

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO.1 MARINE)	MEC Case No. 23-95
ENGINEERS BENEFICIAL)	
ASSOCIATION on behalf of)	
DAVID A. WILLIAMS,)	
)	DECISION NO. 149 - MEC
Grievant,)	
)	
v.)	DECISION AND ORDER
)	
WASHINGTON STATE FERRIES,)	
)	
Respondent.)	
_____)	

Davies, Roberts and Reid, attorneys, by Kenneth J. Pedersen, attorney at law, appearing for and on behalf of District No. 1 Marine Engineers Beneficial Association.

Christine Gregoire, Attorney General, by Anthony E. Keating, Assistant Attorney General, appearing for and on behalf of Washington State Ferries.

THIS MATTER came on regularly before the Marine Employees' Commission (MEC) on December 18, 1995, when District No. 1 Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration against Washington State Ferries (WSF) on behalf of David A. Williams.

In its grievance arbitration request, MEBA asserted that the Washington State Ferries did not implement the 1991-1993 MEBA/WSF Collective Bargaining Agreement for Unlicensed Engineroom Employees after it was signed by the Transportation Commission in August 1994. Specifically, MEBA claims that the contract increased from 240 to 320 the vacation hours an employee can accrue. David

David Williams's vacation hours were cut, as were vacation hours for all unlicensed employees with an excess of 240 hours. Additionally, MEBA asserts that the Unlicensed Contract states that on-call employees should be paid overtime for work in excess of 80 hours in a two-week work schedule. On-call employees have been denied this overtime.

MEBA has certified that the grievance procedures in the MEBA/WSF collective bargaining agreement have been utilized and exhausted. MEBA has also certified that the arbitrator's decision shall not change or amend the terms, conditions or application of said collective bargaining agreement, and that the arbitrator's award shall be final and binding.

The request for grievance arbitration was docketed as MEC Case No. 23-95 and assigned to Chairman Henry L. Chiles Jr. to act as arbitrator pursuant to WAC 316-65-070.

Pursuant to WAC 316-65-080, notice of pre-hearing conference and notice of hearing was sent to all parties. The pre-hearing conference was scheduled for February 1, 1996 and the hearing was scheduled for February 27, 1996. The arbitrator urged the parties to make every effort to reach settlement of the matter before the scheduled hearing date.

The pre-hearing conference was held as scheduled with all parties in attendance. The arbitrator was informed that the parties had settled the first part of the grievance concerning vacation accrual. Unlicensed engineroom employees were now allowed to accrue 320 hours of vacation pay. Dale Edwards, WSF Labor Relations Manager, stated that Mr. Williams had been "made whole" and that the others affected by the case had also been made whole."

MEBA requested withdrawal of this part of the grievance as it had been adjusted.

The second half of the grievance concerning overtime pay to on-call employees for work in excess of 80 hours in a two-week work schedule was discussed, but no settlement was reached. This issue was to be heard at the hearing scheduled for February 27, 1996.

On February 6, 1996, MEC received a letter from WSF Labor Relations Manager Dale Edwards requesting a one-day postponement of the hearing. Mr. Edwards stated in the letter that "I discovered that one of my key witnesses had a previous commitment with her children that day and will be unavailable." MEBA counsel agreed to the postponement. The hearing was rescheduled to February 28, 1996, and was held on that day. All parties were in attendance.

Briefs were filed on April 1, 1996 and have been carefully considered by the MEC.

POSITIONS OF THE PARTIES

Position of MEBA

There are three different classifications of oilers and wipers and they serve three different functions. Both full-time and vacation relief employees are guaranteed full weeks of work. They have a schedule. They receive compensatory time for hours worked between 80 and 84 hours a pay period. They don't get paid for daily overtime until they work 12 and one-half hours in a day. They are eligible for time and mileage in certain circumstances.

The on-call oiler or wiper has no set schedule. He or she is called to work on short notice wherever there is a need. They do not receive travel pay and mileage. Contract section 12.02(1)

clearly sets out that on-call employees are to be paid overtime for work in excess of twelve hours in a day or in excess of 80 in a two-week pay period. WSF has been paying on-call oilers and wipers for overtime in excess of twelve hours in a day but has not paid overtime for hours between 80 and 84 in a two-week pay period. The WSF pay code have a pay "Reason Code," 47, for overtime over 80 hours in a pay week.

MEBA believes that WSF is paying one-half the requirements of Section 12.02.(1) and that Mr. Williams and all other members of his work class need to be made whole for the pay that has not been correctly paid to them.

Position of WSF

It is the position of the WSF, that MEBA's interpretation of Section 12.02(1) of the applicable collective bargaining agreement ignores half of subsection (1). When an on-call employee is working is a position that is controlled by another overtime rule, the other rule's approach to overtime must apply. WSF contends that Mr. Williams worked seven days on and seven days off. Therefore, the provision found in Appendix B, Rule 1 which addresses Hours of Employment, Overtime and Assignment, would apply in Mr. William's case.

The WSF left the arbitrator to determine whether or not Mr. Williams's grievance applied to all employees similarly situated.

STATEMENT OF THE ISSUE

Both parties agree on the issue to be determined by the arbitrator:

Did the WSF violate the collective bargaining agreement by failing to pay on-call oilers and wipers overtime for hours in excess of 80 in a pay period?

Having read and carefully considered the entire record, including the request for arbitration, the transcript of the hearing, and post-hearing briefs in MEC Case No. 23-95 the Marine Employees' Commission now hereby enters the following findings of fact.

FINDINGS OF FACT

1. David A. Williams is employed by Washington State Ferries as an unlicensed oiler.
2. WSF and MEBA are parties to a collective bargaining agreement for Unlicensed Engineroom Employees, effective July 1, 1991, which specifies MEC as the arbitrator of unresolved allegations of contract violations.
3. In August through October, 1994, while Williams was assigned as an on-call oiler to the M/V HYAK, the Chief Engineer on the vessel directed him to fill out time sheets for the appropriate pay period seeking payment of overtime for hours worked in excess of 80, but less than 84. He complied with the order, but the claims were later stricken by WSF and Williams was paid straight time for the hours worked between 80 and 84 in the pay period. Mr. Williams did not grieve the matter at that time. He feared that thereafter he would not be dispatched appropriately.

Late in the summer of 1995, Mr. Williams filed a grievance with his union alleging inaccurate vacation time accrual. For

The first time, he read the entire current collective bargaining agreement and discovered that the ferry system had failed to pay him overtime pay when required to work more than 80 hours in a two week pay period. He brought the alleged violation to the attention of his union representative. Thereafter, a grievance was filed on Mr. Williams's behalf. When the contractual grievance processes had been exhausted by the parties, MEBA filed a request for grievance arbitration with the Marine Employees' Commission.

4. The vacation accrual portion of the grievance was settled between the parties. Employees are now allowed to accumulate the amount of hours agreed to in the contract and the employee representative has stated that all employees have been "made whole."
5. The terms "year round positions," "relief employee" and "on-call employee" are clearly defined in contract Rules 1.11, 1.13 and 1.14. On-call employees are employed subject to the conditions set forth in Rule 12.02 of the contract. Section 12.02(1) states that on-call employees may be employed subject to conditions:

(1) All hours worked in excess of twelve (12) in any day or eighty (80) hours in any two week work schedule shall be paid at the overtime rate, provided that employees who are working in position which are affected by other overtime provisions in the Agreement or its Appendices shall be paid overtime as provided for in such provisions.

. . .

Year round employees work full time. These positions are received by bid on the basis of seniority. The positions receive a guarantee that they will work at least 80 hours during a two-week pay period. Permanent year round employees

work seven-day weeks of twelve hours per day followed by seven days of rest. Schedules are posted well in advance of the work.

Regular relief employees also known as "vacation relief" employees, work a schedule of seven twelve-hour days followed by seven days of rest. They obtain relief positions by seniority bids. They are guaranteed 80 hours of work in a two week pay period. They are assigned to a home terminal and receive time and mileage for assignments to boats working out of other terminals. There are usually eight to twelve relief employees.

On-call employees do not work a set schedule like year round and vacation relief employees. They are not guaranteed any regular work. They are dispatched on short notice to fill in for absent employees.

Both year round and regular relief employees do not receive overtime for in excess of 80 hours in a two-week pay period. Hours worked from 80 to 84 are paid as "compensatory time." Hours worked in excess of 84 hours are paid as overtime.

Appendix B applies to regular relief oiler positions. The second sentence of Section 12.02(1) applies when a person works in positions that are affected by other overtime provisions.

Other overtime provisions apply to persons working in full time or regular relief positions. Mr. Williams did not work in those positions and was never told he was working in one of those positions. The second half of 12.02(1) therefore did not apply to Mr. Williams.

5. The Washington State Ferries has a number of pay "reason codes" to be used by employees to submit claims for overtime. Pay Code 47 is for claims by licensed and unlicensed engineroom employees for "OT/OVER 80 HOURS WEEK (pay period). Pay Code 84 is for claims for OVER 12 HOURS/(ON-CALL ENGINE).
6. David Williams was hired by WSF as an on-call wiper in May, 1993. After one year, he began working as an on-call oiler. Williams worked his way up from wiper to oiler as an on-call employee. He was dispatched on short notice and assigned where needed. As he gained seniority, he obtained more work. He began to work full, seven-day weeks. They were usually made up of a collage of shifts and assignments. He was paid for overtime over twelve hours per shift, but was not paid overtime for work between 80 and 84 hours a pay period. He was never informed that he was working in any position but on-call. On the basis of seniority he bid on and received a regular full time position in late February, 1996.
7. The WSF asked for a one-day postponement of the hearing because a key witness had a commitment with her children and could not appear on February 27, 1996. The postponement was granted. WSF did not offer this person as a witness. WSF did not offer any witnesses. The arbitrator invited the parties to offer expert testimony to help interpret the clause in question. WSF declined to offer any testimony. Only Mr. Williams testified.
8. Both parties asked the Commission to limit the liability to a period of not more than sixty days prior to the filling of the grievance.

The Commission having entered the foregoing findings of fact now hereby enters the following conclusions of law.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction over the parties and subject matter in this case. Chapter 47.64 RCW; especially RCW 47.64.150 and 47.64.280.
2. MEC may not change or amend the terms, conditions or applications of the MEBA/WSF Collective Bargaining Agreement. RCW 47.64.180.
3. In its post-hearing brief, WSF for the first time posed the question of timeliness of Mr. Williams's grievance. WSF argued that the testimony of grievant David Williams revealed that he had knowledge of the possible contract violations for longer than sixty days before the filing of the grievance.

The parties herein met sometime prior to February 1, 1996 to try to resolve the grievance. The portion of the grievance concerning vacation accrual was settled. All parties met with the arbitrator on February 1, 1996 and the issues were fully discussed. The hearing was held on February 28, 1996. At no time prior to that date or at the hearing itself did WSF raise the question of timeliness.

Mr. Williams' explanation of the circumstances of his grievance at the settlement conference and his testimony at the hearing were essentially the same. If there was a question of timeliness, WSF had ample time to raise the issue before hearing. WSF had ample time to question the timeliness of the grievance. They could have questioned it after filing, after the conference that settled the first half of the grievance, at the pre-hearing/settlement conference with the arbitrator or at the hearing. WSF did not question timeliness until they filed a brief. This is too late. The union had a

right to be informed of the assertion and to defend its position. We find that WSF waived its right to question timeliness of the grievance by waiting to question it in the post-hearing brief. Liquid Transporters, 99 LA 217, 222 (Witney, 1992).

In any event, we find that the violation was continuous that it renewed itself every pay period that Mr. Williams was not properly paid. How Arbitration Works, Elkouri and Elkouri, 4th Ed. 1995, p. 197.

4. Rule 12.02(1) applies to on-call employees. The second half of the rule applies to on-call oilers/wipers when they are assigned or designated as regular relief oilers/wipers. Mr. Williams testified that he only worked as an on-call oiler and did not work as a regular relief oiler/wiper.

The second half of Rule 12.02(1) did not apply to Mr. Williams. The first half of the rule does apply. As an on-call licensed engineroom employee he was entitled to overtime pay for the hours worked between 80 and 84 each pay period.

The rule is clear on its face. The employer pays overtime in excess of twelve hours in a day to on-call employees. The employer has a pay reason code for overtime between 80 and 84 hours a pay period for on-call employees. It is reasonable that they give effect to both parts of subsection (1) of the rule.

After considering the evidence submitted, we find that Rule 12.02(1) is clear and unambiguous and should be enforced as written. How Arbitration Works, Elkouri and Elkouri, 4th Ed., p. 349.

5. MEBA has shown by a preponderance of the evidence presented that Rule 12.02(1) of the Unlicensed Engineroom Employees contract has not been correctly interpreted by the WSF and therefore the contract has been violated.

Having entered the foregoing findings of fact and conclusions of law, this Commission hereby enters the following order:

ORDER

1. The question regarding vacation accrual which was filed in the original complaint was resolved by the parties herein and the Washington State Ferries having assured the MEC that all affected employees have been made whole, MEC approves the request by the parties to withdraw this portion of the grievance. The MEC hereby dismisses the portion of the grievance regarding vacation accrual as adjusted by the parties.
2. The Washington State Ferries is ordered to start giving effect to Rule 12.02(1) by paying on-call oilers and wipers overtime pay for hours worked between 80 and 84 in a two-week pay period.
3. WSF is ordered to make David A. Williams whole by paying him the overtime amount earned by him for a period of time starting 69 days prior to the filing of the grievance until he was assigned a full time position.

4. WSF shall make whole the wages of any other oiler or wiper from 60 days prior to the filing of the grievance until current.
5. Within 30 days of the date of entry of this Order, the WSF shall inform the MEC in writing of the steps taken to make whole David A. Williams, including the amount of pay made whole to him.
6. Within 30 days of the date of entry of this Order, WSF shall inform the MEC in writing of the steps taken to make whole the other eligible oilers and wipers by including a list of names of persons made whole and the amounts paid to each.
7. The question concerning overtime raised by District No. 1 MEBA in its request for grievance arbitration filed on behalf of David A. Williams and other bargaining unit members against WSF on December 18, 1995 and docketed as MEC Case No. 23-95, is hereby sustained.

DONE this 26th day of April 1996.

MARINE EMPLOYEES' COMMISSION

/s/ HENRY L. CHILES, JR., Chairman

/s/ JOHN P. SULLIVAN, Commissioner

/s/ DAVID E. WILLIAMS, Commissioner