

IN THE MATTER OF ARBITRATION BETWEEN)
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)
Washington State Department of Transportation,)
Ferries Division)
)
)
And)
)
)
International Organization of Masters, Mates and)
Pilots)
)
Dan Tracy Termination: No. 091007-00045-8)
_____)

AWARD

Before Arbitrator Frederick G. Ihrig

STATEMENT OF THE CASE

In the early morning hours of June 1, 2007, the Cathlamet, a vessel belonging to the Washington State Department of Transportation, Ferries Division, ("WSF") and under the command of Captain Dan Tracy, was involved in an allision (an act of a vessel striking a hard object other than another vessel) while attempting to land at the Mukilteo dock, one of many such docks in the WSF system. Specifically, the Cathlamet struck a dolphin which is a large group of wooden pilings designed to protect the dock. As the result of this allision, the dolphin was destroyed and had to be replaced by steel beams and the dock wing wall and the Cathlamet itself suffered damage with total repair costs to WSF in excess of one million dollars.

Following this event, Captain Tracy was placed on paid administrative leave and a comprehensive investigation was initiated. A fact finding conference was held on June 8, 2007 followed by a Lauderhill conference on June 28, 2007 wherein Captain Tracy was given an opportunity to explain his actions and present mitigating facts and circumstances in his defense and was afforded representation at both meetings by a member of his union, the International Organization of Masters, Mates and Pilots, ("Union"). In addition, a comprehensive investigation of this incident was conducted by

Captain Mark McElwaine and made a part of WSF hearing exhibits. On July 6, 2007, Captain Tracy received a letter from Captain Kelly J. Mitchell, Senior Port Captain for WSF, advising him that he was being terminated as of that date.

On July 30, 2007 a grievance was filed on behalf of Captain Tracy. The parties were unable to resolve this matter pursuant to the terms of the Collective Bargaining Agreement ("CBA") and it was submitted to arbitration pursuant to the procedures of the Federal Mediation and Conciliation Service. A hearing was held at the offices of WSF on January 27 and 28, 2009. WSF was represented by David J. Slown, Assistant Attorney General and the Union was represented by Steven N. Ross, Esq. of the firm Wolfstone, Panchot & Bloch, P.S., Inc. Both oral and written evidence was submitted by the parties and post-hearing briefs were timely filed. A transcript of the proceedings was made and provided to the Arbitrator and the parties.

ISSUE

At the hearing, the parties stipulated to the following issue: "Was the level of discipline imposed upon Captain Tracy appropriate and, if not, what is the appropriate remedy?"

APPLICABLE CONTRACT PROVISIONS

2.01.06 Licensed Deck Officer (This Section is effective, July 22,2005)

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Negligence in navigational and/or ship handling responsibilities, which may result in property damage or injury to vessel personnel and/or passengers, shall be deemed "just cause" for discipline up to and including termination.

* * *

XXI DISCIPLINE

21,01 Discipline For Cause The Employer shall have the right to discipline any Deck Officer for cause, which shall be detailed and communicated in writing to both the Union and the Deck Officer involved.

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XXIV. MANAGEMENT PROVISIONS

24.01 Management of Business Subject to the terms and conditions of this Agreement, the Employer retains the right and duty to manage its business, including the following; the right to adopt regulations regarding the appearance, dress, conduct of its employees, and to direct the work force consistent with work procedures as are necessary to maintain safety, efficiency, quality of service and the confidence of the traveling public that are not contrary to the terms and provisions of this Agreement.

24.02 **Union Intercession** The Union reserves the right to intercede on behalf of any Deck Officer who feels aggrieved and the right to process a grievance on behalf of any such Deck Officer pursuant to the Disputes provisions of this Agreement (Section 22)

BACKGROUND

Captain Tracy was employed by WSF in 1994 following a 21 year career with the National and Oceanic and Atmospheric Administration where he was a commissioned deck officer retiring at the rank of Commander. Following his employment with WSF, he moved up the ranks to the position of Mate in 1999. Since 2003, Captain Tracy held several temporary Master positions and had been Master on the Mukilteo D watch since April 1, 2007.

The 2.4 mile ferry crossing between Mukilteo and Clinton lies in Possession Sound in the northern of Puget Sound and the crossing normally takes between thirteen and sixteen minutes at a speed of just over 13 knts On Thursday the 31st of May at 22:00 the Mukilteo Clinton 'D' watch started the day on the M.V. Kitsap. The 'D' watch ran the Kitsap until tie-up at 01:30 on Friday, June 1. The 'D' watch then transferred over to the Cathlamet except for Captain Tracy who came over at 04:00 to prepare for the morning's first trip. At 04:41, the M.V. Cathlamet leaves Clinton for the first round trip. At 05:20 the Cathlamet returns to Clinton after an uneventful round trip. At 05:32, the Cathlamet departs Clinton for the 'D' watches last trip to Mukilteo with Captain Tracy and Quartermaster Dean McKernzie in the active pilothouse.

Upon departing Clinton, Captain Tracy mentions to QM McKenzie that he feels like he is coming down with something. At 05:38 Captain Tracy tells the QM to slow the

vessel as he needs to take an emergency toilet break. QM McKenzie pulls the stem control handle back to 5 as Captain Tracy leaves the pilothouse for the restroom located behind the pilothouse.

In 2 to 3 minutes, Captain Tracy returns to the pilothouse and QM McKenzie speeds up again to over 13 knts. Captain Tracy takes over the helm at $\frac{1}{4}$ nm from the Mukilteo dock for the final approach to the dock. Realizing that he is closer to the dock than he had believed and because he did not feel the engagement of the bow clutch after some 24 seconds, he orders full back down on both bow and stem controls. In spite of this, the Cathlamet hits the 55 pile timber dolphin at 05:44 traveling at approximately 7.3 knts and sheers to port towards the rear of the north wing wall. At 05:49, the Cathlamet Maneuvers back into the slip to secure while nudging the damaged timber dolphin out of the way to make room in the slip next to the wing wall. One crew member and one passenger suffered minor injuries and two motorcycles fell over on impact. Damage to the dolphin, wing wall and Cathlamet was estimated to slightly exceed \$1,000,000.00.

Immediately following the allision, Captain Tracy and QM McKenzie submitted to required drug and alcohol tests administered by the Terminal Supervisor. Both tests for each of the individuals were negative. In addition, Captain Tracy filed required reports to WSF and the United States Coast Guard. Following its investigation, USCG suspended Captain Tracy's license for 90 days, holding 60 days in abeyance under the condition that he successfully complete a course in Bridge Management Resources which he did approximately one month subsequent to the allision.

As previously set forth above, Captain Tracy was placed on paid administrative leave by WSF and, following several investigations and meetings, he was terminated on July 6, 2007.

POSITION OF THE PARTIES

The Employer - WSF strongly argues that the only possible result of the actions, and the inactions, of Captain Tracy on the morning of June 1, 2007, is the termination of his employment. Severe damage to vessel and dock ensued and the safety of passengers and crew were seriously compromised. Furthermore, policies and procedures for the safe

operation of ferries were ignored wholesale, and the person responsible for all of this was the captain of the ship, the single individual entrusted with the very highest level of authority and responsibility.

WSF maintains a Safety Management System (SMS) to detail operating procedures and practices. This system of procedures and practices provide safe guidelines on how to conduct business and the protocols contained therein are based on the experience of fleet Senior Masters and were developed for landing procedures. The Landing Procedures for the Cathlamet are identified in the vessel specific SMS Manual under CATH DECK 0030.

Because of the mechanical nature of clutching in and out on the Cathlamet and her sister ships, a 3/8 nautical mile safety approach limit is necessary as this establishes time to avert a casualty if there is any failure in the engagement process and this distance and procedures was confirmed and attested by other Senior Deck Officers at the hearing. According to WSF, Captain Tracy failed to adhere to the following procedures:

- The 3/8 nautical mile was ignored as the Cathlamet was traveling 13 Kts and accelerating very close to the 1/4 NM point.
- At approximately 3/8 of a NM the Deck Officer is to announce to the Engine Operating Station that the vessel is approaching dock.
- Did not obtain confirmation from the Engineer Operating Station that the Bow Clutch was engaged and the vessel was now in Maneuver Mode.
- Did not allow ample time to slow vessel and engage clutch so if clutch fails to engage, the vessel can be steered away or stopped using negative pitch on the stem propeller.
- Did not announce approach to the Terminal Staff, for slip availability.
- Did not begin backing the vessel early to ensure control/propulsion system was responding properly.

The policy for Deck Emergencies calls for the following procedures that WSF claims Captain Tracy failed to follow:

- Blow the danger signal of 5 or more blasts on the ship's whistle.
- Move the Engine Order Telegraph to Full Astern
- Use intercom to communicate with Engine room

- Alert Engine Operating Station to Brace for Impact
- Alert passengers to brace for impact.
- Advise terminal by radio of situation

WSF also alleges that Captain Tracy failed to utilize the following backup system to communicate engine orders:

- Emergency Order Telegraph
- Emergency Maneuvering Bells
- Verbal Commands over the intercom to Engine Room

In addition to the above listed failures, WSF also contends that Captain Tracy failed to order watertight doors to be closed and the bilge pump to be on standby.

According to WSF, two additional policies were violated by Captain Tracy. The first involved SMS procedures which require the Master and Mate to alternate navigational duties throughout the shifts. However, Captain Tracy implemented "Watch Splitting," allowing one officer to sleep while the other worked. This decision, according to WSF, forced other crew members into a position where they were in violation of SMS procedures and showed irresponsible actions and a lack of the necessary traits required for effective leadership.

Captain Tracy also left the bridge to go to the bathroom, leaving only an unlicensed individual to navigate the ship, in violation of both WSF policy and USCG directives. He acknowledged that it was wrong but stated that it happens in the fleet. However, according to WSF, Captain Morvan, a union witness who testified in support of Captain Tracy, stated flatly that he would never leave the pilothouse unless another Licensed Deck Officer was present.

WSF also contends that the claim by Captain Tracy that the bow propeller did not engage as quickly as normal, and did not fully engage at all is not supported by the evidence. Based on a thorough analysis by Captain Hughes, it was conclusively demonstrated that Captain Tracy's version of the event could not possibly have happened.

The navigational information presented was based upon highly accurate Automatic Identification System (AIS) data reports from the vessel, which are within 3 meters and 0.1 KTS of actual speed. This information was supplemented with the

Security Video tapes of the vessels' cameras. The gap in data reception that occurred was filled with substantive replications of vessel maneuvering as displayed in the power point pages. Based on the data the following account best describes the actions of the morning of June 1, 2007:

- The Captain had taken command of the vessel and was seen accelerating through 13.0 Knots at 3/8 NM. This occurred at 05:42:13
- 05:42:53 – The vessel is still acceleration through 13.1 Knots at ¼ NM.
- 05:43:31 – The vessel was 718' from the AIS graphic reference point. This is the commencement point for the landing. The Stem handle was Moved to "3" or "0" ahead, based on the Coasting Curve data.
- 05:43:31 – The Bow handle was moved from full feather to "0" and the engagement process began.
- 05:43:47 – Engagement was accomplished and the vessel was ready to maneuver: there appears to be no engagement failure.
- 05:43:47 – 05:43:53 – Both handles were moved to full astern; because vessel is responding to full astern between C & D
- 05:43:53 – The vessel was 303' from the AIS graphic reference point.
- 05:43:53 – 05:43:03 The vessel is responding to Full Astern propulsion: based upon Crash Stop Test Curve.
- 05:44:03 – The vessel was 141' from the AIS graphic reference point.
- 05:44:03 – 05:44:13 – The vessel is traveling at an average speed of 13.5 per second (8.0 knots).
- * 05:44:13 – The vessel was 9' from the AIS graphic reference point. The bow was 9' from impact with the dolphin.
- 05:44:14 – The vessel impacted the dolphin
- 05:44:20 – White Water indicating backing propulsion is seen in the video.

Based on the results of the evaluation, WSF contends that there appears to be no elongated wait period for bow engagement or failure of the engagement process as it was simply initiated too late. The careful analysis of all available data, performed by Captain Hughes, is inconsistent with Captain Tracy's story. It is perfectly consistent with the Cathlamet performing exactly as expected to actions of the Master initiated far too late. It

is also noted that the data were not contested by the Union, and Captain Tracy used the same data in building Ex. U-20.

Concerning the issue of disparate treatment, the Union argued that other Masters have been involved in grounding incidents and have not been terminated. Most of the testimony centered around the case of Captain Stamoulis, whose six-month suspension and permanent demotion was reduced to a 90 day suspension and permanent demotion was reduced to a 90 day suspension with a one-year period of probation in a previous arbitration case. In none of the other cases cited by the Union was there evidence of significant similarities with the case of Captain Tracy.

As discussed by the Arbitrator in the Stamoulis case the reduction in the level of punishment was based in large part upon mitigating circumstances.....Captain Stamoulis 30 years of service with 20 years as a Master.....in contrast to the relatively short service of Captain Tracy. Furthermore, WSF contends that the Arbitrator also gave weight to the nature of the Grievant's failing which involved very brief inadvertence on his part rather than willful misconduct. In addition, the Arbitrator focused most on the very unusual behavior of the helmsman which led directly to the accident and could not be foreseen. In contrast, according to WSF, each of the numerous failures of Captain Tracy was of his own doing, and the full blame may fairly be laid at his feet.

The final argument put forth by WSF was the new language, Rule 2.01.06 in the parties CBA. In that negotiations, the chief negotiator for WSF testified that he made it clear to the Union that WSF sought to tighten up responsibility of Masters for navigational errors. Following extensive bargaining, the Union accepted the language of the second paragraph which clearly established that navigational errors resulting in property damage shall be deemed just cause for discipline up to and including termination.

In conclusion, WSF urges this Arbitrator to deny the grievance of Captain Tracy. His errors were legion, the results about as bad as possible without causing personal injury or death. His story simply does not make sense, and is contradicted by objective evidence. Captain Mitchell was absolutely correct in his decision that Captain Tracy can not ever be trusted with the helm of another Washington State Ferry.

The Union – The Union submits that the only real issue before this Arbitrator is whether the level of discipline imposed on Captain Tracy was appropriate given the nature of his mistakes and the history of discipline administered to other deck officers involved in past incidents where similar mistakes were made. It is the Union's position that although there was "just cause" for some type of discipline, the discipline imposed on Captain Tracy was excessive under the circumstances here, and greatly exceeds the level of discipline imposed by WSF in similar cases where mistakes by other deck officers have resulted in serious marine incidents.

The Union argues that, according to WSF, there have been at least ten serious marine incidents that have resulted in discipline being imposed on a deck officer and in many other marine incidents, no discipline was imposed at all. In each of the ten cases where discipline was imposed by WSF, serious mistakes were made by deck officers, but the degree of discipline imposed has ranged from a written warning for the grounding of a vessel to the termination of Captain Peterson as a result of a positive drug test following a vessel grounding. Furthermore, the Union contends that in several of these cases, the amount of discipline was reduced as a result of a decision by the Washington Marine Employees Commission (Captain Lee), by an arbitrator's decision (Captain Stamoulis) or through the intervention of the Union (Captain Terek). Captain Tracy is the only one of the ten disciplined deck officers terminated as a result of a marine incident, other than Captain Peterson who tested positive for drugs. The Union submits the following data in support of its argument:

Captain Lee (1986) Vessel ran aground with quartermaster at the helm — Captain Lee was suspended for 10 days, which was overturned by the MEC.

Captain Brooks (1986) Vessel grounding. Captain Brooks received a written warning because of his "lack of attention...to assure adequate and proper bridge watch by the ship's crew" and that he "was not aware of the exact position of the vessel prior to the grounding."

Captain Peterson (1996) Took vessel through Cattle Pass a known shoal area where ferries are not authorized to go. Vessel grounded on shoal. Captain Peterson was terminated for a positive drug test.

Captain Williams (1996) Vessel went aground, causing approximately \$500,000. in damage to the vessel. Did not prepare the vessel quickly enough for fog conditions, did not slow the vessel in accordance with the Employer's policy, did not have the appropriate crew members in the bridge at the time of poor visibility. Received a 90 day suspension, with 60 days held in abeyance and one year of probation.

Captain Murray (2000) Vessel went aground, costing approximately \$50,000 in damage to vessel. Received a written warning (mitigating circumstances-squat factor).

Captain Stamoulis (2001) Vessel ran aground - \$1.2 million in damage. Received a 6 month suspension and a 1 year demotion. Arbitrator reduced to 90 day suspension with no demotion.

Captain Terek (no date) Grounding on rocks near Friday Harbor; negligence; not navigating the vessel in a safe manner; not using any navigational aids; not having situational awareness when he turned the vessel onto rocks; multiple SMS violations. Permanent demotion.

Captain Reno (2008) Extensive (\$750,000+) damage to vessel and slip during landing at Bremerton; gash in hull; violation of SMS rules; did not follow protocols for hard landings, notifications failure to safely navigate vessel, lack of navigational skill. Received temporary demotion.

Captain Stowe (2008) "Near Miss" on CHLEAN; Violation of SMS rules; inattention in the wheelhouse; didn't use available navigational aids; didn't follow route manual. One week suspension.

As set forth above, the Union contends that the amount of damage to vessels and/or terminal facilities was very substantial and at least four also involved multiple, serious errors by a deck officer. However, in each of those cases, the discipline ultimately imposed involved some form of suspension and/or demotion but not termination. Progressive discipline was followed in other cases but only in Captain Tracy's case did WSF choose not to use progressive discipline, and to impose the "death penalty" instead.

The Union notes that Captain Tracy acknowledged that he made several significant mistakes in the course of landing the vessel on the day of the incident. He was not feeling well, with diarrhea and a headache. At approximately the 3/8 mile point, he

took over the helm from the quartermaster. However, he did not start attempting to slow down the vessel until he was at approximately the ¼ mile point. During his testimony, he acknowledged that he should have contacted the engine room at 3/8 of a mile as required by SMS, and should have started slowing down earlier.

Approximately 20 seconds after passing the 1450 foot point Captain Tracy first began noticing problems getting the expected response from the vessel. This was because at approximately the 1450' point he brought the bow handle up to 0 expecting to observe the vibrations and noise indicating engagement approximately 20 seconds later. When engagement did not occur, he believed there had been a mechanical failure regarding the change in pitch and brought both handles full astern (full back down) in order to attempt to slow down the vessel in the quickest way possible. The quartermaster observed Captain Tracy doing the full back down and also had observed him moving the bow handle at ¼ mile.

At the point Captain Tracy went to full back down (850' from the dolphin) he acknowledged that he made another serious error by not talking with the engineer. He acknowledged that he should have rang the engineer order telegraph full astern and that he should have possibly sounded the danger signal, but at that point in time he still thought the boat would stop before impact.

In fact, according to the Union, the full back down was not successful. The propulsion system did not respond as expected by Captain Tracy and he was not able to stop the vessel in time. He observed "white water" indicating propulsion only at the point of impact. Based on his experience, he had reasonably believed he would be able to stop the vessel well before reaching the dolphin.

The Union further argues that when the vessel was being put back into service shortly after the incident, it almost immediately experienced a failure of the pitch control system and a similar pitch control problem was experienced by Captain Davis in the summer of 2008 on the same vessel. It is undisputed, according to the Union, that the Issaquah class ferries had a long history of mechanical failures and that the Bello0-Fram diaphragm was found to have failed when the vessel was being returned to service. However, WSF has disputed the link between any of the mechanical problems on the vessel to the events on the day of the landing.

The Union also argues that the Coast Guard investigated the incident as required and following this investigation determined that under the circumstances of the incident the appropriate sanction was a 90 day suspension of Captain Tracy's license, with 60 days held in abeyance coupled with a requirement that he take a bridge resource management course. Captain Tracy successfully completed the bridge resource management course so the Coast Guard suspension was effectively a 30 day suspension. The 30-day suspension imposed on Captain Tracy by the Coast Guard was the same suspension it imposed on Captain Pete Williams after a grounding involving several mistakes by Captain Williams. However, in Captain Williams' case, WSF imposed a suspension of employment equal to the Coast Guard's suspension of his license. In the case of Captain Tracy, the discipline imposed was termination.

The Union argues that Port Captain Kelly Mitchell testified that in making the decision to terminate Captain Kelly he did not consider the level of discipline that had been applied to other incidents, and that Captain Mitchell did not use progressive discipline. As previously noted, other deck officers have been disciplined for serious marine incidents involving serious errors by the master. In the Stamoulis case involving a 2001 grounding of a vessel incurring approximately \$1.25 million in damages, Arbitrator Krebs characterized Captain Stamoulis' actions as "inexcusable misconduct." Despite what the arbitrator obviously viewed as a very serious offense, he held that Captain Stamoulis demotion to Chief Mate was not justified, and that the six month suspension should be reduced to 90 days.

In cases both before and after the Stamoulis arbitration, no deck officer involved in a marine incident has been terminated with the sole exception of Captain Peterson who was terminated after a second positive drug test. Furthermore, several of these other marine incidents involved multiple serious mistakes and rule violations by masters in addition to major amounts of property damage up to \$1.25 million in 2001.

The Union also argues that in Captain Tracy's allision, the cost associated with it are mitigated by the fact that the wooden pilings were near the end of their normal life cycle, were scheduled for replacement, and were replaced and improved by an upgraded system of steel pilings. Furthermore, the Union argues that in Captain Williams case the discipline imposed was equal to the amount of the sanction imposed by the Coast Guard

despite \$500,000. in damages in 1996 dollars. The sanction imposed on Captain Tracy by the Coast Guard was virtually the same, but WSF chose to terminate him instead.

Concerning standards for discipline, the Union states that the CBA provides that the employer "shall have the right to discipline any Deck Officer for cause," and that this provision has remained the same over the years. WSF, according to the Union, has argued that new contract language, added after the Stamoulis arbitration, changes the standard for discipline in this case. However, the relevant portion of that language, in Rule 2.01.06, simply states that negligence in navigational or ship handling responsibilities shall be deemed "just cause" for discipline up to and including discharge. That, according to the Union, was the case prior to the Stamoulis arbitration (the arbitrator in that case found "just cause" for discipline) and remained the case after the Stamoulis arbitration. The Union does not argue that there is no just cause for discipline of some type here. It is the amount of discipline that is in dispute. Captain Tracy made serious mistakes. However, other deck officers, including but not limited to Captain Stamoulis, Captain Reno, and Captain Terek have all made serious mistakes.

The Union further argues that in an apparent attempt to justify its decision to terminate Captain Tracy, WSF has argued that Captain Tracy violated SMS rules purportedly requiring that at 3/8th of a mile from landing, a master must begin the process of moving the handles for "engagement" and that 1/4 mile "engagement" for backdown must have actually been achieved. However, there is actually no such specific requirement written in the rules; instead, it is Captain Mitchell's interpretation of what he believes is implied by the rules. In answer to the question about whether "anywhere in the WSF Exhibits or anywhere else is there a document that states you need to have engagement by 1/4 mile?" his answer was "The specific requirement to have engagement by a 1/4 mile is only implied. In fact, therefore, the Union contends there is no specific requirement to achieve "engagement" by 1/4 mile, and at 3/8 of a mile, a vessel might be speeding up or slowing down.

The Union contends that the degree of discipline in this case should be commensurate with the level of discipline imposed on other deck officers who have made serious mistakes. The collective bargaining agreement should be administered in a uniform manner, and Captain Tracy should not be singled out for termination. A lesser

sanction involving either suspension and/or temporary demotion to Chief Mate would have been appropriate, and would have been consistent with the sanction imposed by the Coast Guard. Furthermore, Captain Tracy should be made whole for all losses suffered as a result of the excessive discipline, including the loss of benefits and PERS pension credits.

DISCUSSION

As previously noted above, the issue before this Arbitrator is not whether just cause for discipline of Captain Tracy exists, but rather it is the level of discipline that is appropriate for his transgressions. Considerable oral and written evidence was provided by the parties at the hearing and their respective positions were succinctly set forth in the post-hearing briefs filed by each side. The Employer, WSF, argues that termination was the only proper discipline for the many violations of policy engaged in by Captain Tracy, while the Union argues with equal determination that past practice in allegedly similar marine incidents by other Masters precluded administering the "death penalty" to him in light of the fact that none of the individuals involved in the other incidents received anything more than various degrees of discipline short of termination but for one who tested positive for drugs on two occasions.

During various post allision investigations, meetings, hearings and, at the arbitration hearing itself, Captain Tracy openly admitted to the commission of a number of serious mistakes leading up to and causing the allision at the Mukilteo dock. He stated that he did not contact the engine room at 3/8 NM as required by SMS. He further admitted that he should have been slowing down earlier than he did as he was still accelerating very close to the 1/4 NM point. When he was concerned about bow engagement he did not utilize any of the three backup systems to communicate engine orders to the engine room, nor did he obtain verbal confirmation that the bow clutch was engaged from the Engine Operating Station. In addition, he did not activate danger signals alerting passengers and crew to brace for impact when he should have even though he still unreasonably believed that the vessel would stop in time.

A major issue of contention involved the alleged failure of the engagement of the bow propeller. Captain Tracy testified that when he initiated the engagement process he

waited the normal engagement time (generally 20 seconds) but did not experience the typical noise or vibration that he was accustomed to. Accordingly, after a very few more seconds, he put the handles in the crash stop position at a point 850 feet from the floater. He testified that he did this because he had been taught that the Cathlamet would stop in approximately 600 feet under crash stop conditions and this would result in a complete stop at the time. However, he felt that the bow propulsion was not operating as it should have and with full crash stop he had no navigational control on the stem rudder. He also stated that he did not observe the normal white water off the bow until about four seconds after the allision.

Captain William Hughes, a 29 year veteran of WSF was assigned to conduct an extensive and complex evaluation of the performance of an Issaquah class vessel, which is the same as the Cathlamet, to provide navigational information on how this vessel performs under identical maneuvering conditions. This navigational information was based upon highly accurate Automatic Identification System (AIS) data reports from the vessel, which are within 3 meters and 0.1 KTS of actual speed. This information was supplemented with the Security Video tapes of the vessels cameras. In addition, actual tests were conducted involving a broad range of operational scenarios. While admitting that this Arbitrator is not able to totally comprehend the many technical aspects the of the research and testing performed by Captain Hughes, the overall conclusion he developed and presented at the hearing was understandable and, as pointed out by WSF, the data was not contested by the Union. It is the opinion of this Arbitrator, therefore, that the bow engagement process was not elongated nor did it fail, but rather it was initiated too late to successfully bring the vessel to a stop prior to striking the dolphin.

Concerning the discrepancy between the conclusions reached by Captain Hughes and the testimony of Captain Tracy relative to the alleged bow clutch failure, this Arbitrator is influenced by more than the extensive research and testing done by Captain Hughes. In cases such as this where conflicting testimony is presented, there is a generally accepted propensity of arbitrators to consider the self interest that motivates the testimony of the employee who, in this case, is trying to keep his job. This principle has been recognized by several arbitrators and was well articulated by Arbitrator Shister in Riley Stoker Corp., 63 Lab. Arb. (BNA) 581, 584 (1974) when he stated:

It was clearly established at the hearing that none of the Company officials involved in the case had any motivation whatsoever for perjuring himself- none of them bore any grudge against the grievant, or disliked the grievant, or had a personal animosity toward the grievant. And it is widely held in labor arbitration that under such facts and circumstances the testimony of managerial witnesses carries greater credibility than that of the grievant.

The same holds true in the present case as there was no apparent animosity toward Captain Tracy on the part of any WSF officials who were directly or indirectly involved in the investigation of this matter or the final decision to terminate his employment.

The Union entered into evidence the decision of Arbitrator Alan R. Krebs in the case of Captain Stamoulis where the arbitrator reduced the initial discipline issued to him by WSF from a 6 month suspension and 1 year demotion to Mate, to a 90 day suspension and one year of probation without the demotion. In citing this case, the Union contends that the actions of Captain Stamoulis were more serious and violative of policy than those of Captain Tracy and supports its argument that the termination of Captain Tracy was clearly excessive.

A careful examination of the Stamoulis decision, however, contradicts that claim in the opinion of this Arbitrator. In support of his reduction of the discipline administered to Captain Stamoulis, Arbitrator Krebs stated:

"This is a severe level of discipline, but one which recognizes the very significant mitigating circumstances which impact the determination of the appropriate discipline. These include the Grievant's very good record of service with the Employer for the past 30 years, including 20 years as a Master. Also considered was the nature of the Grievant's failing here, which involved very brief inadvertence on his part, rather than willful misconduct.....Another mitigating factor was Mr. Tryon's very unusual behavior which directly led to the accident and could not be foreseen" (emphasis added).

The failings of Captain Tracy on the morning of June 1, however, did not involve a very brief inadvertence on his part, but rather involved, in part, a very deliberate and clear violation of both WSF and USCG policies and regulations on several occasions. In addition, the consideration given to Captain Stamoulis for his many years of service do not equally apply to the 13 years of service Captain Tracy had with WSF that included a short time as Master.

Concerning the alleged similarities between the violations of other Captains who have been disciplined in the past and the conduct of Captain Tracy, this Arbitrator is not convinced. While admitting that the general alleged violations of these individuals tend to correspond to those of Captain Tracy, the evidence does not support the contention that they are the same or to the degree of his conduct. Of particular import to this Arbitrator is the seemingly indifference expressed by Captain Tracy relative to the split watch procedure he followed. He admitted, under cross examination, that it was a violation of SMS, but defended his actions by stating that "it happens." Furthermore, he admitted that by implementing the split watch procedure he was, in essence, telling the Mate to violate SMS policy also by making landings without the Master in the pilothouse. Concerning Captain Tracy's allegation about watch splitting that "it happens," Captain Mitchell testified that they were only able to surface one rumor in support of that and the Captain allegedly involved was advised that if he was practicing that procedure he was to stop immediately of face disciplinary action.

Furthermore, Captain Tracy admitted that he violated both SMS policy and USCG rules when he left the pilothouse under the charge of an unlicensed individual when he went to the bathroom, but defended it on the basis of his sudden need to go to the bathroom and, furthermore, his contention that it "happens in the fleet. It's kind of an operational or accepted practice." However, Captain Morvan, a witness for the Union who testified in support of Captain Tracy stated very clearly that he would never leave the pilothouse unless another licensed deck officer was present. This Arbitrator has an additional concern relative to the issue of leaving the pilothouse to an unlicensed individual. This matter could have been completely avoided if Captain Tracy, realizing that he was not feeling all that well, would have called CM Lines to stay in the pilothouse during the entire trip to Mukilteo in the event his condition worsened. However, he did not do this nor did he direct the quartermaster to call CM Lines to the pilothouse when he realized he had an immediate need to go to the bathroom. It was clear that his concern was for his personal needs rather than the safety of the vessel and the many passengers and crew on board. This non navigational failure was of equal or greater importance than his later navigational decisions that led to the allision and it demonstrated a clear failure of his duties as the individual with final control and authority for the safety of all

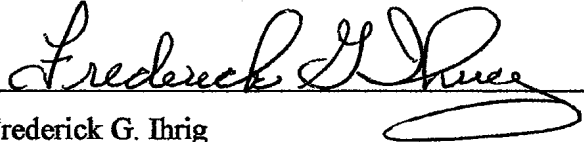
concerned. One can only speculate as to what may have happened if his condition had deteriorated while in the bathroom and he would have been unable to return to the pilothouse for the impending landing.

Concerning the fact that USCG administered a lesser penalty on Captain Tracy, this Arbitrator is not swayed in that this issue is between Captain Tracy and WSF and is controlled by application of the facts to the provisions of the collective bargaining agreement between the parties. USCG operates pursuant to its own rules and regulations and has no authority or interest in labor management disputes and applies its own penalties which may or may not concur with those of the Employer.

Having examined all of the written and oral evidence submitted by WSF and the Union, I must conclude that Captain Tracy engaged in numerous violations of WSF policies and, in specific instances, USCG regulations. In addition, I am clearly of the opinion that his conduct, contrary to the assertion of the Union, was beyond the scope of violations committed by other Captains who were disciplined at various levels short of discharge and, therefore, WSF is not restricted to the discipline administered in those cases. Furthermore, his decisions relative to shift splitting and leaving the pilothouse without a licensed pilot in attendance demonstrated a lack of concern for his crew and the many passengers who faithfully rely upon the integrity and professional conduct and judgment of the Master to get them safely to their destination.

AWARD

For the reasons set forth above, it is my opinion that Washington State Ferries had just cause to discharge Captain Dan Tracy for his conduct on the morning of June 1, 2007. This grievance, therefore, is denied.


Frederick G. Ihrig

5-11-09
Date