

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before John Swanson

DISTRICT NO. 1, PCD, MARINE
ENGINEERS' BENEFICIAL
ASSOCIATION, AFL-CIO

Grievant,

v.

WASHINGTON STATE FERRIES,

Respondent.

MEC CASE NO. 20-04

DECISION NO. 491 – MEC

DECISION AND AWARD

APPEARANCES

Reid, Pedersen, McCarthy & Ballew, by *Michael McCarthy*, Attorney, appearing for the Marine Engineer's Beneficial Association (MEBA).

Rob McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries (WSF).

NATURE OF THE PROCEEDING

The Marine Engineer's Beneficial Association (MEBA) comes before the Marine Employees Commission (MEC) with a grievance regarding an engine room relieving schedule which was effective on August 10, 2003 on the ferry Wenatchee. The parties, MEBA and WSF tried to resolve the matter of the schedule change and its effect on Licensed Engineer Officers through discussions and mediation; however, the matter was unresolved and the issue was submitted to MEC for arbitration and decision.

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ISSUES

1. Should MEC Case No. 20-04 be dismissed as a result of MEBA's alleged failure to comply with the intent of the Settlement Agreement?
2. Did the engine room schedule in effect in September 2003 for B week night shift on the Wenatchee and A week night shift on the Tacoma violate the collective bargaining agreement?
3. If so, what is the appropriate remedy?
4. Did the employer violate the collective bargaining agreement when it failed to pay additional overtime compensation in September, 2003 to engine room employees working B week night shift on the Wenatchee and A week night shift on the Tacoma?
5. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

SECTION 6 – WAGES AND OVERTIME

(c) Minimum payment for any overtime work performed shall be in increments of one (1) hour, except as follows: the employee will be paid one-quarter (1/4) hour at the overtime rate when work is extended one (1) fifteen (15) minutes or less beyond the regular assigned work day, or two (2) fifteen (15) minutes or less beyond twelve and one-half (12 ½) hours within a scheduled shift **Such extended work shifts shall not be scheduled on a daily or regular basis.** Work performed during the third eight (8) hour shift shall be paid at triple-time, unless a six (6) hour break has been granted. Exceptions to this subsection are specified in SECTION 9.

Emphasis added.

SECTION 9 – HOURS

(a) The principle of eighty (80) hours per two-week period is hereby established. For all practical purposes eight (8) or twelve (12) hours shall constitute one (1) day's pay. No one who is a permanently employed Engineer Officer shall receive less than eighty (80) hours pay per two-week period. **The Employer agrees that the eight (8) or twelve (12) hour day will be adhered to depending upon the vessel's schedule and that normal watch schedules will be arranged so that**

Engineer Officers do not work in excess of eighty (80) hours per two-week period.

Emphasis added.

(c) Overtime shall be payable, pay period by pay period, for time worked beyond the scheduled shift and overtime shall be payable, pay period by pay period, for time continuously worked beyond twelve and one-half (12 ½) hours. If the employee works continuously beyond sixteen (16) hours, the employee shall be compensated for that additional time at the triple-time rate unless a six (6) hour break has been granted.

(d) For employees working a schedule of seven (7) days on duty followed by seven (7) days off duty, every effort shall be made to set relief times between 0500 and 0900.

....

(f) PERMANENTLY ASSIGNED VESSELS: Vessels permanently assigned to a designated route.

(1) On the day a Permanently Assigned Vessel moves from one route to another and thereafter until the vessel returns to its regular assigned route, overtime shall be payable for all time continuously worked beyond twelve (12) hours, for the on-watch crew, regardless of the scheduled length of shift.

....

(g) RELIEF VESSELS: Vessels not permanently assigned to a designated route.

(1) Six (6) vessels (M/V HYAK, M/V KITSAP, M/V CHELAN, M/V KALEETAN, M/V ILLAHEE AND M/V TILLIKUM) shall be designated by the Employer as relief vessels. Initially, their home ports shall be their current home port. Hereafter, home ports may be changed as provided in the Collective Bargaining Agreement. Such designation shall remain in effect for at least a two (2) year period. Changes in Relief Vessel designations shall be announced at least thirty (30) days in advance. If a Relief Vessel becomes unavailable to perform its relief function because of refurbishment, marine casualty, sale or decommissioning, the Employer may, upon thirty (30) days notice, designate a substitute Relief Vessel. As the fleet increases in number of vessels, the Employer may designate additional Relief Vessels as required for valid business reasons.

(2) Engineer Officers on vessels newly designated as Relief Vessels may bid for reassignment to another vessel at the same relieving terminal pursuant to Section 20 (j). Employees on Relief Vessels newly re-designated as a

Permanently Assigned Vessel may bid for reassignment to the newly designated Relief Vessel pursuant to Section 20 (j).

(3) Shift schedules for Relief Vessels shall be prepared in accordance with Section 9 (k), with the understanding that such schedules may be changed without notice. Such schedule changes shall not result in overtime for hours in excess of a previously scheduled shift.

(4) On the day a Relief Vessel moves from one route to another, overtime shall be payable to the on-watch crew for all time continuously worked beyond twelve (12) hours, regardless of the scheduled length of shift.

(5) The Chief Engineer on watch at the time of the Vessel move shall insure that the relief times for the new route assignment are known to management and the oncoming watch crew members.

(6) Schedules of Engineer Officers on Relief Vessels shall be arranged as per Section 9 (k) of this Agreement. The last sentence of Section 9 (k) (2) shall not apply to Relief Vessels.

(h) Vessels (except Passenger-Only vessels) running less than sixteen (16) hours per day will be manned by Engineer Officers working under either the above twelve (12) hour schedule or the eight (8) hour schedule. When working eight (8) hour schedules, the work week shall consist of five (5) consecutive eight (8) hour days followed by two (2) consecutive days off. If any vessel is changed from its present length of shift, the Union shall be given as much advance notice as is practicable, but in no case less than two (2) weeks, except in an emergency. In emergency situations, the Employer shall give such notice as the circumstances allow. Engineer Officers affected by any such change shall have first preference to open positions in the schedule of their choice.

(i) The following exceptions to the regular work week are permissible:

(1) The “four (4) days per week, ten (10) hours per day” schedule may be put into effect by mutual agreement on non-scheduled or seasonal vessels only.

(2) Employee work schedules on any vessel may be arranged so as to result in an average of forty (40) hours per week during the scheduled cycle provided, however, such schedules shall not result in abnormal expectancy of overtime for employees. **Overtime shall not be payable for normal time under such schedules but shall be paid whenever the employee performs work in excess of the scheduled shift.**

Emphasis added.

(3) Engineer Officers working under the “seven days on, seven days off” eighty-four (84) hour workweek schedule will be paid for eighty (80) hours and will have the extra four (4) hours of work accrued and credited as compensatory time.

(4) A Vacation Relief Engineer Officer shall work according to the following schedule: his/her work scheduling cycle shall run from the last two-week period of the previous quarter to the end of the last two-week period in the current quarter and so forth.

For each two-week period the Vacation Relief Engineer Officer shall submit his/her Pay Order showing actual time worked as a Vacation Relief Engineer Officer on regularly scheduled watches he/she was relieving. He/she shall be paid eight (80) hours straight time for each two (2) week period plus penalty time and overtime for work performed outside of the regularly scheduled watches.

At the end of each quarterly scheduling cycle, only upon the request of the Vacation Relief Engineer Officer, the Pay Orders submitted by such Vacation Relief Engineer Officer for the period shall be reviewed by the Port Engineer to determine if such Vacation Relief Engineer Officer has worked in excess of an average eighty (80) hours per two-week period excluding overtime for relieving regularly scheduled watches. If such was the case, then eight (80) hours times the number of two-week periods in the scheduling cycle shall be subtracted from such Vacation Relief Engineer Officer’s hours worked and not paid for in that period and the difference, if any, shall be paid to him/her as overtime with his/her next paycheck.

Recognition shall be made of pay increases becoming effective during scheduling cycles.

(j) When engine room watches are maintained in a lay berth or a repair yard, the Engineer Officers assigned to stand those watches will be allowed mileage and travel time if actually traveled to their regular watch relieving terminals as set forth in Schedule A.

(k) Work Schedules

(1) The Employer shall continue the practice of having the Staff Chief Engineers make schedules for the Engine Department employees subject to approval of the Port Engineer.

(2) In scheduling of Engineer Officers under this Section, employee work schedules for any vessel may be arranged so as to result in an average of eighty-four (84) hours per two-week period during a scheduling cycle of not more than four (4) two-week periods (eight (8) calendar weeks); **provided**,

however, such schedules shall not result in a normal expectance of overtime for employees. If a schedule violates this principle, overtime shall be paid for the excess hours. Overtime shall not be payable for normal work time under such schedules, but shall be paid whenever employees perform work in excess of the scheduled hours in accordance with Section 9. Paid leave time shall be computed as time worked. If a vessel schedule changes, all overtime incurred shall be paid.

(3) Engineer Officers shall be paid for eighty (80) hours per two-week period; but shall report the actual number of hours and minutes worked. **Payment shall be subject to adjustment for overtime worked outside of the work schedule and for schedule changes.**

Emphasis added.

RECORD BEFORE THE COMMISSION

The MEC has the following record before it:

1. Notice of settlement conference and hearing.
2. The request for arbitration.
3. Transcript of the hearing.
4. Exhibits accepted into evidence which include some expired Collective Bargaining

Agreements and the 1999-2001 Agreement in effect at the time of the dispute.

5. MEBA and WSF post hearing briefs.

CONCLUSIONS OF LAW

1. The parties 1999-2001 contract was the controlling contract document in effect at the time of the dispute (RCW 47.64.120)

2. The arbitrator has jurisdiction over the parties and the dispute (RCW 47.64.280). The case is properly before the arbitrator.

3. Nothing in the record or labor agreement allows WSF to schedule Engineers on a regular basis to a schedule that contemplates excess hours without penalty. The parties have agreed to daily schedules of twelve and one-half (12 ½) hours without overtime for the purpose

of balancing a two-week period consistent with the ferry schedule to meet the two-week, eighty (80) hour work period.

4. It is unclear in the record whether the four (4) hours that is worked in excess of eighty (80) hours that is credited as compensatory time, is credited as overtime hours or credited as straight time hours.

5. The record is clear that any work regularly scheduled beyond twelve and one-half (12 ½) hours are “excess or extended hours” and such schedule violates the principles espoused in Section 6(c) and Section 9(k)(2) Work Schedules:

Section 6(c) “[S]uch extended work shifts shall not be scheduled on a daily or regular basis.”

Section 9(k)(2) “Such schedules shall not result in a normal expectancy of overtime for employees. If a schedule violates this principle, overtime shall be paid for the excess hours.”

6. Section 9(k)(3) of the labor agreement provides that “Engineer Officers shall be paid for eighty (80) hours per two-week period; but shall report the actual number of hours and minutes worked. **Payment shall be subject to adjustment for overtime worked outside of the work schedule and for schedule changes.**”

7. It is undisputed that the Engineers assigned the August 10, 2003 schedule worked on two Bainbridge assigned vessels, the Wenatchee and Tacoma during the relevant period in dispute and are affected by the outcome of this dispute.

8. There is no dispute regarding the fact that the August 10, 2003 schedule (Union Exhibit #11) requires the normal expectancy of overtime for Engineers and the schedule requires extended work shifts on a daily and regular basis. Mr. Lindeman’s testimony was corroborated by WSF testimony as to the extended work shift requirement of the schedule.

DISCUSSION

It is undisputed in this case that the schedule of August 10, 2003 required Engineers on a daily and/or regular basis to work extended shifts on the vessels Wenatchee and Tacoma. It is difficult to understand from the record what remedy is appropriate for this violation; however, the language can be interpreted to provide what is not appropriate. Section 9(k)(2): "Overtime shall not be paid for normal work time under such schedules." Normal work time is defined in Section 9(a) as either "**eight (8) or twelve (12) hours shall constitute one (1) day's pay.**" (Emphasis added.)

The Employer also agrees that the eight (8) or twelve (12) hour day will be adhered to depending upon vessel's schedules and that "**normal watch schedules will be arranged so that Engineer Officers do not work in excess of eighty (80) hours per two-week period.**" (Emphasis added.)

When WSF requires Engineers to work a schedule that knowingly results in the expectancy of excess hours and violates this recognized principle, overtime shall be paid for work in excess of the scheduled hours in accordance with Section 9.

After careful reading of Section 6, Section 9, the transcript and the exhibits, the arbitrator is convinced that scheduled hours under the circumstances described in the record and the Agreement are twelve (12) hours per day. On the days when an Engineer is required to work excess hours beyond twelve and one-half (12 ½) hours, overtime is due and payable for the work over twelve (12) hours.

It is apparent the parties intended that a penalty be paid for schedules that require excess hours. The penalty as contemplated and paid by WSF for violating the principle in Section 9(k)(2) cannot be the intention of the parties. Learned Counsel for the Union was correct in

indicating that Section 6(c) – “*such extended work shifts shall not be scheduled on a daily or regular basis*” and Section 9(k)(2) – “*such schedules shall not result in the normal expectancy of overtime*” would have no meaning if the only requirement would be to pay overtime for time worked that exceeds twelve and one-half (12 ½) hours. If that was the only penalty, WSF could violate the principles in Section 6 and Section 9 without regard to the contract language or any commitment stated therein.

There is no question that if WSF had a compelling reason for requiring a schedule with extended work hours, MEBA would be willing to sit down and discuss such a schedule in the interests of the traveling public, WSF and MEBA.

DECISION AND AWARD

1. WSF’s motion to dismiss on the grounds that the Union has abandoned the case by failing to perform under the settlement agreement is denied. Both parties had an equal obligation to meet and pursue efforts to resolve the scheduling matter and/or work together to develop a schedule in compliance with the Agreement which served the interests of the traveling public, WSF and MEBA.

2. The engine room schedule of August 10, 2003 regarding B week night shift on the Wenatchee and A week night shift on the Tacoma was in violation of the Collective Bargaining Agreement.

3. The Employer was in violation of the Collective Bargaining Agreement in August and September 2003 when the Employer failed to pay the appropriate overtime compensation to Engineers on B week night shift on the Wenatchee and A week night shift on the Tacoma.

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4. WSF will pay Engineers on the B week night shift on the Wenatchee and A week night shift on the Tacoma overtime pay after twelve (12) hours for each day such Engineer was scheduled to work in excess of twelve and one half (12 ½) hours required by the August 10, 2003 schedule.

DATED this 10th day of October 2006.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved By:

/s/ JOHN SULLIVAN, Commissioner

/s/ ELIZABETH FORD, Commissioner