

STATE OF WASHINGTON  
BEFORE THE MARINE EMPLOYEES' COMMISSION

DISTRICT NO. 1, MARINE ENGINEERS'  
BENEFICIAL ASSOCIATION,

Grievant,

v.

WASHINGTON STATE DEPARTMENT  
OF TRANSPORTATION, FERRIES  
DIVISION,

Respondent.

MEC CASE NO. 16-08

DECISION NO. 563 - MEC

DECISION AND AWARD

**APPEARANCES**

Reid, Pederson, McCarthy and Ballew by *Michael McCarthy*, Attorney, appearing for the District No. 1, Marine Engineers' Beneficial Association (MEBA).

Robert McKenna, Attorney General, by *David Slown* and *Kara Larsen*, Assistant Attorneys General, appearing for the Washington State Department of Transportation, Ferries Division (WSF).

**NATURE OF PROCEEDING**

WSF's engine room employees are all required to do a watch turnover or changeover at the beginning and end of every shift, whereby the off-going crew relays to the oncoming crew the status of the engine room and ongoing issues that may have arisen during that shift. The WSF has never paid engine room employees for the time involved in doing the turnover.

On August 11, 2004, several MEBA members filed a class action lawsuit in Pierce County Superior Court seeking wages for the time spent performing turnover functions. MEBA members prevailed. The Court ordered WSF to pay engine room employees wages for turnover, plus interest, attorneys' fees and double damages under RCW 49.52.050 and RCW 49.52.070. WSF appealed, arguing that the employees' claims should have been brought under the Collective Bargaining Agreement (CBA).

The Washington Court of Appeals reversed the Superior Court's ruling, dismissing the class action lawsuit because the employees' claims should have been brought pursuant to RCW

47.64.150, which required them to seek a remedy through procedures in the CBA or procedures established by the MEC. However, the Court of Appeals' decision emphasized that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration."

On March 14, 2008, District No. 1 MEBA filed the instant grievance with the MEC (docketed as MEC Case 16-08) seeking wages for engine room employees for time spent on watch turnover.

### **ISSUES PROPOSED BY THE UNION**

1. How much money should the Employer be required to pay under the decision of the Washington Court of Appeals in Davis, et al v. Washington Department of Transportation, No. 04-2-010585-0?

2. Should the Employer also be required to pay double damages, interest, and attorney's fees and costs?

### **ISSUE PROPOSED BY THE EMPLOYER**

Did Washington State Ferries violate the Collective Bargaining Agreement (CBA) between WSF and MEBA by not paying overtime compensation for routine watch turnover performed by engine room employees?

### **RECORD BEFORE THE MARINE EMPLOYEES' COMMISSION**

1. Request for Grievance Arbitration, filed March 14, 2008.
2. Notice of Scheduled Hearing, dated August 1, 2008.
3. The official transcript of the hearing conducted on April 3, 2009.
4. Exhibits 1—18, accepted into evidence from the parties during the April 3, 2009 hearing (including the 1999-2001 MEBA/WSF Licensed and Unlicensed Collective Bargaining Agreements).
5. Post-hearing brief of MEBA, submitted June 5, 2009.
6. Post-hearing brief of WSF, submitted June 5, 2009.

## **RELEVANT CONTRACT PROVISIONS**

### **1999-2001 MEBA/WSF Collective Bargaining Agreement—Licensed**

#### **SECTION 6 – WAGES AND OVERTIME**

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(b) Overtime compensation shall be at the rate of two times the base rate in each classification. All overtime requests must be approved and authorized by the Port Engineer, except that in emergency cases overtime pay may be approved by the Staff Chief Engineer or Chief Engineer on watch. The Staff Chief or Chief Engineer shall forward an accurate record of all authorized Engine Department overtime to the Operations Department in a timely manner.

(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 (12½) 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 (9) 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.

### **1999-2001 MEBA/WSF Collective Bargaining Agreement—Unlicensed**

#### **RULE 11 – MINIMUM MONTHLY PAY AND OVERTIME**

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.

11.02 When work is extended fifteen (15) minutes or less beyond the regular assigned work day, or beyond twelve and one-half (12½) hours of a regular assigned work day, such time shall be paid at the overtime rate for one quarter (¼) of an hour. Should work be extended by more that fifteen (15) minutes, the time worked beyond the regular assigned work day or beyond 12½ hours of a regular assigned work day, shall be paid at the overtime rate in increments of one (1) hour. Such extended work shifts shall not be scheduled on a daily or regular basis. Crew members required to work more that one (1) shift without a break shall be paid as follows:

The first scheduled shift shall be paid at the straight time rate; the second shift shall be at the overtime rate; the third shift shall be at triple the straight time rate, unless the employee has had a minimum of a six (6) hour break preceding the third shift excluding travel time.

## **POSITIONS OF THE PARTIES**

### **Union's Position (MEBA)**

The MEBA/WSF Licensed and Unlicensed Collective Bargaining Agreements, (Wages and Overtime sections) require engine room employees to be paid for watch turnover time. The Washington Court of Appeals held that “watch changes are a work activity for which the State must compensate employees.” Union Ex. 4, p. 2 of 10. Turnover clearly represents an extension of work beyond the regularly assigned work day. There is a 15-minute minimum payment due at the overtime rate, once per shift per person.

As far as determining how far back the payments to engine room employees need to go, the Union offers three options: April 9, 2007, which is 60 days prior to the filing of the grievances; August 11, 2004, which is when the class action lawsuit was filed in Superior Court; or August 11, 2001, which is three years prior to the filing of the lawsuit.

### **Employer's Position (WSF)**

Historically, no one has ever been paid for watch turnover beyond the professional wages that they are granted under the contract. Turnover is part of the routine duties of engineer officers and unlicensed engineers. The parties agreed on compensation levels understanding that that was part of the job.

Custom and practice in the maritime industry has never included additional compensation for watch turnover. The Commission should look at this grievance as though it had been filed before the class action suit.

## **FINDINGS OF FACT**

1. WSF's engine room employees are all required to do a watch turnover or changeover at the beginning and end of every shift. WSF policies require off-going employees to exchange pertinent information about operation of the vessel before being relieved by the on-coming crew.

2. During the April 3, 2009 MEC hearing, the parties stipulated that the WSF has never paid engine room employees for the time involved in performing the watch turnover, even though watch turnover extends the employee's work beyond the regular assigned work shift.

3. There is no substantive evidence in the record to confirm whether any individual claims for watch turnover may have been made in the past.

4. On August 11, 2004, several MEBA members filed a class action lawsuit in Pierce County Superior Court seeking wages for the time spent performing turnover functions. MEBA

members prevailed. The Court ordered WSF to pay engine room employees wages for turnover, plus interest, attorneys' fees and double damages under RCW 49.52.050 and RCW 49.52.070. WSF appealed, arguing that the employees' claims should have been brought under the grievance procedures of the Collective Bargaining Agreement (CBA).

5. The Washington Court of Appeals reversed the Superior Court's ruling, dismissing the class action lawsuit because the employees' claims should have been brought pursuant to RCW 47.64.150, which required them to seek a remedy through procedures in the CBA or procedures established by the MEC. However, the Court of Appeals also held that "watch changes are a regular, essential, and required work activity for which the State must compensate under the CBA. **And whether watch changes are work or whether watch changes must be compensated is not an issue for future grievance or arbitration.**" (Emphasis added.)

6. On March 14, 2008, District No. 1 MEBA filed the instant request for grievance arbitration.

7. The parties agree that each watch turnover takes less than fifteen (15) minutes.

8. Both the Licensed and Unlicensed Collective Bargaining Agreements provide that, when work is extended less than 15 minutes beyond the regularly assigned workday, the minimum payment is 15 minutes at the overtime rate. Jt. Ex. 2, § 6(c); Jt. Ex. 3, Rule 11.01.

9. There was no evidence that WSF made any attempt to calculate backpay for watch turnover to determine liability, even after the Court of Appeals issued its Decision.

10. The State provided no evidence to the Arbitrator as to any alternative or compromise position regarding watch turnover pay.

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11. The only evidence in the record that provides any reasonable basis for quantifying backpay was submitted by the Union (Union Ex. 12) in the form of a spreadsheet showing overtime calculated for watch turnover at the rate of fifteen (15) minutes at the overtime rate, once per shift per person. Assistant Engineer Andrew Smalley testified that he created the spreadsheet to determine how much the Union believes WSF owes engine room employees for watch turnover, based on three different time periods:

- a. April 9, 2007—March 31, 2009 starting 60 days prior to the filing of the grievances (the grievance period from the MEBA contracts).
- b. August 11, 2004—March 31, 2009, starting when the class action lawsuit was filed in Pierce County Superior Court.
- c. August 11, 2001—March 31, 2009, starting three years prior to the filing of the lawsuit.

12. At the time of the April 3, 2009 arbitration hearing, MEBA had calculated total watch turnover wages for the three corresponding time periods above, as follows:

- a. \$1,921.562.81
- b. \$4,245,383.84
- c. \$6,747.952.48

### **CONCLUSIONS OF LAW**

On the basis of the complete record before him, the findings of fact and legal analysis, the Arbitrator makes the following conclusions of law.

1. The Marine Employees Commission has jurisdiction over the parties and the subject matter pursuant to RCW 47.64.280.
2. The 1999-2001 Licensed and Unlicensed MEBA/WSF Collective Bargaining Agreements were in full force and effect during the time covered by this matter.
3. The Washington State Court of Appeals has ruled that engine room employees are to be compensated under the Collective Bargaining Agreements for time spent on watch turnover.
4. Section 6 of the Licensed MEBA/WSF CBA and Rule 11 of the Unlicensed MEBA/WSF CBA provide compensation for work that is extended beyond a regular assigned work day.

## **DISCUSSION**

The collective bargaining process and the interpretation of collective bargaining agreements are not based on traditional contract law. Collective bargaining agreements are to be interpreted by the parties, based on the intent of the parties during the bargaining process. Where the parties cannot agree, arbitration is the negotiated procedure utilized to settle disputes. It is well settled that courts should not get involved in the merits of grievances. Further, it is a well settled principle of labor law that the courts should defer to the opinion of the arbitrator. The U.S. Supreme Court has held repeatedly that interpretation of labor agreements is for the arbitrator, and that the court has no business overruling an arbitrator's award simply because the court believes its own interpretation is the better one. The Steelworkers case cited by the State in its brief set forth the U.S. Supreme Court's view. It is the view of the Commission that the State of Washington Court of Appeals overstepped its bounds and directed us, in advance of arbitration, as to what our findings should be. We strongly believe it was inappropriate of the court to have given advance instructions to the Commission on the interpretation of the collective bargaining agreement.

However, the matter is before us as an agency of the State of Washington and we are governed by the courts of this State. We therefore concede to the directive of the Court and find that the matter of whether or not watch changeover is "work" within the meaning of the statutes of the State of Washington has already been determined, and our challenge is to determine the proper remedy.

It is unreasonable to believe that had this grievance over watch turnover been filed with MEC prior to the Court proceedings, MEC would not have applied the same interpretation of the contract as the Court. The contract specifically provides for overtime compensation when work is performed prior to or beyond the end of a work shift.

The State's argument that presupposes the Court improperly ruled in this matter is not a matter before the Marine Employees' Commission. However, the Court properly concluded that the contract requires watch turnover pay is owed to engine room employees at WSF.

Decisions of the MEC are subject to appeal and modification by the Courts. It is well understood that the MEC has no authority to hear an appeal or overrule decisions of the Courts. While the MEC shares the concerns of the WSF about the intervention of the Court into the collective-bargaining process, the WSF ignored the directive of the Court at its peril. Thus,

when the Court determined watch changeover to be work and deferred the matter back to the grievance procedure, the WSF should have begun a method of record keeping to track the amount of time worked by employees. It failed to do so. It failed to take any position on remedy. Therefore, the only evidence in the record about the amount of time employees worked and should be compensated for is that presented by the Union. We are obligated to make our decision based on the record presented at the hearing. Given the only evidence presented as to remedy came from the Union, WSF is directed to implement the following Award.

### **AWARD**

1. The request for grievance arbitration, filed by District No. 1 Marine Engineers' Beneficial Association against the Washington State Ferries, is sustained. WSF will compensate engine room employees for lost wages for unpaid watch turnover.

2. WSF and MEBA will examine timesheet records and calculate overtime for each instance that an engine room employee was not paid for watch turnover from April 9, 2007 to the date calculations are completed. Such calculations are expected to be concluded within 90 days of receipt of this award. MEBA will provide WSF with a MEBA member to assist WSF in the calculations of backpay, at WSF's expense.

3. In the alternative, the parties may agree on a lump sum backpay settlement, to be distributed by MEBA to the engine room employees.

4. If the parties cannot resolve the issue or complete calculations within the 90 days referred to in paragraph 2 (unless they mutually agree to extend the time), WSF will pay \$1,921,562.81, plus interest, in backpay to the MEBA, plus any additional watch turnover wages accrued from March 31, 2009 until the award is implemented (Union Ex. 12).

5. Upon presentation of affidavits, WSF will reimburse the MEBA for attorney fees incurred in bringing this grievance before the MEC.

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6. Attorney's fees for the firm that prosecuted the class action lawsuit that led to the Court of Appeals Decision are denied. Double damages are denied.

7. WSF will pay interest on the backpay settlement at the rate which would accrue on a civil judgment of the Washington state courts.

8. The Arbitrator will retain jurisdiction over this Award for at least 90 days.

DATED this 24th day of July 2009.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN COX, Arbitrator

Approved by:

/s/ JOHN SWANSON, Chairman

/s/ PATRICIA WARREN, Commissioner