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LABOR & PERSONNEL DIVISION

IN THE MATTER OF

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, FERRIES DIVISION

AND

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS

FMCS No.: 100122-53274-8

Date Issued: February 14, 2011

ARBITRATION OPINION AND AWARD

OF

ALAN R. KREBS

Appearances:

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, FERRIES DIVISION

David J. Slown

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS

Rhonda J. Fenrich

IN THE MATTER OF

**WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, FERRIES DIVISION**

AND

**INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS**

OPINION OF THE ARBITRATOR

PROCEDURAL MATTERS

The Arbitrator was selected by the parties with the assistance of the Federal Mediation and Conciliation Service. A hearing was held in Seattle, Washington on November 22, 2010. Washington State Department of Transportation, Ferries Division, was represented by David J. Slown, Assistant Attorney General. The Union, International Organization of Masters, Mates & Pilots was represented by Rhonda J. Fenrich of the law firm Garrettson Gallagher Fenrich & Makler. At the hearing, the testimony of witnesses was taken under oath and the parties presented documentary evidence. A court reporter was present, and, subsequent to the hearing, a copy of the transcript was submitted to the Arbitrator. The Arbitrator received the parties' briefs on January 10 and 12, 2011.

ISSUE

The parties agreed upon the following stipulated statement of the issue to be decided by the Arbitrator:

Was the grievance timely filed?

If so, did the State violate Rule 5.04 and 5.05 by rejecting James Russell as a Mate?

If so, what is the appropriate remedy?

RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT

* * *

RULE 2 - DEFINITIONS

* * *

2.01.15

Mate

The term "Mate" includes Chief Mates and Second Mates, and is any Deck Officer, not a Master, who can establish seniority on the Mate's Seniority Roster. The term "Mate" does not include the Temporary Mate Classification.

* * *

2.01.27

Temporary Mate

The "Temporary Mate" classification applies to any Mate who does not appear on the Mate's Seniority Roster, or who cannot establish seniority under the terms of this Agreement.

* * *

RULE 3 - UNION RECOGNITION AND SECURITY

* * *

3.02 Union Membership

Except as provided in RCW 47.64.160, each Deck Officer covered by this Agreement shall make application to join the Union within thirty-one (31) days following either the Deck Officer's date of employment or the signing of this Agreement, whichever shall last occur; and each such Deck Officer shall maintain membership in the Union for the life of this Agreement.

* * *

RULE 5 - MANNING OF VESSELS

* * *

5.04 Rejection of Deck Officers

In the manning of its vessels or the filling of Deck Officer vacancies, the Employer shall be strictly governed by the provision of this agreement relating to seniority (Rule 20), but may reject any Deck Officer who is unsatisfactory, and the reasons for each such rejection are communicated in writing, within five (5) working days, to both the Deck Officer involved and to the Union.

5.05 Rejections

In the event that either the Union or any Deck Officer rejected by the Employer feels aggrieved by any such rejection, the matter shall be handled as a dispute and adjudicated under the provisions of this Agreement relating to Grievances, Rule 22.

* * *

RULE 20 – SENIORITY

* * *

20.06 Mates' Seniority Roster

The Mates' Seniority Roster shall consist of all Deck Officers with all route pilotage as defined in Rule 20.01 and possesses the minimum license qualifications. Additionally, any employee who has worked for the Employer for six (6) months or more shall establish a Mate's seniority date as of the day on which the employee presents the Mate's license to the Employer and meets all license qualifications.

20.07 Posting of Seniority Rosters

The Union shall revise the Deck Officers', Masters', and Mates' Seniority Rosters in January of each year, based upon information supplied by the Employer, and the Employer shall then promptly post the three (3) revised seniority rosters in a place easily accessible to the Deck Officers affected thereby.

20.08 Protest of Seniority Rosters

All Seniority Rosters shall be subject to protest by written notification to the Delegate Committee of the Union, consisting of not less than five (5) members to be elected by the membership of the Union, and who shall be responsible for the preliminary adjudication of all seniority disputes, under the provisions of this Agreement relating to disputes Rule 22, provided, however, that no protest of Seniority Roster, except for the correction of a typographical error, shall be commenced more than ninety (90) days after the facts and circumstances giving rise to the protest actually become known or, in the exercise of reasonable care, should have become known, to the Deck Officer affected.

* * *

RULE 22 – GRIEVANCE PROCEDURE

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22.02 Terms and Requirements

* * *

C. Computation of Time

The parties acknowledge that time limits are importance to judicious processing and resolution of grievances. Days are calendar days, and will be counted by excluding the first day and including the last day of timelines. When the last day falls on a Saturday, Sunday or holiday, the last day will be the next day which is not a Saturday, Sunday or holiday. Transmittal of grievances, appeals and responses will be in writing.

- D. Failure to Meet Timelines
Failure by the Union to comply with the initial thirty (30)-day deadline contained in 22.03 A, below, will result in automatic withdrawal of the grievance. . . .

* * *

22.03 Filing and Processing

- A. Filing
A grievance must be filed within thirty (30) days of the occurrence giving rise to the grievance or the date the grievant knew or should reasonably have known of the occurrence. This thirty (30) day period may be used to attempt to informally resolve the dispute.
- B. Processing
Step 1 – Director of Operations or Designee:
If the issue is not resolved informally, the Union may present a written grievance to the Director of Operations or designee with a copy to the WSF Labor Relations Office within the thirty (30) day period described above. . . .

* * *

NATURE OF THE DISPUTE

This dispute concerns the Employer's decision to reject the Grievant for service as a deck officer on its vessels. The Grievant, James Russell, has worked for the Employer since 1997. He began as an ordinary seaman and progressed to able-bodied seaman (AB). In those jobs, he was represented by the Inland Boatmen's Union (IBU). At the time of the hearing in this matter, the Grievant's AB assignment was as quartermaster, steering the vessel as part of the bridge crew. Until November 2008, the Grievant had not been disciplined.

The Grievant holds a mate's license issued by the U.S. Coast Guard. Captain Tim Saffle, the Union's branch agent, testified that in order to progress from AB to mate, an employee must have worked 18 months as an AB, attend a 30-day schooling paid for by the Employer, and then pass Coast Guard examinations. In 2007, after passing the tests and obtaining his mate's license, the Grievant completed the Employer's mates' orientation class. During the summer of 2007, the

Grievant filled a temporary four-hour position as a second mate. Also during the summer of 2007, the Masters, Mates & Pilots Union (MM&P), which represents deck officers such as mates, advised the Grievant of his obligation to join the MM&P and pay his initiation fee and dues, in order to be eligible to work as a mate. The Grievant replied in an email that paying dues to both the IBU and the MM&P was "prohibitive." A representative of the MM&P replied to the Grievant that payment of dues to both unions would be required unless he "chose not to work in the MMP." The Grievant informed the MM&P that because of the hardship in paying dues to both unions, he decided not to be an MM&P member.

Steven Rodgers, the Employer's director of marine operations, testified that the Grievant wrote numerous letters complaining that a particular ferry captain was mentally unstable. Mr. Rodgers testified that such letters were sent to people in the legislative branch and to various people in the state capital, including the secretary of transportation and all the way up to the governor's office. The Grievant testified that he did write letters to officials of the Ferry System and to the U.S. Coast Guard in which he stated that the captain was mentally ill. He testified that Mr. Rodgers responded to him something to the effect that he had looked into these allegations and found them to be unsubstantiated.

Mr. Rodgers testified that he viewed the Grievant's allegations about the captain's mental instability to be inappropriate. He testified that the Employer would investigate any operational incidents that needed to be investigated, but that the Grievant writing letters concerning the captain's mental state was a problem. In July 2008, a meeting was held attended by Mr. Rodgers, the Employer's human resources director, the Grievant, and his representatives from the IBU. During this meeting they discussed one incident involving the Grievant and the captain. That incident had been investigated by representatives of the Employer and the IBU and they each

determined that the Grievant's allegations could not be substantiated. Mr. Rodgers testified that he told the Grievant that he was not qualified to analyze the captain's mental health, and that his writing letters to various agencies and officials stating that the captain was insane was inappropriate. Mr. Rodgers testified that at the conclusion of the 2 ½ hour meeting, he directed the Grievant to stop writing letters about the mental stability of the captain, and instead to notify him directly if any problematic events occurred involving the captain so that they could be investigated.

The Grievant testified that during this meeting, Mr. Rodgers lectured and berated him, and said that his comments about the captain were slanderous. The Grievant testified that he responded that he was qualified to make those statements about the captain. The Grievant testified that Mr. Rodgers made an effort to discourage him from writing letters, but never ordered him to stop. Dennis Conklin, the IBU regional director, testified that during the meeting he debated with the human resource director whether the Grievant had a right to write letters, and that she agreed that he could write letters to Ferry management.

Mr. Rodgers testified that there is a hierarchy of command on a ferry vessel and the crew must work together and follow the directions of the vessel's captain. He testified that he was concerned that the Grievant's behavior was creating an environment where the captain would not be able to work with him. Mr. Rodgers testified that after the meeting, the Grievant wrote another letter about the captain's mental state. In the Grievant's statement which accompanied his grievance in this matter, he wrote that he would continue to comment about the captain's mental health when necessary in order to have a safe and respectful workplace.

On September 23, 2008, Mr. Rodgers sent a certified letter, with return receipt requested, to the Grievant. In that letter, Mr. Rodgers stated that he was invoking Rule 5.04 in order to

reject the Grievant as a deck officer. Mr. Rodgers explained in that letter that the Grievant had “shown an inability to follow instructions given directly to [him] from management by continuing to write letters which included narrative or speculation about [the captain’s] mental health after being directed to stop. . . . These are not characteristics of an employee I wish to promote; furthermore, I will not tolerate insubordinate behavior, which I consider your continued correspondence regarding [the captain] to be. . . .”¹ On the same day, Mr. Rodgers also sent a copy of this letter to the MM&P by fax. Mr. Rodgers testified that at about the same time he spoke to Mike Murray, an MM&P official, about this letter. Mr. Rodgers testified that he rejected the Grievant as a mate because a deck officer needs to show good judgment and the Grievant’s behavior showed very poor judgment.

The rejection letter was mailed to the post office box which the Grievant had provided to the Employer as his mailing address. The Postal Service made three attempts to deliver the letter to the Grievant and then returned it to the Employer as undeliverable. The Postal Service noted on the envelope that it went unclaimed on September 24, 29, and October 9. The Employer took no further steps to deliver the letter to the Grievant. The Grievant testified that the post office box that the letter was mailed to was correct, and he would pick up his mail there, but that he did not go to his mail box daily.

During the fall of 2008, the Grievant was denied his bid for a mate’s position. On September 25, 2008, the Grievant wrote to the MM&P delegate committee the following letter:

Recently, I was refused membership in the MMP and denied, too, the right to bid on an officer’s job. If I recall correctly, that was because, as [International Vice President] Murray stated, I had turned down an opportunity to join earlier when I was required to do so . . . Clearly, I had no awareness whatever that my dodging joining the union initially would mean I would be permanently prohibited from working as an officer. . . . I was denied membership and a job,

¹ In that letter, Mr. Rodgers also asserted that the Grievant had engaged in fabrications. That allegation was not pursued by the Employer during the arbitration hearing.

but nobody at MMP had the courtesy to even call me up about it. . . . Barring a person permanently from use of a license, for which he or she worked for years, is way out of proportion to my transgression. . . . [The bid administrator] told me the MMP was responsible. When I called Mr. Murray, and Lori, who would not give her last name, . . . [i]t was tough-luck, buddy, attitude that I got from them. . . .

On October 9, 2008, Captain Murray wrote to the Grievant:

After reviewing your situation with the General Executive Board, you are welcome to join the Master, Mates and Pilots. Under the following conditions:

- 1) You join MM&P and pay dues from the day that you had your 31 days in.
- 2) You pay your initiation dues. If you choose to comply with these requirements you may maintain your position on the Seniority List. You had your 31 days in on 8/6/2007. . . .

On October 13, 2008, the Employer's bid administrator sent an email to the Grievant explaining that his MM&P status was "under dispute because [he had] never paid [his] union dues." The Grievant testified that after he received the email from the bid administrator, he believed that he was not being assigned as a mate because of the dues dispute.

On November 24, 2008, Mr. Rodgers issued a "written warning" to the Grievant in which he was directed to stop his insubordinate and discourteous behavior. Mr. Rodgers wrote in that disciplinary letter that since their July meeting, the Grievant had continued "to write accusatory letters and . . . reference the lack of mental capacity of" the captain. In that letter, Mr. Rodgers also wrote that the Grievant had been discourteous to the captain and other employees by making "false and libelous statements about them" and had been "insubordinate by disregarding [his] directive to discontinue making derogatory statements with regard to [the captain's] mental state."

According to an attachment which the Grievant included with his grievance in this matter, a Union attorney, by letter dated February 23, 2009, advised him of the contents of Mr. Rodgers' September 2008 rejection letter.

On April 20, 2009, the Employer's bid administrator sent the following email to the Grievant in response to the Grievant's bid on a mate's position:

I did receive your bids for the PO (A) 2MT job. However, I was also informed by Operations Director, Steven Rodgers, that you had been sent a letter regarding the invocation of Rule 5.04 of the MM&P Contract. Until this particular decision is changed or the matter resolved, I am not able to award you any MM&P positions.

The Grievant testified that this was when he first discovered that Mr. Rodgers had invoked Rule 5.04 to reject him as a mate and until then he thought that the reason he was not awarded his mate's bid was because of a Union dues issue.² The Grievant testified that he actually received Mr. Rodgers' rejection letter on April 20, 2009.

On May 4, 2009, a grievance was submitted to the Employer protesting the Grievant's rejection as a mate. The Employer denied the grievance on the basis that it was not filed in a timely manner according to Rule 22.03.A

Mr. Rodgers testified that his rejection of the Grievant as a deck officer was not permanent and he was still free to apply for a deck officer's position. He testified that as far as he knows, the Grievant has now stopped writing letters about the captain's mental state.

POSITION OF THE EMPLOYER

The Employer contends that the grievance must be dismissed as untimely filed. While the Employer recognizes that the written notice of the Grievant's rejection as mate, which it

² In his testimony, the Grievant did not mention the February 23, 2009 letter he received from the Union attorney which discussed the rejection letter in detail, according to his written grievance submission.

mailed to his mailing address, was returned as undeliverable, it points out that a copy of this notice was simultaneously sent to the Union and was discussed with a Union representative. It further points out that two days after the rejection letter was sent by Mr. Rodgers, the Grievant sent a letter to the Union concerning a continuing dispute over his dues payment and referring to his "permanent" ban from working as a deck officer. The Employer asserts that it is reasonable to conclude that the Grievant discussed his rejection with a Union official and had been told they would not pursue his right to grieve under Rule 5.05. The Employer suggests that the Grievant decided not to sign for the rejection letter after being told what was in it by a Union representative. On the merits, the Employer contends that the rejection should be sustained because the Grievant acted with reckless disregard of the need to have ferry employees work harmoniously together. The Employer asserts that its representatives met with the Grievant and explained to him that his actions were disrupting the workplace. The Employer argues that it cannot entrust the Grievant with the heavy responsibilities of a deck officer unless he can learn from his mistakes and change by treating his co-workers with dignity and respect.

POSITION OF THE UNION

The Union contends that the submission of the grievance was timely. It argues that since the letter was returned as unclaimed, the Grievant was not informed of his rejection as required by Rule 5.04. The Union disputes the Employer's assertion that the Grievant should have known of his rejection because of his communications with the Union over his failure to pay Union dues. The Union reasons that while the dues issue may have prevented the Grievant from bidding, that issue is independent of his rejection, a subject which is not mentioned in his correspondence with the Union. The Union maintains that the grievance was timely because it

was filed within thirty days of April 20, 2009, when the Grievant first learned that the reason he could not bid on the mates' positions was the Rodgers' rejection letter. The Union avers that when the rejection letter was returned as undeliverable, the Employer should have delivered the letter to him at work, which would not have been a problem. The Union further argues that even if it is found that the Employer provided appropriate notice in September 2008, the violation was a continuing one, and the Grievant timely grieved a new violation which occurred when he was denied his bid on April 20, 2009. On the merits, the Union contends that the Employer violated Rule 5.04 by rejecting the Grievant as a mate. The Union asserts that the term "unsatisfactory" used in Rule 5.04 should be read as akin to termination since the employee will be unable to work in an MM&P position. The Union notes that the Grievant is currently performing in a satisfactory manner, as testified to by Mr. Rodgers, and can now apply for a mate's bid. In order for this to occur, the Union states, the Arbitrator would need to order his reinstatement on the deck officer seniority roster. The Union maintains that the Employer has not proven that the Grievant engaged in unsatisfactory behavior. It avers that the Employer had no authority to limit the Grievant's speech. It denies that the Grievant was ever ordered to stop making statements about the captain or that he was ever disciplined for this. The Union maintains that the November 24, 2008 formal written notice issued by Mr. Rodgers to the Grievant occurred almost two months after his rejection as a deck officer and therefore it is inappropriate to use as a basis for justifying the prior decision.

PROCEDURAL ARBITRABILITY

Rule 22.03.A requires that a grievance be filed within 30 days "of the occurrence giving rise to the grievance or the date the grievant knew or should reasonably have known of the

occurrence.” Other arbitrators generally hold that the time lines specified in a contract for the filing of a grievance are normally enforceable such that an employee who waits too long to file a grievance may be barred from obtaining redress. A respected treatise cites many arbitration decisions in support of the following observation regarding the general practice of arbitrators:

If the agreement does contain clear time limits for filing and prosecuting grievances, failure to observe them generally will result in dismissal of the grievance if the failure is protested. Thus, the practical effect of late filing in many instances is that the merits of the dispute are never decided.

Ruben, ed., Elkouri & Elkouri – How Arbitration Works, 6th ed. (1997), pp. 220-21. See also, Whitfield Tank Lines, Inc., 62 LA 934, 936 (Cohen, 1974). Your Arbitrator is also mindful of the requirement in Rule 22.02.D that failure to comply with the 30-day deadline “will result in automatic withdrawal of the grievance.”

It is clear from the grievance and attachments that the Grievant was informed by a Union attorney of Mr. Rodgers’ September 23, 2008 rejection letter. That notification occurred in a letter dated February 23, 2009. Thus, there can be no dispute that on or about February 23, 2009 the Grievant should reasonably have known of Mr. Rodgers’ rejection letter. His May 2009 grievance occurred more than 30 days after his obtaining knowledge of the rejection letter.

Nevertheless, the grievance was not filed in an untimely manner because it is a “continuing” grievance. A continuing violation is one where the act complained of is repeated, so that it may be said that each day on which it is repeated there is a new occurrence which initiates the running of contractual time limits for the filing of a grievance. Elkouri and Elkouri - How Arbitration Works, *supra*, pp. 218-19. The concept of continuing violation was aptly described by Arbitrator Dana E. Eischen in Brockway Co., 69 LA 1115, 1121 (1977), as follows:

. . . The foregoing cases establish the general principle that in a continuing or recurring type of grievance the grievance may be filed within the time specified

after the first occurrence of the alleged violation “or following any subsequent repetition or recurrence of the action or behavior which is the basis of the grievance.” The underlying premise of this position “is simply that a current occurrence of a repeated and continuous violation reasonably and properly can and should be given the same status as if the same current violation were occurring for the first time.” . . .

As, Mr. Rodgers testified, his letter of rejection of the Grievant dated September 23, 2008 was not a permanent bar to the Grievant’s bidding of a deck officer position. Its application to a future bid was discretionary on the part of the Employer and grievable. Thus, the filing of a grievance within 30 days of the Employer’s rejection of the Grievant’s bid for a deck officer position in April 2009 was timely within the meaning of Rule 22.03.

THE MERITS

Rule 5.04 provides that the Employer “[i]n the manning of its vessels or the filling of Deck Officer vacancies . . . may reject any Deck Officer who is unsatisfactory.” The Agreement does not explain further what the parties intended by the use of the term “unsatisfactory.” As I view its application in the context of an employee advancing from a seaman position to a deck officer position, it means that the Employer must reasonably determine that the applicant is unfit to serve in the position for the reasons which are stated. Since it is the Employer which is asserting that the employee should be rejected as unsatisfactory, it has the burden of proving that is the case.

I find that the Employer did prove that it had sufficient basis to reject the Grievant for a bid position as a deck officer because he was “unsatisfactory.” I base this finding on the totality of the following considerations. First, the Grievant had never before worked as a regular deck officer, other than as a “temporary mate,” a position which did not require the establishment of seniority. His bid into a regular mate’s position would be a promotion from his AB job to deck

officer status. As a mate, he would have increased authority and there would be added importance to his communicating with not only lower ranking crew members, but also the captain of the vessel. With the increase in authority, there would also be added importance to his following directions from higher ranking officers, including the ship's captain. It is undisputed that the Grievant communicated in writing to various individuals that a particular captain was, in essence, mentally ill. I credit Mr. Rodgers' testimony that he told the Grievant that this behavior had to stop. In the context of the heated exchange during this July 2008 meeting which the Grievant acknowledged, it is very unlikely that Mr. Rodgers' direction to stop was merely a suggestion, and not an order, as the Grievant has claimed. Mr. Rodgers' testimony that the Grievant continued to write letters questioning the captain's mental status, even after their discussion, has not been disputed. Indeed, the Grievant received a written warning for this in November 2008. Moreover, even after this, when the Grievant submitted his grievance, he wrote that he would "continue to" "comment about [the captain's] mental health . . . when . . . necessary. . ." Until the Grievant commits to working in a respectful manner with his superior officers, including the captain at issue, it is reasonable and appropriate for the Employer to conclude that he is "unsatisfactory" and not worthy of a promotion to a deck officer position.

The Grievant's behavior is not protected by notions of freedom of speech. In order to qualify as a satisfactory employee, he must demonstrate that he is able to work with, cooperate with, and obey superior officers. Freedom of speech on a vessel does not extend to rude and insubordinate behavior directed at superior officers. At the time the grievance in this matter was filed, the Grievant appears to have been unwilling to change his behavior.³

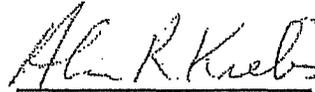
³ This opinion is not intended to preclude the Grievant from bidding for deck officer positions in the future. Such bids are subject to the application of Rules 5.04 and 5.05.

OPINION OF THE ARBITRATOR

It is the Opinion of your Arbitrator, for the reasons set forth in the attached Opinion, that the grievance is denied.

Sammamish, Washington

Dated: February 14, 2011



Alan R. Krebs, Arbitrator