STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration Before
Commissioner David E. Williams

INLANDBOATMEN'S UNION OF THE PACIFIC, Grievant, v. WASHINGTON STATE FERRIES, Respondent.	MEC Case No. 38-00 DECISION NO. 270 - MEC DECISION AND AWARD

Pete Jones, Regional Director, appearing for and on behalf of the Inlandboatmen's Union of the Pacific.

Christine Gregoire, Attorney General, by *David Slown,* Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

THIS MATTER, in arbitration, having come regularly on for presentation before the undersigned arbitrator (on November 9, 2000), under a collective bargaining agreement between the parties, and they having been fully heard (on February 22, 2001), with the evidence having been adduced, and each side having advanced written argument in accord with their agreement, the decision and award are now returned, herewith, as follows:

NATURE OF THE CASE

As noted, this matter arises under a valid collective bargaining agreement between the parties, the Inlandboatmen's Union of the Pacific (IBU) and the Washington State Ferries (WSF).

The case is grounded on that agreement with special reference to the provisions embodied therein, as Rule 31.05, which read as follows:

> **31.05** WSF [the employer] has the option to provide training at the work site of the employee or an alternate location. The procedures below are adopted for governing pay practices relative to WSF sponsored training. (Emphasis added.)
>
> A. WSF shall provide a minimum of ten (10) days notice to employees when employees are requested to attend ferry system sponsored training classes. If employees are not provided ten (10) days notice, the employee will have the right to refuse the class.
> B. All employees shall be paid mileage for attending training classes. Travel time to and from the training classes shall also be paid unless the class concludes within the scheduled shift hours.
> C. Employees shall be paid a minimum of their scheduled shift hours for that day for attending training classes. The overtime provision shall apply to training classes exceeding the above noted scheduled shift hours.
> D. Employees' lunch period shall be included in the work/class schedules.
> E. Employees required to attend training classes on their day or days off shall be paid overtime rate of pay.
> F. Employees working on Friday Harbor or Orcas tie-up vessels shall be covered for the entire two (2) day tour to attend training classes.
> G. Employees attending training classes shall have at least eight (8) hours, excluding travel time, between the completion of their last work shift and the beginning of training classes.

(Emphasis added.)

As the moving party, the union (IBU) has referred also to additional provisions of the agreement, *viz*:

> **1.17** **TOURING WATCH**. A "touring watch" is a watch to which the employee is assigned where they are on duty for two successive work shifts not to exceed a total of sixteen (16) working hours separated by a minimum of six (6) hours off between watches during a maximum period of twenty-seven (27) hours. The overtime provisions of this Agreement shall apply if these watches are varied.

(Emphasis added.)

. . . .

> **11.01** The overtime rate of pay for employees shall be at the rate of two (2) times the straight-time rate in each classification.

With its brief, the IBU has set forth what it regards as the facts of the case, with the following summary:

> Training as scheduled and held for Friday Harbor tie-up vessel crew "M" watch, Nisqually, May 8, 2000 at Friday Harbor. Tr.10: 10-11. "M" watch was relieved for the first day of their Touring Watch (Rule 1.17 Tr 7:19-25) and worked the second day of their tour as directed by WSF. "M" watches work hours are ten (10) hours for the first shift and six (6) hours for the second shift. Tr. 10:13-15. Rule 31.05 of the CBA contains the training language and Paragraph F contains language pertaining to Friday Harbor tie-up crews. It states that "Employee's working on Friday Harbor or Orcas tie-up vessels shall be covered for the entire two (2) day tour to attend training classes." The crew requested overtime, six (6) hours, for working the second shift of their tour.

At pages 6 and 7, of the transcript of record, in this case, the union's position is described additionally, *viz*:

> The employees felt that under the language of the contract, which is . . . fairly clear and unambiguous, is that they are covered for the entire two-day shift. And what occurs is that when they commenced training early where their normal shift starts at approximately noon, I believe 11:50, they start training at 8:30. So prior to that getting off the touring watch the day before, they don't have the 24 hours off that they're entitled to. That is somewhat shrunk down somewhere in the neighborhood of 18 hours because of having to get up and whatnot and prepare for an 08:30 training class.

The employers (WSF's) recitation, as to such facts, imparts essentially the same substance. Thus:

> The grievants herein all contend that they are due additional pay as a result of training conducted at Friday Harbor in May 2000. The *Nisqually* operates on the Anacortes-San Juan route and has a tie-up in Friday Harbor. The "M" watch is a touring watch, and the tie-up in question is between two shifts of tour. Transcript, pp. 5-7. On May 8, 2000, the members of the "M" watch were scheduled to attend training in Friday Harbor instead of performing the first, ten-hour shift of their touring watch. The training was held from 0830 to 1630, a period of eight hours. Pursuant to Rule 31.05 of Exhibit 6, they were paid ten hours' pay for this eight hours of training, because ten hours was the normal length of their shift that day. Transcript, pp. 10-11. The next day, they worked

> their scheduled shift of six hours, the second half of the tour. The basis of their grievance is that they believe they are entitled to overtime for this entire six-hour shift under Rule 31.05 (F). (p. 2, WSF Brief)

The facts, as recounted by the parties, are reflected in the two written grievances concerning the matter, which were registered by IBU, with WSF, in accord with the contractual procedure:

> According to Rule 31.05 Section F, Friday Harbor or Orcas tie-up; shall be covered for the 2 day tour. I worked the next day, asked to be put in for overtime and was refused by W.S.F.
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> * * *
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> We, the undersigned and crew of the Nisqually "M Watch," WSF, Ron C. Donn-AB, Suzanne P. Rowe-AB, Michael P. Herko-OS, Daniel A. Morrill-OS, are entitled to 6 hours of overtime pay, as per Union Agreement, Rule 31.05 Sec. F, which states that employees working on Friday Harbor and Orcas tie-up vessels, shall be covered for the (2) day tour to attend training classes. Our crew worked a 6 hr day following the training class and was denied 6 hrs overtime pay by the WSF payroll dept. There was also no mention made by the payroll dept. regarding "early call-out pay." (Our boat shift starts @ 1150 and our training class began 0830. We are therefore justified, we strongly believe in our request for 6 overtime hours of pay.

Such grievances were "processed," under the contractual arrangements, but remained unresolved, hence the instant arbitration proceeding, which presents the questions for decision, as follows:

THE ISSUES

There is no issue, as to the jurisdiction of the arbitrator to hear and decide the instant dispute between the parties regarding the correct interpretation and application of their collective bargaining contract, relative to the material and agreed facts, as the same have been presented, and are of record, here.

On the other hand, the parties disagree sharply, with respect to whether, in arbitration, the referenced grievance ought to be sustained, with a commensurate remedy. The issues here in arbitration, then, are:

1. Should each of two grievances advanced by IBU be sustained because WSF violated the applicable contract, in the circumstances thereby presented, and

2. If so, what remedy ought to be awarded to the represented employees?

PRELIMINARY STATEMENT

The initial arbitral response, generated by the hearing in this case, is that, by way of a primary step, there ought to be careful evaluation, as to whether the problem here is resultant from "ambiguous" contract language.

In such a context, an arbtirator might to be guided by the frequently invoked standard referenced, for example, in *How Arbitration Works*, 470 (5th ed.) with this expression:

> Probably no function of the labor-management arbitrator is more important than that of interpreting the collective bargaining agreement. The great bulk of arbitration cases involve disputes over 'rights' under such agreements. In these cases the agreement itself is the point of concentration, and the function of the arbitrator is to interpret and apply its provisions.
>
> There is no need for interpretation unless the agreement is ambiguous. If the words are plain and clear, conveying a distinct idea, there is no occasion to resort to technical rules of interpretation and the clear meaning will ordinarily be applied by arbitrators.

On the other hand, if, as a matter of warranted impression, pivotal language in a contract under scrutiny, is not clear, or can be regarded as somewhat elliptical, then the following proposition is accepted, not infrequently, in the arbitral community:

> [W]here the evidence is in equipoise and where there is no clear and unambiguous language in the contract to guide the decision making involved and where prior arbitral authority does not contain any common predicate or guidelines for the findings indicated therein, the grievance must fail for lack of proof—there being no probative evidence in the file to sustain the protest as filed. *Rockwell Int'l*, 82 LA 42, 45 (Feldman, 1984), cited by Elkouris, p. 473 (5th ed.).

In response to repeated emphasis by WSF, of the defense that acceptance of the IBU's analysis of the controlling contract would lead, to a "harsh or absurd" result, another rule, generated and followed by seasoned arbitrators, has been well-explained, by the Elkouris, 5th, p. 495, thus,

> When one interpretation of an ambiguous contract would lead to harsh, absurd or nonsensical results, while an alternative interpretation, equally consistent, would lead to just and reasonable results, the latter interpretation will be used. Where the extreme positions of both parties would have produced absurd results, an arbitrator rejected both and arrived at his own interpretation of the disputed provision.

The precept, then, holds that, if the choice is between contending and arguably justified interpretations of abstruse contractual verbiage, the disposition ought to favor respect for justice and reason over adherence to exaggerated nonsense.

Notwithstanding the foregoing "rules" of contract interpretation, when all is said and done,

> The arbitrator does not sit as a court of equity. He must take his thoughts from the four corners of the agreement and decide the case under the law of the contract rather than under the law of equity. The decision, therefore, lies within the four corners of the agreement and not under some rule that may be better but not within the confines of the agreement. Elkouris, 515 (5th ed.).

(Emphasis added.)

Another way of conveying the need, in labor arbitration, to resolve the problem at hand, "within the four corners of the agreement" is attributable to arbitrator Carlton J. Snow, who notes, at pp. 72-73, *Common Law Of The Workplace*, National Academy of Arbitrators, BNA, 1998:

> Arbitrators make an effort to avoid isolation from the rest of the agreement, unless the parties manifest a contrary intention. As Harry Shulman observed '[T]he interpretation which is most compatible with the agreement as a whole is to be preferred over one which creates anomaly,' Shulman, Harry, *Reason, Contract and Law In Labor Relations,* 68 Harv. L. Rev. 999, 1018 (1955), *reprinted* in Management Rights and the Arbitration Process, 169, 191 (1956).

Thus, the arbitrator's "function is not to rewrite [the] Agreement and certainly not to suggest, imply nor to inform the Parties of what changes should be effected, renegotiated or changed even if his sense of justice and fairness should so dictate or even if he believes the Agreement contains inequities." Cited, FN 250, Elkouris, 515 (5th ed.)

DISCUSSION

Giving such attention, as may be justified, under the circumstances of record, to the principles of contract interpretation set forth above, the following analysis appears appropriate:

1. The obviously important Rule 31.05, embodied in the parties' collective bargaining agreement, prescribes especially, at the outset, that, "The procedures below <u>are</u> <u>adopted</u> for <u>governing</u> pay practices relative to WSF sponsored training." (Emphasis added.)

2. Rule 1.17, included in such agreement, states, "a "touring watch" is a watch to which the employee is assigned where they are on duty for two successive <u>work shifts</u> not to exceed a total of sixteen (16) working hours separated by a minimum of six (6) hours off between watches during a maximum period of 27 hours. <u>The overtime provisions of this Agreement shall apply if these watches are varied</u>." (Emphasis added.)

3. Rule 31.05 F provides that, "Employees working on Friday Harbor or Orcas tie-up vessels shall be covered for the entire two (2) day tour to attend training classes." (Emphasis added). This aspect of the contract does not say that the training classes shall be regarded as "work shifts," within the meaning of Rule 1.17, above.

4. The quoted contractual clauses use of the word "shall" establish the recorded purpose and intent, with clarity. In sum, the referenced provisions do not equivocate, nor otherwise create serious doubt, as to what their competent authors have chosen to say.

5. It is not in dispute that timing and functional content of the contractual M touring watches, for the instant grievants, were "varied," by the employer, to accommodate the training objective.

6. Rule 31.05, including subsection F thereof, treats the important subject of training, but does not say that the employer may, alter a valid tour, for M watch, by effecting a "bifurcation," whereby the employees concerned are assigned to ten hours, at a training class, and then to a "work shift" for six hours, digressing, in the process from the times, by the clock, which would have been involved, agreeably with the established structure.

7. Provisions of 31.05 A, which mandate ten days notice to employees requested to attend training classes, ordains, that, given the specified notice, an employee cannot decline the training assignment. No additional substance of relevance, with respect to the instant questions, is set forth by a component of that clause.

As noted, in a situation of the instant variety, sometimes, a fuller measure of assurance can be acquired by consulting "authoritative" views expressed by respected text books. For example, Fairweather's *Practice and Procedure in Labor Arbitration*, 199-201 (2nd ed.) notes:

The policy considerations fundamental to a strict application of the parol evidence rule in labor arbitration were explained by Arbitrator Archibald Cox in *United Drill & Tool Corp.*[28 LA 677, 679-80]:

> [T]he rule is bottomed on common sense. Many business transactions require long and complicated negotiations during the course of which the parties present many arguments and offer a wide variety of proposals and counterproposals. At the end, if a bargain is struck, both parties may want to be able to draw a writing setting forth their undertakings so that each can say with assurance, 'This is it. Here is the agreement setting forth our obligations.' Business transactions would be unstable gambles indeed if this could not be done—if either party were subject to the risk of having a judge or jury go back over all the give-and-take of the prior negotiations and then tell him that it was not enough to carry out the writing. The parol evidence rule makes it possible for the parties to eliminate the uncertainty, if they wish, by adopting the writing as the complete and final expression of their agreement.

Arbitrator Peter Kelliher in *Pillsbury Mills* [14 LA 1045, 1048-49] explained what would happen if the parol evidence rule were not respected in construing labor agreements:

> [T]here would be no point in reducing contract terms to writing. This is not simply a technical rule, but has a long range importance in the maintenance of good relations between the parties. The collective bargaining agreements between the parties are arrived at only after extended negotiations and create an understanding that covers a suitable period of time. Alleged oral agreements cannot be permitted to vary the terms or to serve as amendments to written agreements.

(Emphasis added).

Similarly, Arbitrator Newton Margulies in *Armstrong Rubber Mfg.*, 19 LA 683, 685, said:

> The oral agreement [sought to be established by one party] is in flat contradiction of the Main Contract. If the existence of the Oral Contract were to have been proved, its terms would mean that the principal substance of the Main Contract was written for little purpose and the Supplemental Contract was written for no purpose. This is a conclusion which does not recommend itself to

> any arbitrator interested in sound labor relations. Written contracts should seldom if ever be considered to have been drafted, in part or in whole, for the purpose of misleading employees, management and insurance companies.

In keeping with the time honored principles underlying the parol evidence rule and the reasons, as expressed above, as to why such tenets have application, with regard to a written collective bargaining agreement re-negotiated periodically over a long period of years by able and conscientious representatives of the parties, the grievances here in issue ought to be and hereby are granted, along with the request of each grievant for six hours overtime pay by way of remedy.

This result is warranted because of the unilateral variation, from the contractually specified characteristics of “M watch,” in its administration by the employer, as well as departure thereby, from the meaningful passage, as to “the entire two day tour,” set forth by Rule 31.05 F of the controlling contract.

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AWARD

The grievances, before the arbitrator, are granted. Each grievant, i.e., Terry B. Buholm and the members of M watch, Nisqually crew, (Donn-AB, Rowe-AB, Herko-OS, Morrill-OS), each should be paid, by WSF, the difference between the wages he/she actually received for the "six hour day following the training class" and the applicable overtime rate, for that six hour period, at "work".

Dated this _____ day of May, 2001.

Respectfully submitted,

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David E. Williams, Arbitrator
MARINE EMPLOYEES' COMMISSON

APPROVED:

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John D. Nelson, Commissioner

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John P. Sullivan, Commissioner