BEFORE THE ARBITRATOR

In the matter of the arbitration of a dispute between WASHINGTON STATE FERRIES and INLANDBOATMEN'S UNION OF THE PACIFIC	CASE 24905-A-12-1513 ARBITRATION AWARD

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Robert H. Lavitt*, Attorney at Law, for the union.

Attorney General Robert M. McKenna, by *Don L. Anderson*, Assistant Attorney General, for the employer.

On June 18, 2012, the Washington State Ferries (employer) and the Inlandboatmen's Union of the Pacific (union) filed a joint request for grievance arbitration. The Commission appointed Lisa A. Hartrich as the arbitrator. Arbitrator Hartrich conducted a hearing on July 26 and July 27, 2012, in Seattle, Washington.

ISSUES

Was the Memorandum of Understanding (MOU), signed by the parties on March 3, 2011, valid? If the MOU was valid, did the employer violate the MOU when it implemented a reduction in staffing levels on June 17, 2012? If so, what is the remedy?

PROCEDURAL BACKGROUND

This case comes before the Arbitrator through somewhat unique circumstances. On June 15, 2012, in order to resolve a pending application for a temporary restraining order filed in Thurston County Superior Court[1] and a pending unfair labor practice complaint,[2] the parties stipulated to resolve the underlying grievance through an expedited arbitration process with the Commission. The parties agreed to adhere to an expedited process because the decision impacts the fall bidding

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1 *IBU v. State and Paula Hammond*, No. 12-2-01225-1 (Thurston County, June 15, 2012).

2 Case 24378-U-11-6245 was filed by the union on November 4, 2011, and withdrawn on June 25, 2012.

schedule for the ferry system. The parties agreed to jointly request an arbitrator from the Commission, file pre-hearing briefs and exhibits by July 23, 2012, hold a hearing on July 26 and July 27, 2012, and present oral closing arguments in lieu of post-hearing briefs. The parties secured assurance from the Commission that a decision would be issued no later than the close of business on August 8, 2012.

In addition to its pre-hearing brief, the employer filed a motion for partial dismissal for untimeliness.[3] The Arbitrator declined to rule on the motion until after the close of the hearing. The employer's motion for partial dismissal is denied.

RELEVANT CONTRACT LANGUAGE

MOU

The March 3, 2011 MOU was signed by Dennis Conklin, the union's regional director, Tim Saffle, regional representative for the International Organization of Masters, Mates & Pilots (MM&P),[4] Diane Leigh, Director of the employer's Labor Relations Office (LRO),[5] and Captain George Capacci, Deputy Chief of Ferries. The MOU reads as follows:

MEMORANDUM OF UNDERSTANDING
BETWEEN
THE STATE OF WASHINGTON
AND
INLAND BOATMAN'S UNION,
MARINE EMPLOYEES' BENEFICIAL ASSOCIATION, AND
MASTER, MATES AND PILOTS[6]

The parties agree to the following:

A. The Washington State Ferries (WSF) and marine unions will request that the United States Coast Guard review the staffing levels for the following vessel classes: Jumbo Mark I, Super, Issaquah and Evergreen State.

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3 The employer argued that the union should have filed a grievance within 30 days after September 21, 2011, when the employer first notified the union of its efforts to effectuate the MOU.

4 An earlier, slightly different version of the MOU was also signed by Jeff Duncan of the Marine Engineers' Beneficial Association (MEBA). Duncan had to leave the meeting before the final MOU was complete.

5 The LRO is now known as the Labor Relations Division (LRD).

6 Mistakes in union names are as written in the original MOU.

B. Once the Coast Guard completes its crewing review, the provisions of the current collective bargaining agreements that specify staffing levels will be modified to reflect the Coast Guard's determination of appropriate staffing for each vessel in the classes reviewed. If the Coast Guard review creates a need for a change in staffing levels, WSF will implement those changes in the next seasonal bid cycle. WSF will notify the unions and fulfill its statutory bargaining obligations prior to implementing the change.
C. Nothing in this agreement or the collective bargaining agreements preclude WSF from staffing above COI.
D. The parties agree that this resolves the staffing level issues for the collective bargaining agreements and that Coast Guard's determination of staffing levels is safe.

This agreement becomes effective upon final signature of the parties. If this MOU conflicts with any provision in a collective bargaining agreement, the terms of this MOU shall supersede the conflicting provision(s) of the collective bargaining agreements.

Collective Bargaining Agreement

The parties' collective bargaining agreement (CBA) contains the following relevant provisions:

Rule 6 – Scope

. . . .

6.02 The parties agree that the provisions of this Agreement constitute the complete agreement between the parties. Any letter or memorandum of understanding (MOU) applicable to the parties shall be listed in the Appendix of this Agreement (Appendix "F") as a letter or MOU that is in effect for the term of this agreement or a term specifically less than the term of the agreement. A letter or MOU not listed shall be null and void. Letters or MOUs added to the agreement during its term shall specifically state the duration of the letter or memorandum of understanding not to exceed the term of the agreement. Also, it is expressly understood and agreed upon that no term or provision of this Agreement may be amended, modified, changed, or altered except by a written agreement executed by the parties. This clause does not constitute a waiver by either party of its duty to bargain pursuant to RCW 47.64.

Rule 7 – Crew Requirements

7.01 The Employer agrees to adopt the following minimum manning schedules as part of this Agreement.

7.02 Except in cases of emergency and for movements within the vicinity of Eagle Harbor, each vessel, while in service, shall have a minimum manning as follows:

. . . .

FACTUAL BACKGROUND

The parties' current CBA is dated July 1, 2011, through June 30, 2013. The union represents approximately 900 employees, including deckhands in the classifications of Able Bodied Seaman (AB) and Ordinary Seaman (OS). The parties began negotiating a successor CBA in 2010 in accordance with RCW 47.64.170, and submitted impasse issues to interest arbitration per RCW 47.64.300. Arbitrator Sylvia Skratek held a hearing from August 2 through 6, 2010, and issued a decision and award on September 22, 2010. On November 18, 2010, the director of the state's Office of Financial Management (OFM) determined that all arbitration awards submitted in 2010, including the union's award mentioned above, were not financially feasible. The parties were then faced with going back to reopen the contracts in early 2011.

The maritime unions were under pressure to reopen their contracts because of the employer's precarious financial situation. The ferry system in particular was under the scrutiny of the state legislature during the early days of the 2011 session. The parties met several times in February and March 2011 in an attempt to find ways to cut costs. The union, along with MEBA and MM&P, bargained their reopeners as a coalition with the employer.

The parties began looking at staffing levels as a potential avenue for cutting costs. Rule 7 of the CBA establishes the minimum number of employees required on each vessel by classification (known as "current" staffing levels). The United States Coast Guard (Coast Guard) also determines and maintains minimum staffing levels for safety purposes, known as a vessel's Certificate of Inspection (COI). COI staffing levels are required in order for a vessel to operate. Some of the ferry vessels already operate at COI levels, while others are staffed above COI levels per Rule 7 of the CBA.

The employer previously proposed to eliminate the CBA staffing levels and instead require COI minimum staffing levels. One such proposal was submitted to interest arbitration before Arbitrator Skratek in 2010. Skratek declined to award the employer's proposal, stating, "Given the concession on the part of the Union to not seek a wage increase during these difficult economic times, the Arbitrator is unwilling to find that the employees should undertake an increased

workload without additional compensation." As stated above, the arbitration award was deemed not financially feasible in its entirety by the OFM.

During the 2011 reopener discussions, the employer again proposed eliminating the CBA staffing levels in favor of COI levels. The union was willing to discuss a compromise, but was not willing to agree to COI staffing levels on all vessels across the board. As a result of the negotiations on staffing levels, the parties developed an MOU. The parties agreed to have the Coast Guard review the staffing levels to determine the "appropriate staffing for each vessel" in the classes of Jumbo Mark I (2 vessels), Super (4 vessels), Issaquah (6 vessels) and Evergreen State (3 vessels). These four classes represent 15 of the employer's total fleet of 23 vessels. The parties agreed that the CBA would be modified to reflect the Coast Guard's determination of appropriate staffing if the Coast Guard's review created a need for a change in staffing levels. The parties also agreed that the Coast Guard's determination of staffing levels were safe. The MOU did not specify a timeline for completion of the Coast Guard's review. The parties signed the MOU at the last bargaining session for the reopener on March 3, 2011, or sometime in the early hours of March 4.

During the months that followed, union representatives Jay Ubelhart and Dennis Conklin, and the employer's chief negotiator, Jerry Holder, exchanged numerous e-mails to iron out final language changes to incorporate into the 2011-2013 CBA. It appears that the final document was print-ready sometime in September 2011. Many changes were incorporated by agreement. However, the MOU was not mentioned at all during these e-mail exchanges, and was not incorporated into the 2011-2013 CBA.

On September 21, 2011, Captain George Capacci e-mailed the union (as well as MEBA and MM&P) and attached a letter to John Dwyer, Captain of the Port for the U.S. Coast Guard Sector Puget Sound. Capacci's e-mail to the unions stated, "Attached is the letter for your signature to start the process for the US Coast Guard review of the staffing levels on the four classes of WSF vessels . . . ." Capacci requested signatures from the three union representatives. On October 5, 2011, Capacci sent a second e-mail to the union, again requesting a signature on the letter to Dwyer. The letter requested that the Coast Guard "review the Certificate of Inspection (COI) staffing levels" for the four classes of vessels listed in the MOU.

In response to the employer's proposed letter, Captain Tim Saffle of the MM&P drafted another letter to Dwyer on behalf of the three unions which asked the Coast Guard to review the "current staffing levels" for the four classes of vessels, and included an attachment listing the current staffing levels. Saffle's letter also invited Dwyer to jointly meet with the signatory parties if he needed additional information. Saffle sent his version of the letter to Capacci on October 13, 2011. On October 18, 2011, Capacci sent a revised draft of the Dwyer letter to the three unions, incorporating some of the input from Saffle. Notably, Capacci changed "review of the Certificate of Inspection (COI) staffing levels" to the exact language from the MOU, requesting the Coast Guard to "review the staffing levels."

On October 19, 2011, Jeff Duncan of MEBA, on behalf of the three unions, sent a revised version of Saffle's letter to Capacci, again reiterating that the unions wanted the letter to Dwyer to include an attachment of the current staffing levels. On October 21, 2011, Capacci sent another revised letter to the unions for review, adding the suggestion that Dwyer meet jointly with the signatories of the letter should the Coast Guard need more information. Capacci's e-mail accompanying the letter stated, "We still believe this joint letter is consistent with our signed MOU. Accordingly, I request your signature to move this effort along."

On November 1, 2011, Capacci e-mailed Dwyer the employer's final version of the letter requesting the staffing level review. The letter was signed only by David Moseley, Assistant Secretary of the Ferries Division. The unions were not signatories to the letter. On November 2, 2011, the three unions sent their own letter to Dwyer, requesting that the Coast Guard review the "current staffing levels," including the attachment listing the current staffing levels.

On November 4, 2011, the union filed an unfair labor practice complaint with the Commission on behalf of all three unions, claiming the employer's November 1 letter to Dwyer violated the MOU because the letter was not signed jointly by the unions and the employer. Additionally, the union claimed the letter was sent prematurely, violating the employer's "duty to bargain the final version of the letter pursuant to the MOU by implementing their version while bargaining was actively in progress." The union's requested remedy included an order that the MOU be revoked for the length of the contract.

On November 8, 2011, Dwyer e-mailed Capacci requesting more information "as to what is prompting this request . . . ." On November 9, 2011, Capacci e-mailed a document to Dwyer which listed both the COI staffing levels and the CBA staffing levels for each vessel side-by-side. On November 22, 2011, in response to a request for further information from the Coast Guard, Capacci sent Dwyer muster lists. Muster lists outline the duties each crew member is responsible for in case of an emergency (fire, rescue, abandon ship). Muster lists are written specifically for each vessel, and are displayed prominently on the vessels.

On March 12, 2012, Dwyer sent Moseley a letter stating, "We have completed our review of the 15 vessels involved, and find that the manning levels[7] of the Jumbo Mark I, Issaquah, and Evergreen State classes of ferries, as stated on their Certificates of Inspection (COIs), are satisfactory." The letter went on to say that "further review" was needed to confirm that the Super class ferry COI staffing levels were adequate to ensure proper safety levels in an emergency.

On March 27, 2012, Moseley sent a letter to the union, stating that the Coast Guard review had been completed for the Jumbo Mark I, Issaquah, and Evergreen State vessel classes, and therefore, per the MOU, the employer intended to implement the change in staffing levels for those classes for the summer season bid cycle. Moseley added, "We stand ready to bargain the effects of that change."

On April 4, 2012, the union sent a letter to Dwyer stating that the union found Dwyer's March 12 letter "quite troubling." The union's letter expressed concern that the unions had been excluded from the review process, and noted the disagreement between the parties regarding whether COI or current/CBA staffing levels were indicated by the MOU. The union's letter stated: "The parties did not negotiate for a review of the COI. I emphasize that the parties drafted and agreed to the foregoing language [in the MOU] with full knowledge of the distinction."

On April 9, 2012, the employer had a labor/management meeting with the three maritime unions. Jeff Pelton, labor relations manager for the employer, testified that at that meeting the unions requested dates of availability for meeting on the matter of staffing.

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7 Capacci testified that "staffing," "manning," and "crewing" are synonymous terms.

On April 19, 2012, the union filed a grievance over "the announced reduction of current crew levels, as it would violate Rule 7 – Crew Requirements" in the CBA. The grievance further contended that the employer's "failure to incorporate the MOU into the parties' current CBA (2011-13) renders it null and void under Rule 6.02 . . . ." On May 2, 2012, the parties met for the Step One grievance meeting with Steve Rodgers, Director of Marine Operations for the employer. The grievance was denied by Rodgers in a letter dated May 22, 2012.

On May 3, 2012, Pelton sent a letter to the union providing the employer's available meeting dates for discussing the impacts of the change in staffing levels for the summer season. The employer provided six potential meeting dates in May and early June. On May 4, 2012, the union sent a reply letter to Pelton, stating that it was willing to meet with the employer to try and resolve the dispute, but maintained its position that the employer's announced staffing reductions were a breach of the CBA. The union provided dates in July because it had scheduling conflicts on the dates in May and June provided by the employer. On May 7, 2012, Pelton sent a letter to the union, suggesting that the parties convert a scheduled May 22 meeting set for 2013-2015 CBA negotiations to discuss the impacts of the staffing level changes. The staffing changes were scheduled to take effect on June 17, 2012.

On May 11, 2012, the parties met to mediate another matter. On that date, the parties discussed Pelton's proposal to use the May 22 bargaining meeting for discussing the staffing level issue instead. On May 24, 2012, Pelton sent a letter to the union summarizing the May 11 conversation, stating that the union had rejected the idea. Pelton's letter indicated that the union had expressed that a grievance had been filed on the matter, and that an injunction would be forthcoming. Pelton reiterated that the employer stood ready to discuss the impacts of the staffing changes "before implementation on June 17, 2012."

In the meantime, the union scheduled a meeting with Dwyer to discuss its concerns regarding the Coast Guard's review of the COI levels. The meeting occurred on May 4, 2012. The union prepared a chart detailing the passenger-to-crew ratio to underscore its safety concerns if COI minimum staffing levels were to be implemented. The meeting and the union's safety concerns were further detailed in a letter sent to Dwyer by the union's counsel on May 14, 2012.

On June 17, 2012, the employer implemented the new staffing levels for the summer season. Approximately 27 full-time positions were eliminated.

DISCUSSION

The union argues that the MOU is null and void because it was never incorporated into the CBA as required by Rule 6.02. Rather, the union relies on Rule 7 in the CBA, which sets out the minimum staffing levels for each vessel. Arguing that Rule 7 prevails over the MOU, the union contends that the employer violated the contract by reducing staffing levels below what is allowed in the CBA.

Alternatively, the union argues that even if the MOU were to be found valid, some required conditions of the MOU were not fulfilled, and therefore the employer did not have the justification to implement the change in staffing levels until those conditions were met.

The employer asserts that the MOU is a valid, clear, and unambiguous agreement between the parties. The employer further argues that the conduct of the union shows that it considered the MOU to be valid. However, the employer concedes that if the MOU were found to be invalid, it must abide by Rule 7 and staff its vessels in conformity with the CBA.

Was the MOU valid?

The union argues that the MOU is not valid because Rule 6.02 states, "A letter or MOU not listed shall be null and void." The union points out that the parties have a long practice of incorporating MOUs into the CBA, including several changes made as a result of bargaining in February and March 2011.

The MOU states, "If this MOU conflicts with any provision in a collective bargaining agreement, the terms of this MOU shall supersede the conflicting provision(s) of the collective bargaining agreements." However, the union argues that this language does not negate the mandatory process in Rule 6.02. The union contends that the language is ambiguous because it is not clear what was intended by the phrase "conflicts with any provision." The union asserts that this

language was meant to apply only to the staffing requirements in Rule 7. However, no evidence was presented to support this assertion.

Jerry Holder, chief negotiator for the LRO assigned to work with the ferry unions, was present at all of the coalition bargaining sessions in February and March of 2011, and was present during the discussions leading up to the MOU. However, he was not the author of the MOU. He, in collaboration with the union, was responsible for finalizing the 2011-2013 CBA. Holder testified that it did not occur to him that the MOU was left out of the CBA because it was "case specific." Holder testified that he assumed the Coast Guard would be contacted within a short period of time, and there was no reason for the MOU to be incorporated into the CBA.

Jay Ubelhart, the union's business agent, worked with Holder to finalize the 2011-2013 CBA. Ubelhart testified that he did not realize the MOU was not included with the other changes made to the final CBA. He stated, "It wasn't on my radar."

There is no evidence that the employer or union intentionally or inadvertently left the MOU out of the final CBA. In fact, both parties were very conscientious and fastidious about keeping track of all of the changes that needed to be incorporated into the 2011-2013 CBA. It is hard to imagine that both parties would overlook such an important MOU if either party thought it should be incorporated into the CBA.

The union's conduct during the exchange of draft letters to the Coast Guard between the three unions and Capacci in the fall of 2011 indicates that the union was acting under the notion that the MOU was valid, even if the unions did not agree with the employer's interpretation of the MOU. At that time, there is no evidence that the union considered the MOU null and void. While the union disagreed with the draft letters written by Capacci, the union drafted and sent its own letter to the Coast Guard sharing its point of view as to the meaning of the MOU. This indicates that the union was only disagreeing with the meaning of the MOU, not the validity. Additionally, the union's unfair labor practice complaint, filed on November 4, 2011, did not dispute that the MOU was valid. The fact that the union raised the Rule 6.02 argument over one year after the parties signed the MOU is not convincing.

The Arbitrator finds that the language of the MOU is clear on its face, and that the MOU is valid. The MOU stood alone as a separate agreement to resolve a particular dispute by leaving it up to the Coast Guard to decide what the parties were unable to determine on their own.

Did the Employer Violate the MOU?

In concluding that the MOU is valid, the question now becomes whether or not the employer properly adhered to the provisions of the MOU. The union argues that the MOU contains two conditions precedent that remain unfulfilled, and that the employer cannot implement the changes contemplated by the MOU until those conditions are fulfilled.

First, the union argues that the parties agreed to have the Coast Guard review "staffing levels" for certain vessel classes. The union contends that the Coast Guard did not review the "staffing levels," but rather reviewed the COI levels.

Second, the union argues that the MOU requires the Coast Guard to complete its review before the staffing levels can be modified. The union contends that the Coast Guard's review is not yet complete.

It is evident from the testimony at hearing that the parties disagreed about whether the Coast Guard should review the COI staffing levels or the current staffing levels. Captain Capacci was present at the bargaining sessions on behalf of the employer in February and March 2011, and was present for discussions leading up to the MOU. Because of the parties' fundamental disagreement about how to proceed with the discussion on staffing levels, Capacci testified that the parties agreed to "let the Coast Guard decide this for us." Capacci testified that the employer used the term "staffing levels" in the MOU because the employer determined that the language was "neutral." When the employer finally sent the request to the Coast Guard on November 1, 2011, the letter quoted the exact language from the MOU, and did not mention COI levels at all. The union sent their own letter to the Coast Guard, stating its position that the union wanted the Coast Guard to review the current (CBA) staffing levels. Later, when the Coast Guard requested more information, Capacci provided them with a chart showing both COI staffing levels and the CBA staffing levels. He later provided the Coast Guard with the muster lists for both the COI and CBA levels.

Based on the evidence presented, it appears that the Coast Guard had the information it needed to conduct a review of the staffing levels. Whether it chose to use COI or CBA levels was left up to them. The MOU clearly states that the parties agreed that the Coast Guard's review "resolves the staffing level issues for the collective bargaining agreements and that [the] Coast Guard's determination of staffing levels is safe."

Dwyer's March 12, 2012 letter to the employer clearly states, "We have completed our review of the 15 vessels involved, and find that the manning levels of the Jumbo Mark I, Issaquah, and Evergreen State classes of ferries, as stated on their Certificates of Inspection (COIs), are satisfactory." In the same letter, the Coast Guard stated that it still needed to conduct "further review" of the Super class staffing levels. As a result, the employer implemented staffing changes on the three ferry classes for which the Coast Guard reported the reviews were complete. No changes were implemented for the Super class, pending further Coast Guard review.

On its face, the MOU does not require the Coast Guard staffing review to be complete on every vessel or class before changes can be implemented. The MOU states, "If the Coast Guard review creates a need for a change in staffing levels, WSF will implement those changes in the next seasonal bid cycle." The employer acted reasonably in only making staffing changes on vessels in the three classes where the review was complete, while reserving implementation for the fourth class until the Coast Guard completes its review.

At hearing, the union's witnesses testified that they had a meeting with the Coast Guard on May 4, 2012. At the meeting, the union expressed safety concerns regarding the Coast Guard's staffing review based on COI levels. The union contends that this meeting supports the conclusion that discussions about appropriate staffing levels are still ongoing and therefore the Coast Guard's review is not complete. Ubelhart testified that the Coast Guard "said they were going to look into that and . . . get back to us." As of the date of this hearing, the union had not yet heard back from the Coast Guard.

The union's contention that its ongoing discussions with the Coast Guard show that the Coast Guard's staffing review is not complete does not sway the Arbitrator to its position. The Coast

Guard completed its review of the staffing levels for three ferry classes on March 12, 2012. The MOU charges the Coast Guard to be the decision-maker, and both parties entrusted the Coast Guard to determine what "safe" staffing levels are. Both parties agreed to give the Coast Guard the power to make this decision for them, and as such, the Coast Guard's decision must be honored.

AWARD

Based on the record as a whole, it is the decision of the Arbitrator that the March 3, 2011, MOU is valid. Furthermore, the employer did not violate the MOU when it implemented staffing reductions on June 17, 2012. The grievance is DENIED.

Issued at Olympia, Washington, this 7th day of August, 2012.

Lisa A. Hartrich

LISA A. HARTRICH, Arbitrator