer and to the Grievant's employment exists because the events took place on a WSF ferry during a sailing with passengers on board and involved WSF co-workers and, potentially at least, members of the public.

Based on the evidence in the record, I find that the Grievant engaged in misconduct as alleged.

### 3.) Procedural regularity in the investigation of the misconduct.

South Regional Port Captain Bill Michael and HR Representative Steven Durant interviewed Ms. Phillips and Mr. Hoskins on April 9, 2013. Captain Michael submitted a report

---

<sup>7</sup> The KIRO7 news account of the events of April 5 included the statement: "...when a black deck officer intervened, the off-duty ferry employee, who is white, called the officer the "n-word" repeatedly". Mr. Hoskins testified that this statement is not accurate concerning the "n-word", although he testified that the Grievant did use the offensive term "niggas" during the conversation with Mr. Hoskins. (TRI-92:14-TRI-93:11)

of his findings to the Senior Port Captain Kelly J. Michael. (E6) The Employer then held a fact-finding meeting with the Grievant on April 26 and the Grievant had Union representation during the fact finding. The Employer also conducted a *Loudermill* pre-disciplinary meeting on June 7 that gave the Grievant and the Union the opportunity to present any additional facts to the Employer. (U24)

Based on the record, I find that the Employer met the just cause requirement of procedural regularity in conducting the investigation.

4.) Reasonable and even-handed application of discipline, including progressive discipline when appropriate.

The Grievant sailed for the Employer for fifteen years prior to his termination. He had no prior discipline for misconduct similar to the misconduct in this case. In his testimony, Mr. Hoskins made a passing reference to prior incidents in which the Grievant used offensive language toward other employees, but he did not provide details and any past incidents did not result in disciplinary action and may not have been reported to management. (TRI-96:1-TRI-99:7) The Grievant received discipline in March 2010 in the form of a forty-hour suspension for misuse of sick leave. (E7)

The majority of labor arbitrators subscribe to the view that discipline is meant to be corrective rather than punitive. Therefore, labor arbitrators typically expect employers to apply progressive discipline prior to terminating an employee's employment. The purpose of progressive discipline is to correct an employee's unacceptable behavior through the application of escalating levels of discipline. Those corrective actions range from oral counseling through written warnings, suspensions and ultimately termination if the behavior is not corrected. Through progressive discipline the employer clearly communicates the areas of inadequate or unacceptable performance and the employee has the opportunity to adjust future behavior to the employer's reasonable expectations. Typically, discharge follows only when the possibility of correction appears to have been exhausted.

In some instances, however, an employee's behavior falls within a class of offenses that are so serious that immediate termination without progressive discipline is justified. Reasonable people may differ about where the line should fall between progressive discipline offenses and immediate termination offenses. Words such as egregious often are used to characterize the most serious types of offenses, but such words do not provide clear guidance. Labor arbitrators

often distinguish between those cases that require progressive discipline and those that justify immediate termination by examining the facts to determine whether the misconduct represents extreme behavior that breaches or destroys the fundamental understanding on which the employment relationship between the employer and the employee is based. (Abrams & Nolan, *Toward a Theory of "Just Cause" in Employee Discipline Cases*, 85 Duke Law Journal 594 (1985), as quoted in St. Antoine, *The Common Law of the Workplace*, 2<sup>nd</sup> Ed., p. 186 (BNA Books; 2005))

The WSF Code of Conduct discusses the issue of immediate termination, but does not provide detailed guidance on how to distinguish offenses that require progressive discipline from offenses that justify immediate termination. The Code lists six offenses that may lead to immediate termination and another fourteen offenses that may lead to disciplinary action up to and including termination or, if less serious, will be subject to progressive discipline. (E12)

The Employer contends that no excuse can be made for the Grievant's conduct on April 5, 2013. The Employer argues that the Grievant engaged in clearly egregious misconduct and his actions warranted termination. The Union contends that the Grievant's conduct on April 5 was the "final meltdown of an alcohol abuser." The union argues that the Grievant's conduct warrants discipline, but discharge was not the appropriate disciplinary response, particularly in light of the Grievant's work record and the remedial action he took in entering and participating actively in alcoholism treatment and recovery programs.

Because the misconduct clearly occurred as alleged, the principal question in this case is whether the Employer's decision to discharge the Grievant was a reasonable and even-handed response to the proven misconduct.

The Union contends that the Employer has not consistently terminated employees for alcohol and drug-related misconduct. Mr. Ubelhart testified concerning a number of other employees who received a second chance after an incident involving alcohol or drugs. The Union contends that all the Grievant is asking for is to be treated in a similar manner to other employees who had drug or alcohol problems at work.

The general rule in labor arbitration on consistent application of discipline under a just cause standard is stated as follows:

It generally is accepted that enforcement of rules and assessment of discipline must be exercised in a consistent manner; all employees who engage in the same type of misconduct must be treated essentially the same, unless a reasonable basis

exists for variations in the assessment of the punishment (such as different degrees of fault, or mitigating or aggravating circumstances affecting some, but not all of the employees). (Elkouri & Elkouri, Kenneth May, Editor *How Arbitration Works*, 7<sup>th</sup> Edition, p. 15-76 (BNA Books; 2012)) (footnotes omitted)

Of the eleven cases that the Union identified as receiving less discipline than the Grievant, most are examples of situations in which an employee reported to work intoxicated or failed a drug test. Mr. Rodgers characterized those cases as, for example, situations in which “an employee was destroying himself at no real consequence to the system.” (TRI-172) He testified that in those instances in which an employee is found to be under the influence at work, the Employer has a history of trying to work with people to aid them in their rehabilitation.

The Grievant’s case has the element of intoxication at the workplace, but also has the added elements of sexual harassment and offensive sexual and racial comments. Therefore, the Grievant’s case differs significantly from those that involved only intoxication or drug use.

In a case cited by the Union that had both the elements of intoxication and other misconduct, an employee drove his vehicle off a raised loading bridge and crashed onto the car deck of a ferry on which he was supposed to work the next day. The employee was off-duty and intoxicated. The ferry was out of service at the time. (TRI-218:9-TRI-221:25, U7) That employee returned to work following a suspension and seniority adjustment and signed a return to work or last chance agreement.

In another case cited by the Union, an employee who worked as a ticket seller reported to work, retrieved his safe containing his selling fund or bank, put the safe in the trunk of his car and drove off, leaving his post unattended. The employee was intoxicated at the time. (TRII-12:17-TRII-17:1) That employee was on a last chance agreement at the time of the incident for a prior incident of intoxication at work. The Employer gave the employee a second last chance agreement. The employee went into alcoholism treatment and remains employed today. (U11)

Although these two examples involved serious misconduct, the nature of the misconduct differs significantly. WSF has a diverse workforce and serves a diverse public. (TRI-168:13-TRI-171:2) The conduct exhibited by the Grievant is totally inconsistent with the Employer’s obligations to serve both a diverse public and to employ a workforce that reflects the diversity of the community WSF serves. As Mr. Rodgers testified:

In some cases, termination is very appropriate because of the overall and long-reaching effects the policy violation had.

And in this particular case as I thought about this, which I gave great weight to this simply because I've known Mr. Ross for a long time myself, is that I had to look at how this was going to affect the entire system and what would the employees feel would be tolerable.

Washington State Ferries went through very serious...times...about from when I started in about 1972 up until about 1984, '85, where this type of behavior was swept under the rug. There were multiple lawsuits. There was a lot of press feed. There were a lot of things that were giving discredit to the system as a whole.

And it was difficult for minorities and women to work within the Washington State Ferries because of the long-standing, what I would say, merchant seaman type culture that was within the system. And it took a long time for the ferry system to turn their way—to turn their bow out of that type behavior, and it took a lot of education, and it took a lot of work.

So when I look at that history and a lot of those employees are still here today, it's difficult for me to justify anything but termination with this type of behavior. (TRI-169:13-TRI-170:13)

The testimony in the record also shows that news travels fast within WSF. The Grievant testified that within a couple of days of April 5 he received random text messages from other WSF workers asking “what did you do; what were you thinking?” (TRII-55:12-20) Mr. Hoskins testified:

Q. Does information move around the fleet among employees?

A. Oh, all the time. I mean, you can do something, and the next thing you know, the news—it's contagious. I mean the culture here at WSF, is something happens, you are going to hear about it, you are going to know about it, from Pt. Defiance all the way up to the San Juan Islands. I mean it's just the culture. It's been like this ever since I've been hired. (TRI-101:4-11)

Mr. Hoskins also testified that when the Grievant came back to work briefly after he completed the treatment program, Mr. Hoskins received texts from coworkers, a lot of whom “were pretty upset.” (TRI-100:6-11) In addition, a negative news report about the April 5 incident appeared on television on June 1, 2013, which was a few days after the Grievant returned to work for two days in late May after completing the treatment program. (E14)

Mr. Hoskins testified as follows concerning his response to the April 5 interaction with the Grievant:

Q. So...you said you were in disbelief. Why?

A. Because I've never really had a conversation—since all my years working at WSF, I've never had a situation either passenger, maybe we had a few words here and there, but not to the intensity of the conversation anything like that ever happened to me. And at that time, it was probably, what 14, 15 years now at that time...did that ever happen.

And plus it was just—the relationship that I had with JR that—I was in disbelief because I never thought he really had feelings or thoughts like this toward me. Because in the past, there's some incidents. I defended him on a few things with other coworkers.

And so that's why I said I was more like in disbelief with what I'm hearing, what Bonnie was telling me. And it was just like, you know, totally uncalled for anybody to display any type of actions and words like that, especially a person that works for WSF. There should have been a level of still—you still have got to keep a certain level of professionalism wherever you are. (TRI-66:7-Tri-67:3)

Mr. Hoskins also testified as follows:

Q. So based on what happened with you the night of April 5<sup>th</sup> of 2013, do you want to have to work with Mr. Ross again?

A. You know, I'm a very forgiving person. But deep down, there's some things that kind of hurt. And I'm not saying time will take it away, but our relationship as far as coworkers has totally drastically changed. No, I wouldn't prefer to work with him. (TRI-69:3-9)

In my judgment, the Employer reasonably concluded that continuing the Grievant in employment would create disruption in the workforce and would potentially lead to further negative public attention, such as negative news reports about WSF. The Employer also reasonably concluded that continuing the Grievant in employment could undermine the Employer's efforts to promote equal employment within the WSF system.

The Grievant testified that he stopped drinking on April 16, 2013 after the Union notified him that the Employer was calling the Grievant in for a fact-finding related to the April 5 events. He testified that he has not had a drink since. (TRII-58:13-16) The Grievant testified that he

entered and completed in-patient alcoholism treatment and he continues to be actively involved in a recovery program. (TRII-59:6-TRII-60:20; TRII-66-TRII-77; U21-U23)

As witnesses at this hearing testified, many people successfully recover from alcoholism, remain sober and lead productive lives thereafter. (TRI-47:16-20; TRI-139:2-TRI-142:4) The process of recovery often has a transformative effect on the individual that extends beyond simply stopping drinking. The Grievant described the positive, transformative effect that recovery has had in his life. (TRII-102:15-TRII-103:2) Clearly, the Grievant's conduct in obtaining treatment and continuing in follow up programs is commendable.

Had this been a case of intoxication in the workplace without the other elements, the outcome would very likely be different. Intoxication, however, does not provide an excuse for serious misconduct of the type engaged in by the Grievant. The mitigating factors of length of service, the lack of prior discipline for similar conduct and the Grievant's commitment to alcoholism treatment are outweighed by the Employer's interest in protecting the integrity and credibility of its equal employment policies and rules.

#### Conclusion

After full consideration of the evidence and the arguments submitted by the Parties, I find that the Employer had just cause to terminate the Grievant's employment.

//  
//  
//

IN THE MATTER OF THE ARBITRATION BETWEEN

INLAND BOATMEN'S UNION OF	)	
THE PACIFIC,	)	ARBITRATOR'S OPINION
	)	AND AWARD
UNION,	)	
	)	
and	)	JOHN ROSS TERMINATION
	)	GRIEVANCE
STATE OF WASHINGTON,	)	
	)	
EMPLOYER.	)	
_____	)	

For the reasons set forth in the Opinion that accompanies this Award, the grievance must be and it is denied.

Dated this 29<sup>th</sup> Day of September 2014

  
\_\_\_\_\_  
Joseph W. Duffy  
Arbitrator