BEFORE THE ARBITRATOR

In the matter of the arbitration of a dispute between INLANDBOATMEN'S UNION OF THE PACIFIC and WASHINGTON STATE FERRIES	CASE 24940-A-12-1517 ARBITRATION AWARD (James Garner)

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Laura Ewan* and *Robert H. Lavitt*, Attorneys at Law, for the union.

Attorney General Robert W. Ferguson, by *Catherine R. Seelig*, Assistant Attorney General, for the employer.

On June 27, 2012, the Washington State Ferries (employer) and the Inlandboatmen's Union of the Pacific (union) filed a joint request for grievance arbitration. The Commission appointed Jamie L. Siegel as the arbitrator. On October 8, 2012, the employer filed a motion for dismissal based on timeliness, grievability, and arbitrability. On November 9, 2012, the union filed its response to the employer's motion. By e-mail dated November 28, 2012, I denied the employer's motion. I ruled that the evidence before me was insufficient to determine the timeliness issue, and I invited the parties to further address the issue at hearing and in their post-hearing briefs.

On December 10, 2012, I conducted a hearing in accordance with the binding arbitration provisions of the collective bargaining agreement between the parties. The parties presented evidence in the form of both witness testimony and exhibits. The parties filed post-hearing briefs on February 1, 2013.

ISSUES

The parties did not agree to an issue statement and stipulated to my authority to develop the issue statement. The issues before me include the following:

1. Was James Garner's grievance timely filed?

2. Did the employer violate Rule 25.01(C) when it failed to notify the union of James Garner's on-duty injury?

3. Did the employer violate Rules 18 and 21 when it did not credit James Garner with sick leave and vacation leave accruals while on maintenance and cure?

The employer violated Rule 25.01(C) of the collective bargaining agreement (CBA) when it failed to notify the union of James Garner's on-duty injury. In addition to ordering future compliance with the notification provision in Rule 25.01(C), I find the proper remedy for the employer's violation is to waive the CBA's requirement that the union file this grievance in 30 days. After considering the entire record, I find the employer did not violate Rules 18 and 21. Garner was not eligible to accrue sick leave and vacation leave while on maintenance and cure.

BACKGROUND

James Garner, the grievant, has worked for the employer as a deckhand aboard Washington State ferries for approximately 20 years. On June 8, 2011, Garner sustained an injury on the job; paperwork concerning the incident was completed the next day. By letter dated June 16, 2011, the employer accepted Garner's claim for Jones Act benefits and informed him of his entitlement to "maintenance, cure and unearned wages."[1] "Maintenance and cure" represents payments to injured sailors and is common in some segments of the maritime industry when injured employees are not eligible for Washington industrial insurance time-loss benefits. Garner returned to work on June 17 or 18. Starting on August 7 or 8, Garner was off work again for an extended period due to recurring issues with his arm stemming from the June 8 incident. While away from work due to his injury, Garner received maintenance and cure in the amount of $35 per day and $30 per day as a wage supplement.[2] Garner applied for assault benefits under RCW 47.04.250 which authorizes the reimbursement of some employee costs attributable to being assaulted by a motorist. On September 13, 2011, the employer denied Garner's application for these statutory assault benefits.

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1 The Jones Act allows injured sailors, including certain bargaining unit employees such as Garner, to make claims and collect against their employer.

2 The maintenance and cure is untaxed; the wage supplement is taxed.

In February 2012, Garner noticed that sick leave and vacation leave either were not accruing on his pay stubs or would appear on one stub and disappear on another. Garner asked the employer's payroll department about his leave accruals and was informed that he was not eligible because eligibility required being in pay status for at least 80 hours per month.

In March 2012, Garner contacted Dennis Conklin, the union's regional director, and on April 11, 2012, the union filed a grievance on Garner's behalf. Part one of the grievance asserts the employer violated the CBA by denying Garner's application for statutory assault benefits. Part two of the grievance asserts the employer violated the CBA by failing to provide notice to the union of Garner's injuries under Rule 25.01(C) and by not allowing Garner to accrue sick leave, vacation leave, and holidays while on maintenance and cure.

The parties agree that statutory assault benefits are discretionary and not subject to the grievance procedure. As a result, the issue of assault benefits is not before me.[3] Additionally, the union's evidence and post-hearing brief did not address the issue of holidays; as a result, I consider that issue withdrawn.

RELEVANT CONTRACT PROVISIONS

The 2009-11 CBA was in effect from July 1, 2009, through June 30, 2011. The 2011-13 CBA was in effect from July 1, 2011, through June 30, 2013. The relevant provisions of the 2009-11 CBA remain unchanged in the 2011-13 CBA. The parties stipulated to the admission of both CBAs. The following CBA provisions are relevant to the issues before me:

> RULE 1 – DEFINITIONS
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> . . . .
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> 1.26 CONTINUOUS EMPLOYMENT
> "Continuous employment" shall be broken by resignation, discharge, termination or written notice of layoff of six (6) months or more.

[3] The union does not allege the employer violated CBA Rule 8.05, the provision addressing assault benefits.

OTHER DEFINITIONS AND TERMS Unless the context of a particular section in question indicates otherwise, all other words and terms used in this agreement shall be given their common and ordinary meaning.

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RULE 14 – GRIEVANCE PROCEDURE

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14.02 TERMS AND REQUIREMENTS

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C. Computation of Time
The Parties acknowledge that time limits are important to judicious processing and resolution of grievances. . . .

D. Failure to Meet Timelines
Failure by the Union to comply with the initial thirty (30) day deadline contained in 14.3 A [14.03A], below, will result in automatic withdrawal of the grievance. Failure by the Union to comply with other timelines contained in this Grievance Procedure may be submitted to the arbitrator for his or her determination. Failure by the Employer to comply with the timelines will entitle the Union to move the grievance to the next step of the procedure.

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14.03 FILING AND PROCESSING

A. Filing
A grievance must be filed within thirty (30) days of the occurrence giving rise to the grievance or the date the grievant knew or should reasonably have known of the occurrence. This thirty (30) day period may be used to attempt to informally resolve the dispute.

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D. Authority of the Arbitrator
1. The arbitrator will:
   a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;

b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;

. . . .

RULE 18 – VACATIONS

18.01 Each employee with a minimum of six (6) continuous months' employment shall receive one (1) working day of vacation leave, with full payment for each month of completed employment up to and including twelve (12) months. Additional bonus days of vacation leave will be credited for satisfactorily completing the first two (2), three (3), four (4), five (5), seven (7), nine (9), eleven (11), thirteen (13), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), twenty-six (26), twenty-eight (28) and thirty (30) years of continuous employment. Employees will accrue vacation leave according to the rate schedule in Subsection 18.02.

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RULE 21 – SICK LEAVE

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21.01 Each full time employee who has completed six (6) months of continuous employment shall receive one (1) day (eight [8] hours) of sick leave credit for each completed month of service commencing with the employee's date of employment. Service for this purpose shall exclude time worked prior to January 1, 1958. Sick leave credits shall accumulate. Sick leave accruals for part-time and/or temporary employees will be computed on an hourly basis, based on the ratio of hours worked to normal straight time hours worked by regular employees during those periods.

RULE 25 – MAINTENANCE AND CURE

25.01

A. When any member of the crew of a vessel is entitled to daily maintenance, it shall be paid at the rate of thirty-five ($35.00) dollars per day. In addition to and separate from the thirty-five ($35.00) dollar daily maintenance rate, the Employer shall pay a wage supplement of thirty ($30.00) dollars per day. In the event of a Jones Act judgment, the supplemental amount paid by WSF shall be applied to offset any Jones Act judgment against WSF.

. . . .

C. The Employer agrees to notify the Union of all injuries to employees when such injuries occurred while on duty.

D. The Employer recognizes the right of the Union to intercede on questions which may arise under the application of this rule.

PRINCIPLES OF CONTRACT INTERPRETATION

Much of the arbitration case authority supports the "plain meaning rule," which provides that when bargaining agreement language is clear and unambiguous, arbitrators will not look outside the four corners of the bargaining agreement to determine the meaning of the language. ELKOURI & ELKOURI, *How Arbitration Works* 434 (6th ed. 2003). In contrast, when contracts are silent or ambiguous about a matter, arbitrators look to other evidence, including the parties' custom and past practice, which may be enforceable as part of the parties' agreement. ELKOURI & ELKOURI, *How Arbitration Works* 606 (6th ed. 2003).

In *Skogen v. Washington State Ferries*, Decision 6, *motion for reconsideration den'd*, Decision 6A (MEC Case 6-83, 1985), the Marine Employees' Commission (MEC), acting as arbitrator, found that the parties' past practice relating to filling positions justified the employer's preferential appointment of an employee ahead of the grievant. In discussing the role of past practice, the MEC concluded:

> When the terms, conditions and applications of a collective bargaining agreement are unclear or ambiguous, the Marine Employees' Commission turn to 'past practice' for interpretation. "...the labor arbitrator source of law is not confined to the express provision of the contract, as is the industrial common law – the past practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it (*United Steelworkers of America v. Warrior & Gulf Navigation Co.,* 363 U.S. 574)."

In typical contract interpretation grievances, arbitrators generally apply the rule that the union bears the burden of proving by a preponderance of the evidence that the employer violated the CBA. ELKOURI & ELKOURI, *How Arbitration Works* 190 (Supp. 2010). I apply that standard in this case.

ANALYSIS

ISSUE 1: Was James Garner's Grievance Timely Filed?

Rule 14.03(A) of the CBA requires the filing of a grievance within 30 days of the occurrence. Rule 14.02(D) states that failure to comply with the 30-day deadline results in the automatic withdrawal of the grievance.

In many circumstances, arbitrators strictly enforce grievance timelines. In this case, I cannot enforce the timeline because, as described in more detail below, the employer had an affirmative obligation to provide the union timely notice of Garner's injury. Because the employer violated the CBA when it failed to provide this notice, I find that the proper remedy is to waive the 30-day time limit for the union to file this grievance.

ISSUE 2: Did the employer violate Rule 25.01(C) when it failed to notify the union of James Garner's on-duty injury?

Under Rule 25.01, the section of the CBA addressing maintenance and cure, the parties agreed as follows:

> C. The Employer agrees to notify the Union of all injuries to employees when such injuries occurred while on duty.
>
> D. The Employer recognizes the right of the Union to intercede on questions which may arise under the application of this rule.

Rule 25.01(C) of the CBA clearly and unambiguously requires the employer to give the union notice of all on-duty injuries. Rule 25.01(D) follows the notice requirement and acknowledges the union's role in helping employees with questions about the application of the maintenance and cure rule.

Although the CBA does not include specific timelines by which the employer must provide the required notice, the uncontroverted evidence demonstrates the employer failed to provide the union any notice of Garner's injury. I find the employer violated Rule 25.01(C).

As described above, as a remedy for this violation, I waive the CBA's 30-day time limit for the union to file Garner's grievance. Additionally, I order the employer to comply with Rule 25.01(C) and provide notice to the union when employees sustain future on-duty injuries.

ISSUE 3: Did the employer violate Rules 18 and 21 when it did not credit James Garner with sick leave and vacation leave accruals while on maintenance and cure?

The union argues that the employer violated CBA Rules 18 and 21 when it did not credit Garner with sick leave and vacation leave accruals while he was on maintenance and cure. Rule 25 relating to maintenance and cure does not address leave accrual. The CBA's rules relating to sick leave and vacation leave do not explicitly address employees on maintenance and cure (bold and italics added):

> RULE 18 – VACATIONS
>
> 18.01 Each employee with a minimum of six (6) continuous months' employment shall receive one (1) working day of vacation leave, with full payment ***for each month of completed employment up to and including twelve (12) months***. Additional bonus days of vacation leave will be credited for satisfactorily completing the first two (2), three (3), four (4), five (5), seven (7), nine (9), eleven (11), thirteen (13), fourteen (14), sixteen (16), eighteen (18), twenty (20), twenty-two (22), twenty-four (24), twenty-six (26), twenty-eight (28) and thirty (30) years of continuous employment. Employees will accrue vacation leave according to the rate schedule in Subsection 18.02.
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> . . . .
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> RULE 21 – SICK LEAVE
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> . . . .
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> 21.01 Each full time employee who has completed six (6) months of continuous employment shall receive one (1) day (eight [8] hours) of sick leave credit ***for each completed month of service*** commencing with the employee's date of employment. Service for this purpose shall exclude time worked prior to January 1, 1958. Sick leave credits shall accumulate. Sick leave accruals for part-time and/or temporary employees will be computed on an hourly basis, based on the ratio of hours worked to normal straight time hours worked by regular employees during those periods.

The union argues the key language in both rules is "continuous employment." Because Garner maintained "continuous employment," as Rule 1.26 of the CBA defines that term (see page four above), the union asserts Garner was eligible to accrue sick leave and vacation leave while on maintenance and cure. The employer agrees that Garner remained continuously employed but argues that his "continuous employment" determines how many days of vacation Garner would receive if he was eligible to receive leave, not whether he is eligible. I agree with the employer.[4]

According to Rule 18.01, employees are eligible to accrue vacation leave "for each month of completed employment up to and including twelve (12) months." The rate of vacation leave accrual is based upon the employee's years of continuous employment. According to Rule 21.01, employees are eligible to accrue one day of sick leave for each "completed month of service."

The CBA does not define "month of completed employment" or "completed month of service." Furthermore, these terms do not lend themselves to a "common and ordinary meaning," as Rule 1 of the CBA references (see page four above). As a result, I must review the parties' past practice to determine the meaning the parties ascribe to those terms and whether the employer violated the CBA.

The record includes no evidence of other employees on maintenance and cure accruing sick leave and vacation leave. The record includes evidence from one of the employer's payroll department employees who has worked in the department for ten years. In an e-mail dated February 16, 2012, Cindy Bellus, then payroll and labor processing supervisor, explained Garner's ineligibility for leave accruals as follows:

> The IBU contract does not address Leave accruals for employees on Leave of Absences, or OJI [on-the-job injury] who are in paid status for less than full time.

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4 The union cites *IBU v. Washington State Ferries,* Decision 572 (MEC Case 19-06, 2009), in support of its position. The decision is not, however, relevant to this issue. The decision holds that on-call and part-time employees accrue sick leave and vacation leave at a rate that is based on their years of "continuous employment," rather than hours worked. The decision does not address eligibility for sick leave and vacation leave accrual and does not address employees on maintenance and cure. My review of MEC decisions revealed no cases addressing the issue of eligibility for sick leave and vacation leave accrual for employees on maintenance and cure.

> Because it is not addressed, we have always followed general government rules, which say an employee has to be in paid status for 80 hours in the month to receive leave accruals. WAC 357-31-175. This may not always be the case, but this is currently (and has been for at least the 10 years I've been here) the practice.

At the hearing, Bellus confirmed the practice that employees must be in pay status for 80 hours in a month to receive leave accruals. Her testimony was uncontroverted. The union presented no credible evidence rebutting the practice Bellus described; the union presented no credible evidence that the days when employees are on maintenance and cure and receive the wage supplement count toward the 80 hours of paid status required for an employee to be eligible for leave benefits.

Dennis Conklin testified about negotiations for the wage supplement portion of Rule 25, which the union obtained in the 2005-07 CBA through an interest arbitration award. Conklin testified that Rule 25's wage supplement includes the accrual of sick leave and vacation leave:

> We had agreed that under L&I they receive their calculation for two-thirds of the benefit is based on their benefits, their healthcare and their wages, and then they come to a number and that's what they get paid, right? So what they had said is that we would -- we would receive the $30 a day, which would be a wage supplement, which is the wage for the day, and you would receive your healthcare and sick leave -- you would receive your vacation and sick leave because that would continue to give you your health benefit, which still was less than -- when you calculate it out, was still less than the two-thirds. But it was close. It was as close as we could get. And so we had agreed to that.
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> And what they had said is the wage supplement was $30 a day, and if you didn't take a lawsuit against them that was your wage for the day was $30. And that's why they tax it, because that is your wage for the day. And if you want more than that, you have to take action against them, right, and sue them. And if you don't all you receive is the $30 a day, plus you're supposed to receive your vacation and sick leave so you could continue to receive your health benefits while you're off.

I find the record does not establish that Rule 25's wage supplement includes the accrual of sick leave and vacation leave. Arbitrator John Byrne's interest arbitration decision for the 2005-2007 CBA awarded the union's proposed wage supplement but made no reference to sick leave and vacation leave eligibility for employees under Rule 25.

I note that Rule 8.05, which addresses benefits in the event of "unprovoked assault, theft, robbery or fire," specifies an employee's eligibility for fringe benefits as follows:

> The Employer will pay the employee the employee's regular straight time rate of pay, including all fringe benefits, less the applicable temporary disability compensation paid by the State of Washington under the Worker's Compensation Statute or the applicable maintenance and cure provisions as provided under the Jones Act and Rules 21 and 25 of the Agreement.

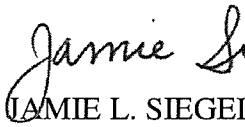
Had the parties or the arbitrator intended to include the accrual of sick leave and vacation leave as part of Rule 25, they knew how to write specific language to accomplish that intent. They did not do so.

The union did not carry its burden of proving that the employer violated Rules 18 and 21. Neither the bargaining history nor the parties' past practice establish that Garner was entitled to sick leave and vacation leave accruals.

AWARD

I grant the grievance in part, and deny it in part. The employer violated Rule 25.01(C) and is ordered to comply with Rule 25.01(C) and provide notice to the union when employees sustain future on-duty injuries. The employer did not violate Rules 18 and 21 and Garner was not eligible to accrue sick leave and vacation leave while on maintenance and cure.

Issued at Olympia, Washington, this 19th day of March, 2013.



JAMIE L. SIEGEL, Arbitrator