

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

INLANDBOATMEN'S UNION
OF THE PACIFIC on behalf of
SAM CALABRESE,

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 43-03

DECISION NO. 396 - MEC

DECISION AND AWARD

APPEARANCES

Schwerin, Campbell and Barnard, by *Robert Lavitt*, Attorney, appearing for the Inlandboatmen's Union of the Pacific and Sam Calabrese.

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

STATEMENT OF THE CASE

This case is before the Marine Employees Commission based upon a grievance filed on May 23, 2003, by the Inlandboatmen's Union of the Pacific (IBU) on behalf of employee Samuel Calabrese. The grievance, MEC Case 43-03, alleges that Washington State Ferries (WSF) failed to pay Calabrese, an AB seaman at the AB rate for work performed on March 29, 2003. WSF denied the grievance and IBU filed its request for arbitration, contending that past practice and the Collective Bargaining Agreement require that Calabrese be paid the AB rate for the March 29 shift. WSF maintains that the appropriate rate was the Ordinary Seaman (OS) rate because that was the job performed by Calabrese on the date in question.

MEC scheduled this matter for settlement discussion, but when settlement failed, the matter was set for arbitration and the hearing was held on August 4, 2003 with MEC Chairman John D. Nelson as arbitrator. Both parties participated fully in the arbitration hearing and timely briefs were filed by both WSF and IBU.

ISSUE

Does the IBU/WSF collective bargaining agreement require WSF to pay overtime at the AB rate to employees who, while holding a permanent full-time AB position, accept overtime assignments performing OS work?

POSITIONS OF THE PARTIES

The IBU argues that there is a consistent past practice of paying permanent AB seamen at the AB rate even when they work as an Ordinary on a temporary or relief basis. IBU posits that the parties' Collective Bargaining Agreement, at Rule 7.08 requires that Calabrese be paid the AB rate in these circumstances. Rule 7.08 states:

An Able Seaman with ten (10) or more years of service may change jobs without loss of pay if the employee becomes handicapped to the extent that the employee might otherwise lose the job, or if the employee is assigned to such other job by the Employer.

WSF contends the plain meaning of Rule 7.08 is to protect ABs who suffer some handicapping condition, and further applies to a situation where assignment to such other job would be more permanent than an overtime relief situation. IBU counters that Rule 7.08 presents two independent and alternative conditions that qualify an AB employee to change jobs without loss of pay—if the employee is assigned to another job by the Employer or if the employee becomes handicapped to an extent that the employee might otherwise lose his present job. IBU contends that these conditions operate disjunctively.

It is difficult to read any longstanding practice that would give meaning to the parties' respective positions. While the IBU presents testimony of a practice that seems to support its position, WSF managers credibly testify that since the recent advent of automated dispatch system, its audit team routinely changes pay orders where the pay claimed differs from the work performed.

WSF argues that the parties intended that employees be paid according to the work they do when they drafted the language of Rule 7. Said rule specifies the number of OS and AB positions on each vessel and states at Rule 7.07:

The wage rates contained in this Agreement for Able Seaman apply to employees occupying Able Seaman positions aboard and holding U. S. Merchant Mariners documents endorsed as Able Seaman (eighteen [18] months minimum), and to employees occupying Ordinary Seaman positions with ten (10) years or more of service with Washington State Ferries, and who cannot obtain AB endorsements due to physical reasons. . . .

Thus, the WSF reasons, the language "employees occupying" is the touchstone for AB pay eligibility. While there have been instances in the past where ABs have performed overtime work functioning as an OS, but paid at the AB rate, these instances have been undetected by WSF because of inadequate tracking data. Since the automated dispatch system has existed, whenever a payroll audit discloses the performance of OS work, WSF has paid such time at the OS rate.

FINDINGS OF FACT

1. WSF and IBU have had collective bargaining agreements for a number of years.
2. Samuel Calabrese was hired in 1990 by WSF and has worked as an Able Bodied Seaman (AB) since 1993 or 1994.
3. While employed by WSF, Calabrese has worked under the WSF/IBU Deck Department Collective Bargaining Agreement (CBA).

4. Calabrese worked as a permanent AB assigned the “D” watch on the Fauntleroy, Vashon, Southworth run.

5. Calabrese was called by the WSF dispatcher on his day-off, March 29, 2003, and asked to work the South Sound Relief Watch. He was not told the nature of his relief assignment, but was urged to accept the work as the dispatcher was having difficulty in finding anyone for the Watch.

6. Upon reporting for the relief watch, Calabrese presented his AB rating to the Mate on the vessel and reported for the vacant position, which was an OS position. The OS position is the basic first level position under the Deck employees’ CBA.

7. The Mate filled out and submitted Calabrese’s time sheet with the code for AB pay at the overtime rate.

8. At the time of this occurrence, the hourly rate under Rule 19 of the CBA was \$18.23 per hour for OS and \$20.49 for AB. Calabrese had already completed his 80 hours work for the pay period and his overtime rate for this relief assignment was to be paid at two times the hourly rate.

9. Calabrese’s time sheet was later audited and his pay for that shift red-lined and changed to the OS rate.

10. Based upon his own experience and upon discussions with fellow ABs, Calabrese had the understanding that permanent ABs when working as Ordinaries, were paid the AB rate.

11. Calabrese’s understanding was confirmed by testimony from AB employees Cynthia Biringer and Tim Robertson, each of whom had been paid the AB rate within the past two years while working in an OS position.

12. WSF managers, Captains Malde and Saffle, serve as members of the Deck department payroll audit team. Both testified that when a pay order reflected work performed was OS work, but paid at the AB rate, they would have changed the rate to OS.

13. Captains Malde and Saffle also observe that in the past, before the WSF's new automated dispatch system was on line, it would have been more difficult to verify the nature of the work performed if at variance from that claimed on the pay order.

14. Since the Deck department payroll audit team has been functioning, WSF management uniformly changes or red-lines pay orders where they notice that AB pay is claimed for doing OS work.

CONCLUSION

The parties have presented their contentions well in this proceeding. While the ambiguity presented by Rule 7.08 might be fleshed out by a consistent practice, that device does not appear to be available. Thus, prior to the payroll audit team checking pay orders and using the database of the automated dispatch system, there were certainly instances when an AB claimed wages at the AB rate for performing OS work. Since the more automated approach and with regular audits that practice seems to have disappeared. There is no evidence that prior to the present style of auditing payroll, WSF knew or approved the practice to which AB Calabrese claims entitlement.

The Rule at 7.08 seems to premise on protecting the long term AB who cannot continue his/her AB job because of a handicapping condition. Mr. Calabrese volunteered for overtime and was not assigned another job. Rule 7.08 cannot be read to require AB pay in circumstances here present.

The grievance will be denied and the following Conclusions of Law will be entered.

CONCLUSIONS OF LAW

1. The Marine Employees' Commission has jurisdiction in this case.
2. The 1999-2001 contract, under which this grievance/arbitration process was processed, remains in full force and effect by operation of law even though its stated expiration date has past. RCW 47.64.170.
3. The contract between the parties does not mandate the payment of AB overtime wages to AB Calabrese. The practice of the parties does not alter the general contractual requirement that employees are paid according to the position occupied.
4. There is insufficient basis for the contractual claim in this matter.

ORDER OF DISMISSAL

On the basis of the above Finding of Fact and Conclusions of Law, the Marine Employees' Commission hereby Orders that the grievance be denied.

DATED this _____ day of December 2003.

MARINE EMPLOYEES' COMMISSION

JOHN NELSON, Arbitrator

Approved by:

JOHN BYRNE, Commissioner

JOHN SULLIVAN, Commissioner