

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	OPINION AND AWARD
)	
THE INLANDBOATMEN'S UNION)	
OF THE PACIFIC, PUGET SOUND REGION)	
)	
THE INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES AND PILOTS)	
)	
"IBU AND MM&P" OR "THE UNIONS")	
)	
AND)	
)	
WASHINGTON STATE FERRIES)	
)	Work Schedules
"WSF" OR "THE EMPLOYER")	Grievance

HEARING:

January 26, 2010 and January 27, 2010
Seattle, WA

HEARING CLOSED:

January 27, 2010

ARBITRATOR:

Timothy D.W. Williams
2700 Fourth Ave., Suite 305
Seattle, WA 98233

REPRESENTING THE EMPLOYER:

David Sloan, Assistant Attorney General

REPRESENTING THE UNION:

Robert Lavitt, Attorney

APPEARING AS WITNESSES FOR THE EMPLOYER:

George Capacci, Captain
Matt Handbey, Operating Program Manager
Teri Haffie, Manager of Operations, Dispatchers and Watch
Center Supervisors
Steve Rodgers, Director of Operations
Jerry Holder, Labor Negotiator - Office of Financial
Management

APPEARING AS WITNESSES FOR THE UNION:

Tim Saffle, Captain
Dennis Conklin, IBU Regional Director
Perry Squires, Captain
Gregory Faust, Relief Mate

EXHIBITS

Joint

1. Collective Bargaining Agreement between the State of Washington and Inlandboatmen's Union of the Pacific, effective July 1, 2009 through June 30, 2011
2. Collective Bargaining Agreement between the State of Washington and Masters, Mates & Pilots, effective July 1, 2009 through June 30, 2011

Union

1. Memorandum of Understanding Regarding the Elimination of Touring Watches
2. Grievance Letter dated November 18, 2009
3. WSF - Deck Schedules 2010 Winter (1/3/2010-3/27/2010)
4. MM&P and IBU's Proposed Deck Schedules for 2010 Winter: Anacortes/San Juans (B- & E- Watches); Clinton/Mukilteo (G-Watch)
5. Power Point - Comparison of WSF and MMP/IBU Deck Schedules for 2010 Winter - Anacortes/San Juans (B- & E- Watches); Clinton/Mukilteo (G-Watch); travel distance map
6. Table - Crew Travel Distances. Anacortes/San Juans (B- & E- Watches)
7. November 6, 2009 - Steve Rodgers Letter to Tim Saffle (MMP) and Dennis Conklin (IBU) with attachment
8. Capt. Perry Squires Email to USCG Capt. Suzanne Englebert
9. Capt. Perry Squires Email to David Moseley, WSF
10. August 5, 2008 - USCG letter to WSF, David Moseley
11. October 23, 2008 - IBU, MMP, WSF joint letter to USCG Capt. Suzanne Englebert
12. October 31, 2008 - USCG Capt. Suzanne Englebert letter to Dennis Conklin, IBU

13. July 13, 2009 - USCG Capt. Suzanne Englebert letter to David Moseley, WSF
14. June 1, 2009 - Island Sound Web reporter, *Ferry Schedules to be Dramatically Different if USCG Upholds Its Ruling*
15. Power Point - Crew Endurance Management (WSF Training Dept.)
16. Crew Endurance Management Practices for Washington State Ferries, Endorsed by Working Group, et al.
17. USCG - Crew Endurance Management Practices (Final Report 2003, Excerpt)
18. USCG - Crew Endurance Management Practices - Addendum 2005
19. USCG - Crew Endurance Management, Commandant Instruction 3500.2 (March 30, 2006)
20. Crew Endurance Management, WSDOT, Newsletter, Vol. 3, April 2009
21. Sleep Deprivation: Effects on Safety, Health and the Quality of Life, Farrah Hassen
22. 8 Serious Ways Sleep Deprivation Can Hurt Your Health, Liz Vaccariello
23. 5 Scary Health Risks of Sleep Deprivation, Danielle Dowling
24. Sleep Habits: More Important Than You Think, Michael Breus, PhD
25. Scientists Finding Out What Losing Sleep Does to a Body, Rob Stein, Washington Post, October 9, 2005
26. Workplace Health & Safety bulletin, Fatigue, Extended Work Hours, & Safety in the Workplace, Work Safe Alberta
27. WSDOT 2009-2011 Transportation Budget

Employer

1. Vessel Crew Hours Recap
2. Power Point Slide Show
3. Letter to David Sloan dated 9/25/2009
4. Letter to Robert Lavitt dated 10/27/2009

BACKGROUND

Washington State Ferries hereafter "the Employer" or "WSF") and the Inlandboatmen's Union of the Pacific in conjunction with Masters, Mates & Pilots (hereafter "IBU and MM&P" or "the Unions") agreed to submit a dispute to arbitration. A hearing was held before Arbitrator Timothy Williams in Seattle, WA on January 26 and 27, 2010. At the hearing the Parties had full opportunity to make opening statements, examine and cross examine sworn witnesses, introduce documents, and make arguments in support of their positions. An official transcript of the proceedings was taken and a copy of the transcript was provided to each Party and to the Arbitrator.

At the close of the hearing, the Parties were offered an opportunity to give closing oral arguments or to provide arguments in the form of post-hearing briefs. Both parties chose to give closing oral arguments. Thus the award, in this case, is based on the evidence and arguments presented during the hearing.

SUMMARY OF THE FACTS

The Employer, Washington State Ferries (WSF), operates a system of ferries in the Puget Sound. The operation involves 22 vessels calling on 19 different ports and employs approximately 1800 to 2000 employees, the majority of which are represented by

the Inlandboatmen's Union of the Pacific (IBU) and the Masters, Mates & Pilots (MMP). The instant grievance is filed jointly by both Unions.

Prior to the events that led up to the instant dispute, crewmembers employed by WSF were able to bid into combinations of shifts referred to as "touring watches". A touring watch is a shift followed by a sleep period followed by another shift. The Union and the Employer submit that the option of touring watches was an arrangement which worked well for employees and management. One result of the existence of touring watches, however, was that crewmembers sometimes worked more than 12 hours in a 24 hour period. The U.S. Coast Guard (USCG) has a requirement in place, referred to as the 12/24 standard, that no crewmember exceed 12 hours of work in a 24 hour period. Prior to August of 2008, this requirement was waived by the USCG as regards the Employer.

By letter dated August 5, 2008, Captain Metruck of the U.S. Coast Guard directed that the Employer observe the 12/24 standard and, accordingly, eliminate the touring watches for some of the runs operated by WSF by January 31, 2009. The timeline was subsequently extended to accommodate difficulties in the design and implementation of new scheduling practices intended to bring the Employer in compliance with the USCG

directive. The Parties are currently in disagreement over schedules for the winter of 2010.

On September 3, 2009 the Parties negotiated and signed a Memorandum of Understanding Regarding Effects of the Elimination of Touring Watches (MOU). The MOU provides for a committee process to discuss schedule changes and for expedited arbitration in the event that the Parties are unable to reach agreement over the proposed crew deck schedules. According to the MOU "the Unions may elect to jointly file a grievance and proceed to expedited arbitration. The grievance may include the question of whether the schedule(s) are reasonably consistent with the health and safety of Deck Hands, Masters, Mates and Pilots" (Ex. U-1).

Scheduling committee meetings involving both Unions and the Employer took place on November 3, 2009 and November 4, 2009. The Unions raised concerns regarding the Employer's proposed schedules for the winter of 2010 and offered a proposal intended to address those concerns.

By letter dated November 6, 2009, Director of Marine Operations Steve Rodgers informed the Unions that their proposal was rejected by the Employer. Mr. Rogers states that "the impact would be approximately \$75,000 for the winter schedule period... [due to] a potential cost increase, I can not consider including those types of shifts" (Ex. U-7). WSF intended to

proceed with the implementation of its originally proposed schedules.

On November 18, 2009 the Unions jointly filed a grievance alleging that three Watches - Anacortes B & E and Mukilteo #2 - were not consistent with the health and safety of crewmembers as scheduled by the Employer. The Unions requested expedited arbitration, as provided for by the MOU.

The grievance came to be heard by Arbitrator Timothy Williams on January 26, 2010 and January 27, 2010.

STATEMENT OF THE ISSUE

The Parties agreed to the following statement of the issue:

1. Are the Watches at issue (Anacortes B & E and Mukilteo G) in violation of the Parties' MOU regarding the effects of the elimination of touring watches?
2. If so, how should they be changed?

The Parties stipulated that the matter is properly before the Arbitrator and that the Arbitrator may retain jurisdiction following the issuance of the award in the event that the Parties are in dispute over the implementation of any potential remedy.

APPLICABLE CONTRACT LANGUAGE

**MEMORANDUM OF UNDERSTANDING REGARDING EFFECTS OF THE ELIMINATION
OF TOURING WATCHES**

3. Committee Process

- A. Before the Employer changes any printed running or crew schedules, the Inlandboatmen's Union and the Masters, Mates and Pilots (Unions) shall jointly be consulted to arrange crew schedules reasonably consistent with the health and safety of Deck Hands, Masters, Mates and Pilots, and with properly and conveniently serving the customer, and to provide shifts for Deck hands, Masters, Mates and Pilots as provided above. The Unions will each name two employees to a committee whose sole purpose will be to examine proposed changes to crew schedules and recommend improvements therein to the Employer. The said committee will meet as is necessary to meet crew schedule changes. Union members will be paid for eight (*) hours at their regular straight-time rate of pay for each committee meeting. Committee meetings will be scheduled to allow time for travel within the eight (*) hour shift. Mileage will be paid as is appropriate. If management extends the committee meeting time, then travel time will be paid as appropriate.

- B. Should the Employer and the Unions not reach agreement over the proposed crew deck schedules, the Unions may elect to jointly file a grievance and proceed to expedited arbitration. The grievance may include the question of whether the schedule(s) are reasonably consistent with the health and safety of Deck Hands, Masters, Mates and Pilots.

- C. In the event of such a dispute, the Parties agree upon the following process:
 - iii. At the arbitration hearing, the Arbitrator shall have sole and unfettered discretion to consider any evidence that is presented by the representatives, as well as to limit the length or volume of information presented. The Arbitrator shall have the authority to

question the representatives and their witnesses, and ask for further information, and to control the conduct of the meeting in any fashion.

- iv. Within ten days of the conclusion of the meeting referred to in paragraph three (3) above, the Arbitrator shall inform the Parties in writing of his/her decision. The decision shall not alter or amend the terms and conditions of the Collective Bargaining Agreement. The Arbitrator will also include in his/her decision any analysis or reasoning on which the decision is based. Additionally, if the Arbitrator finds the schedule not reasonably consistent with health or safety standards, the arbitrator will provide the parties guidance as to the changes necessary to bring the schedule into compliance. The decision of the Arbitrator shall be final and binding upon the Union, the employer and the grievant(s).

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE STATE OF WASHINGTON
AND INLANDBOATMEN'S UNION OF THE PACIFIC, 2009-2011

RULE 14 - GRIEVANCE PROCEDURE

14.03 Filing and Processing

E. Arbitration Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

COLLECTIVE BARGAINING AGREEMENT BETWEEN THE STATE OF WASHINGTON
AND MASTERS, MATES & PILOTS, 2009-2011

RULE 22 - GRIEVANCE PROCEDURE

22.03 Filing and Processing

E. Arbitration Costs

1. The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties.

POSITION OF THE UNION

The Unions' position is that the schedules proposed by the Employer are not reasonably consistent with the health and safety of bargaining unit members. The instant grievance concerns three of those schedules - Anacortes B & E and Mukilteo G - which the Unions maintain are egregiously inconsistent with health and safety considerations. The Unions request that the Arbitrator consider their proposed schedules which aims to address some of the health and safety issues in a cost-effective way.

The Unions' point of departure is the Crew Endurance Management (CMP) practices that have been developed over time by the US Coast Guard, with the participation of WSF. The CMP is a program which provides guidelines and training materials aimed at mitigating the factors that may degrade a crewmember's ability to perform their duties safely. Such factors include sleep deprivation and disruption, shiftwork maladaptation, nutrition, stress, the consumption of substances such as caffeine, tobacco and alcohol etc. all of which are linked to short-term safety concerns and long-term health issues.

The Union recognizes that the Employer operates a large number of runs, including some 24/7 operations, and therefore undesirable shifts such as the graveyard are unavoidable. Consequently, the Unions do not request the types of schedules

that would be considered optimal for employee performance, health and safety because ideal schedules are unrealistic considering the demands of the Employer's operation.

The Unions emphasize that their proposal is meant to strike a balance between the operational demands of the Employer and the necessity to mitigate those risk factors associated with impaired crewmember performance. According to the Unions, its proposal regarding the three runs currently at issue constitutes an incremental approach which addresses only those concerns which are most pressing and would be relatively cost-effective to eliminate. What the Unions are requesting is not a drastic departure from the schedules proposed by the Employer, but ones that ensure that crewmembers are working under terms which do not place them under unacceptable amounts of duress.

The Unions identify several problems with the schedules as developed by the Employer and argue that these problematic scheduling practices have a severe negative impact on crewmembers' ability to function well on the job and on their long-term personal health. The problems identified by the Unions, their negative consequences and the proposals to remedy them are as follows:

First, the Anacortes B Watch has varying shift lengths and starting times. The problem that inconsistent starting times presents for bargaining unit members is the additional stress

that accompanies such a complex schedule. In this line of work it is simply unacceptable to be late. As Captain Squires testified, having no consistency in starting times results in a diminished ability to sleep because the body is unable to habituate to a single waking time and causes stress at the moment of waking as the employee must calculate whether they are up at the right time on the right date. Similarly, inconsistent shift lengths makes it difficult to habituate to a routine of work and rest which promotes overall well being.

The Unions' proposal provides for consistent 9 hour shifts each day and more consistency with starting times. The Unions' proposal also consists of 9 work days in a two-week schedule, rather than the 10 days proposed by the Employer, resulting in one three-day and one two-day period off work every two weeks. The three-day rest period provides employees with an additional day off to recover from the effects of rest lost during working days.

The Anacortes E Watch has similar problems of varying shift lengths. In addition, this watch presents a particular difficulty to employees because they are scheduled to work past midnight, get two days off, and return to work at 5:10 a.m. The result is inadequate recuperation time outside of work. The literature on sleep makes it clear that switching between early and late shifts is a significant stressor in that the body is

unable to establish a routine which promotes quality sleep. As a consequence, employees need to be able to make up any sleep deficit during their days off. Because a late finish time and early start time bracket their days off, employees are unable to get sufficient rest during their two days off to compensate for the jetlag-type sleep problems caused by having to switch between early and late shifts.

The Unions' proposal does not eliminate the necessity of switching from early to late shifts, however it provides employee with an additional day off for recuperation and recovery to mitigate the negative "jetlag" effects of such a schedule. The Unions' proposal also achieves consistent nine hour shifts.

Last, the Mukilteo G Watch as proposed by the Employer likewise has the problem of varying shift lengths. In addition, it incorporates graveyard shifts and does so in a manner which provides for rest periods of less than two days in length. The negative consequences associated with working graveyard shifts are well documented in the literature. The body produces higher levels of the sleep-promoting hormone melatonin during what is referred to as the "red zone" late at night. This is the most difficult time to be alert and operating. A graveyard shift disrupts the body's natural circadian rhythm and forces employees to combat the natural inclination to sleep during the

darkest hours. These problems are exacerbated by the fact that, under the Employer's proposal, crewmembers never get even two consecutive days off for rest and recuperation.

The Unions' proposal eliminates graveyard shifts, provides for consistent 8 hour shifts and gives crewmembers two periods of two days off for rest and recuperation every two weeks.

In addition to the safety concerns inherent in conducting complex maritime operations, where the crew must be prepared for an emergency situation at all times, with inadequate rest, the literature demonstrates that sleep deprivation poses problems for the long term health of the employees. Health problems associated with lack of sleep, disrupted sleep and stress include obesity, heart disease, and diabetes. The Unions urge the Arbitrator to consider the long term impact on employees who work difficult schedules year after year. The benefits of the scheduling changes proposed by the Unions would add up over time to make a difference in protecting employees' health.

Last, the Unions address the Employer's argument that the proposed changes cannot be accepted because they are not cost neutral. From the Unions' perspective, the expenses associated with making the suggested improvements are a mere drop in the bucket when the overall operating budget of the WSF is considered. More importantly, however, there is nothing in the Parties' Memorandum of Understanding which dictates that any

change in schedule must be cost-neutral to be adopted. Rather, the Unions believe that the intent of establishing a committee process to deal with the issue of scheduling around the elimination of touring watches was so that a balance could be struck between the Employer's legitimate interest in running its operations efficiently and the Unions' need to protect the safety, health, and well-being of their members. The Unions' proposals do not break the bank while working to ameliorate some of the difficulties faced by employees.

For all of the reasons presented above, the Arbitrator should direct the Employer to adopt the Unions' scheduling proposals.

POSITION OF THE EMPLOYER

The Employer's position is that the budgetary problems facing WSF at the present time simply do not permit it to consider proposals which would increase its costs. Nothing in the Memorandum of Understanding negotiated by the Parties was intended to require the Employer to give up its basic right of establishing working hours. In making the decision to reject the schedules proposed by the Union, the Employer appropriately considered many factors including the health and safety of affected employees. The Arbitrator should uphold management's

reasonable determination that the schedules as proposed by WSF do not pose a risk to health and safety.

Traditionally, scheduling employees is the purview of the employer. Prior to the MOU at issue today, the Employer's only obligation regarding scheduling was to notify the Unions of any upcoming changes. With the elimination of the touring watches, the Unions wanted more involvement in the scheduling process. What was established was a committee process, paid for by the Employer, which allows for more collaboration between the Parties on the matter. The Employer nonetheless retains the right to have the ultimate decision making power, subject to this expedited arbitration process. The reason the Employer was unwilling to negotiate away its discretion is that unlike the Unions, who are legitimately interested only in protecting the interests of its members, the Employer must consider multiple stakeholders including the traveling public, Washington taxpayers, and legislators as well as the employees.

The proposals submitted by the Unions are attractive to the Employer in several aspects. For example, if crewmembers work nine hour days rather than eight hour days on the Mukilteo run as proposed by the Union, they would be scheduled to work while the vessel isn't running and would be free to do cleaning and maintenance. The Employer's problem is simply that in the difficult economic climate that it is currently facing, it

cannot afford a cost increase of approximately \$60,000 for the winter schedule even though, had the money been available, adopting the Union's proposal might be considered good use of funds.

Additionally, the Employer faces uncertainty regarding the potential cost of the Unions' proposals because there are currently grievances pending which may place an additional financial burden on the Employer. The matter at issue in those grievances is overtime for relief workers. If the Unions prevail, the Employer may be obligated to pay for one hour of overtime for every nine-hour shift worked by a relief. Consequently, the Employer cannot commit to the Unions' proposals which replace many eight-hour shifts with nine-hour shifts. The financial impact of such a change beyond the winter of 2010 could truly be astronomical.

The Unions argue that the switch to nine-hour shifts is a needed improvement because it allows employees to work nine days in a two week period rather than ten. While it may be desirable to work nine days, the question before the Employer was whether working ten days out of fourteen poses a risk to employee health and safety. The Employer reasonably concluded that it did not, thus it was appropriate to consider the cost-impact of switching to nine-hour shifts in deciding not to make the change. The Employer argues that Mr. Rodgers, the decision maker in this

case, would have been irresponsible in his duties had he failed to consider the financial consequences of implementing the changes proposed by the Unions.

The Unions' case relies heavily on recommendations found in the crew endurance manual. While the Employer fully agrees that wherever possible crew endurance principles ought to be observed, it also points out that, to a large extent, complying with crew endurance recommendations is up to the employee. The Employer has no ability to ensure that workers follow a proper diet, get the proper exercise, and otherwise behave in a manner which optimizes their ability to be alert and functioning at work. Likewise, while driving to or from work without proper rest is a concern, ultimately it is up to the individual employee to decide which watch in which locations works best. Different individuals can adapt differently to different shifts. The unfortunate situation before the Parties is that the Coast Guard has directed WSF to eliminate touring shifts which were acceptable to both Unions and management. The Employer has done its best to comply with the USCG directive while considering both employee safety and operational costs.

From the Employer's perspective, the issue before the Arbitrator is not which schedules are best for crewmembers, but rather whether WSF management acted responsibly in deciding to adopt their schedules for winter 2010. The Employer believes

that, while difficult schedules are a necessary part of conducting such complex operations, the schedules adopted by management fully support the health and safety of workers. They are very similar to schedules which have been in effect for the duration of the ferry system and identical to those implemented in the fall, which were originally designed by a union member. Absent a finding that management did not act reasonably and failed to consider the health and safety of its employees, the Arbitrator should not interfere with the Employer's decision-making authority.

For all of the reasons presented above, the Employer requests that the Arbitrator deny the grievance.

ANALYSIS

The Arbitrator's authority to resolve a grievance is typically derived from the Parties' collective bargaining agreement (CBA) and the issue that is presented to him. In this instance, the Parties have executed a separate agreement, the Memorandum of Understanding (MOU) *Regarding the Elimination of Touring Shifts*. The Parties agree that the grievance focuses on the terms of the MOU and that the Arbitrator's authority to issue a decision regarding the grievance is derived there from. Furthermore, the Parties have stipulated a statement of the issue. The issue before the Arbitrator is:

Are the watches at issue - Anacortes B and E, Mukilteo G - in violation of the parties' MOU regarding the effects of the elimination of touring watches?

In bringing forth the instant grievance, the Union makes the allegation that the Employer failed to comply with language in the MOU regarding the health and safety of employees when it implemented the above-listed watch schedules in winter 2010.

The MOU states in relevant part:

The grievance may include the question of whether the schedule(s) are reasonably consistent with the health and safety of Deck Hands, Masters, Mates and Pilots.

Accordingly, the issue before the Arbitrator is whether the schedules implemented by the Employer were reasonably consistent with health and safety standards.

The Arbitrator begins his analysis by noting that in a grievance arbitration proceeding, the employer is generally assigned the burden of proof in any matter involving the discipline or discharge of an employee. In all other matters, the Union, as the grieving party, is assigned the burden of proof. The instant grievance does not involve an issue of discipline, but rather concerns the interpretation and application of negotiated language regarding health and safety considerations involved in developing crew schedules. The burden of proof, therefore, lies with the Union.

As this is a contract interpretation dispute, the level of proof required of the Unions is a preponderance of the evidence.

In order to prevail, the Unions must show by a preponderance of the evidence that the proper interpretation of the relevant language prohibits the Employer from adopting the schedules in question.

In this Arbitrator's experience, a typical contract interpretation dispute is based on the allegation that a specific action of the Employer has violated a provision of the CBA. This case is not typical in that it is more about the Employer's judgment than it is about a specific action. The Unions makes the case that, in applying the terms of the MOU, management failed to arrive at the correct conclusion regarding proper scheduling. The Unions grieved that management did not properly consider the health and safety of employees, as had been agreed.

The language of the MOU gives the Unions the right to challenge the Employer's judgment and considerations, particularly as those considerations apply to the issue of health and safety. Thus, the Unions carry the burden of proof to provide evidence that management acted inconsistent with the MOU. If the Unions are successful in this effort, then in order for the Employer to prevail it must assume a burden of rebuttal and present evidence to demonstrate that its reasoning and conclusions regarding the health and safety implications of the

adopted schedules were appropriate given all the facts of the matter.

Should the Arbitrator find that sufficient rebuttal evidence supports the Employer's case, it would be improper for him to direct that the schedules be changed even should the Unions show a better schedule. Such an award would violate the generally accepted principle that an arbitrator is not to substitute his own judgment for that of management. The role of the labor arbitrator is not to second guess management but rather to determine whether the decision of management violated a binding agreement. Ultimately, the burden of proof in this case remains with the Unions and that burden is met not simply by presenting more favorable schedules but rather by showing that the work schedules in question did not comply with the terms of the MOU.

In approaching the issue in dispute, the Arbitrator next considers what appropriately constitutes his role under the MOU. According to the pertinent language, the Arbitrator's role is two-fold. First, the Arbitrator must determine whether the Unions provided sufficient evidence to prove that management failed to give proper difference to the phrase "reasonably consistent with health and safety standards" when it set the three work schedules that are in dispute. Should the Arbitrator

find that the Unions failed to provide sufficient evidence, then the grievance will be dismissed.

The Arbitrator notes that the MOU dictates "reasonable" consistency, indicating that the Parties intended for the language to provide some amount of flexibility. Thus, the schedules may be acceptable even in the event that they are not fully or perfectly consistent with health and safety standards. The Arbitrator is in agreement with the Employer that the MOU does not dictate that the health and safety of employees be the only consideration in the design of schedules. Neither does the MOU dictate that it is the primary consideration. However, the Union did bargain the ability to challenge management via expedited arbitration in the event that management adopts a schedule which from the Union's perspective is not "reasonably" safe or healthy. It is clear from the MOU's emphasis on health and safety that it must be a key consideration. A schedule which goes against or ignores health and safety standards is clearly unacceptable.

Should the Arbitrator sustain the grievance, the second part of his role is to provide the Parties with "guidance" as to what changes are necessary. Thus, it is not within the Arbitrator's authority to dictate to the Employer which schedule to adopt. Rather, the Arbitrator is to provide some guidelines regarding what constitutes reasonable consistency with health

and safety standards as provided by the MOU. After issuing his award, the Arbitrator will give the matter back to the Parties to work out the specifics of scheduling. By stipulation of the Parties, the Arbitrator then retains jurisdiction in the event that there is further disagreement regarding the guidance provided in this opinion and award. Thus, the Arbitrator may have a continuing role in facilitating the development of schedules which are in full compliance with the MOU.

This analysis continues by looking first at the question of whether the three schedules in question are in compliance with the requirements of the MOU. Next, if the Arbitrator determines that the schedules are not in compliance, the Arbitrator will provide guidance to the Parties on the construction of new schedules.

Compliance with MOU

The Arbitrator begins his analysis of the question of compliance by noting that the MOU permits the Unions to file a grievance if they believe that the work schedules are not "reasonably consistent with the health and safety of Deck Hands, Masters, Mates and Pilots." The instant grievance challenges the three schedules based on the question of health and safety.

The Unions provided substantial evidence with regard to the impact of work schedules on the health of ferry workers. Health

concerns raised by the Unions included obesity, diabetes, and other physical and mental illnesses. The primary concern of the Unions is that over time a difficult work schedule can lead to insufficient sleep and other causes of deteriorating health.

Additionally the Unions raise two safety concerns specifically related to the relationship between challenging work schedules and insufficient sleep. Sleep deprivation leads to fatigue and the greater likelihood of unsafe actions during work hours. Also, the Unions looked at safety issues related to employees' commutes; the dangers of a late night drive home when the employee is suffering from fatigue associated with the cumulative effects of poor sleep habits and a late work schedule.

The Arbitrator notes that the famed architect Frank Lloyd Wright supposedly made the statement that he could "design a house that would guarantee a divorce in a year." The Unions concern in the instant case is similar but related to health and safety as opposed to marital problems. The Unions contend that the Employer has implemented work schedules that will unnecessarily contribute to employee health problems and safety incidents.

Most importantly, Unions believe that the Employer violated the MOU because it did not give adequate consideration to the health and safety of the employees when it constructed the three

contested work schedules. Having carefully studied the transcript of these proceedings and reviewed the various documents that are in evidence, the Arbitrator has determined that while the Anacortes B Watch does not violate the MOU, the Anacortes E and the Mukilteo G Watches do violate the MOU. The Arbitrator's reasoning is set forth in the following multipoint analysis.

First, in evaluating the claims by the Unions that the Employer has violated the MOU, the Arbitrator looked carefully at the testimony of management witnesses to determine the extent to which considerations about health and safety influenced schedule construction. This evidence exists primarily in the testimony of Director of Operations Steve Rodgers and Manager Terri Haffie. They provided testimony on how employee work schedules (watches) are constructed.

This evidence indicates that there are three primary factors in constructing the watches. Meeting the operational needs necessitated by the ferry schedules is the first and most important variable. The second is the restrictions that are a product of the labor contract and/or statute. An example is the fact that the CBA requires that a watch begin and end at the same place (Tr p 188). Finally, there are budget concerns that will impact the ability of the Employer to pay overtime or

assume other payroll costs associated with the structure of the schedule.

The Arbitrator takes particular note of the fact that there is nothing in the testimony of either Mr. Rodgers or Ms. Haffie that indicates any specific consideration of health and safety needs as part of the process for building the watches. Mr. Rodgers did testify that he has adapted the schedules on several occasions in response to specific requests from employees (Tr p 198, 199). He did not indicate whether the requests involved issues around health and safety. Additionally, the Arbitrator notes that the examination of Employer witnesses did not elicit any specific disclosure about the way in which health and safety concerns were considered in the process of building the watches. Also, Employer arguments do not point to any specific method by which health and safety concerns were considered.

Ultimately the Arbitrator concludes that health and safety matters are considered only when the Unions raise concerns as has happened in the instant case. In other words, it is an after the fact consideration not a during the process concern.

Second, the one central concern under evaluation by the Arbitrator is the risk to employees' health and safety in the context of endurance management. There is no question that everyone involved in the operations of the ferry system has a stake in crewmembers' ability to be alert and fully functioning

to ensure the maximum safety of passengers, equipment, and the crewmembers themselves. The Arbitrator's review of evidence regarding endurance management revealed that certain factors impacting workers' ability to be alert and focused are almost fully at the control of the employee. Such factors include proper nutrition, exercise, and the use of substances such as caffeine, alcohol, and tobacco. As regards other factors, the Employer has much more control than employees. Critically, such factors have included the design and implementation of work schedules which carry significant implications for employees' ability to obtain the rest needed to function well on the job.

As mentioned above, the Employer has no control over the distance its employees commute to work. The Arbitrator agrees with the Employer's point that employees are free to bid on watches regardless of the location of their homes and some choose to commute longer distances than may be strictly necessary. Even though decisions made by the Employer may affect the options available to crewmembers in terms of where they must report to work, on balance driving time is not at the Employer's control but at the control of the employees.

While the issue of driving time may not be directly relevant to the instant dispute, it is a reasonable concern in that it affects the employees' ability to get the proper amount of rest. Bidding into shifts that require less driving time is

one thing employees can do to maximize the time available for sleep and combat the difficulties posed by demanding work schedules. Other ways in which employees may improve their health and safety is by taking steps to optimize the quality of sleep, for example by sticking to a routine of sleeping/waking times whenever possible.

On the other hand, the evidence on crew endurance management also makes it clear that the body has a limited ability to compensate for certain difficulties created by demanding schedules. Working through the "red zone" necessarily disrupts the body's circadian rhythm and compromises the individual's quality of sleep during off work hours due to decreased levels of melatonin produced by the body during daylight. Switching between day shifts and night shifts necessarily disrupts sleeping routines and compromises the individual's ability to fall asleep during off work hours simulating the effects of jet-lag.

So while the Arbitrator agrees with the Employer that employees are not entirely powerless on the matter, he finds that the impact of difficult work schedules is such that they severely compromise the employees' ability to get sufficient, quality sleep. Considering how demanding the schedules here admittedly are, the Arbitrator concludes that there is good

reason to make health and safety a key consideration in the construction of the watches.

Third, there are a number of factors that make the instant grievance challenging. One of the most demanding of these is the necessity of developing a methodology by which to assess the overall impact of the work schedules on the health and safety of employees. The Arbitrator is concerned with the highly subjective nature of simply making a judgment call as to whether the three watches are reasonably consistent with health and safety standards. There are three schedules in dispute and each has elements that raise health issues. The elements differ from schedule to schedule. The work schedules are difficult for a variety of reasons and the combinations of difficulties differ for each schedule.

The Arbitrator finds that there is a need to develop a systematic approach to quantifying the factors which contribute to poor endurance management; turning a subjective judgment into an objective measurement. This approach will enable the Parties to compare the health and safety implications of one work schedule against those of a different schedule and provide some bases to determine whether the Union is to prevail with their grievance related to the three schedules.

Ultimately, in an effort to be as objective as possible, the Arbitrator fashioned a penalty point system by which to

measure the negative health impacts of each schedule. In this system, a schedule which is more onerous from a health and well-being standpoint is assigned more points than a less onerous schedule. Obviously, the penalty point system has not been scientifically constructed, but rather reflects the Arbitrator's assessment of the substantial data provided by the Unions with regard to work schedules and employee health. The system gives points for those elements in the work schedule that raise health issues; the more significant the issue, the greater the number of points. The Arbitrator developed the following categories using the analysis as set forth in the describing paragraph:

1 point: The work schedules are based on a two-week block of time. During that two-week period an employee receives two multi-day rest periods (the equivalent of a weekend off). For a standard 8 to 5, 5 day work week, an employee has 63 hours off on a weekend. When those hours began to shrink down, the value of the time for purposes of rest and recovery also shrinks. The Arbitrator assigned one penalty point when the total number of hours from the end of the last work shift to the start of the next work shift was less than 60 hours.

-5 points: The Arbitrator assigned -5 penalty points (or 5 credit points) when the total number of hours from the end of the last work shift to the start of the next work shift was greater than 72 hours. The credit is due to evidence that a three day break helps substantially with rest and recovery.

1 point: Inconsistent starting times make it more difficult for employees to establish and maintain good sleep rhythm. When a starting time differs from that of the prior day by one plus hour, even though the

employee remained on the same shift, the Arbitrator assigned one penalty point.

2 points: When a starting time differs from the prior day by two or more hours, even though the employee remained on the same shift, the Arbitrator assigned two penalty points.

2 points: The work schedules are based on three shifts: early morning, midday and late evening. Changing shifts during the two-week block of time is difficult and more so when it is done more than once. Two penalty points were assigned for each shift change when the change was from the early shift to the midday shift or from the late evening shift to the early morning shift.

3 points: Three penalty points were assigned for each shift change when the change was from the midday shift to the late evening, the late evening shift raising the greatest concerns with health issues.

1 point: The red zone (9 p.m. to 7 a.m.) is the time when the best sleep occurs (Un Ex 17 beginning at p 31). Starting work at 4:00 in the morning has a different health implication from starting work at 8:00. Likewise, ending work at 8:00 p.m. is less onerous than ending work at 11:30 p.m. Thus, the Arbitrator assigned one penalty point for each shift that starts or ends in the red zone.

The Arbitrator notes that in assigning penalty points to the various watches, decisions were made to the minute. Starting work at 6:50 in the morning is not rounded to 7:00. Likewise, a shift that starts 55 minutes later than the day before does not incur a one hour penalty point.

The Arbitrator also points to the fact that the parties agree that whether one considers the schedule imposed by management or the one proposed by the Unions, they are difficult schedules to work. Thus the measure of both the WSF schedule

and the Unions' proposed schedule should indicate that they are both difficult.

The following are the three watches in dispute, the Union's proposed modifications and the Arbitrator's assessment of penalty points

ANACORTES B WATCH

	WSF	Union Proposal
Week 1		
SUN	04:45 – 13:45 (9 hr)	04:45 – 13:45 (9 hr)
MON	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
TUE	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
WED	DAY OFF	DAY OFF
THU	DAY OFF	DAY OFF
FRI	04:10 – 12:10 (8 hr)	DAY OFF
SAT	04:45 – 13:45 (9 hr)	04:45 – 13:45 (9 hr)
Week 2		
SUN	04:45 – 13:45 (9 hr)	04:45 – 13:45 (9 hr)
MON	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
TUE	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
WED	DAY OFF	05:10 – 14:10 (9 hr)
THU	DAY OFF	DAY OFF
FRI	04:10 – 12:10 (8 hr)	DAY OFF
SAT	04:45 – 13:45 (9 hr)	04:45 – 13:45 (9 hr)

<u>Scoring</u>	<u>WSF</u>	<u>Unions</u>
Shift Change	0	0
Red zone start or finish	10	9
Multi day off	0	-5
Gap in start time	<u>0</u>	<u>0</u>
Total	10	4

ANACORTES E WATCH

	WSF	Union Proposal
Week 1		
SUN	15:15 – 00:15 (9 hr)	15:15 – 00:15 (9 hr)
MON	(Cont from Sun) DAY OFF	(Cont from Sun) DAY OFF
TUE	DAY OFF	DAY OFF
WED	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
THU	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
FRI	15:30 – 23:30 (8 hr)	05:10 – 14:10 (9 hr)
SAT	15:15 – 00:15 (9 hr) (goes to next day)	15:15 – 00:15 (9 hr) (goes to next day)
Week 2		
SUN	15:15 – 00:15 (9 hr)	15:15 – 00:15 (9 hr)
MON	(cont from Sun) DAY OFF	(cont from Sun) DAY OFF
TUE	DAY OFF	DAY OFF
WED	05:10 – 12:10 (7 hr)	DAY OFF
THU	05:10 – 12:10 (7 hr)	05:10 – 14:10 (9 hr)
FRI	15:30 – 23:30 (8 hr)	05:10 – 14:10 (9 hr)
SAT	15:15 – 00:15 (9 hr) (goes to next day)	15:15 – 00:15 (9 hr) (goes to next day)

<u>Scoring</u>	<u>WSF</u>	<u>Unions</u>
Shift Change	8	8
Red zone start or finish	10	9
Multi day off	2	-4
Gap in start time	<u>0</u>	<u>0</u>
Total	20	13

MUKILTEO G WATCH

	WSF	Union Proposal
Week 1		
SUN	13:50 – 21:50-(8 hr)	14:50 – 22:50 (8 hr)
MON	12:55 – 20:55-(8 hr)	13:55 – 21:55 (8 hr)
TUE	21:55 – (05:55 (8 hr)	13:55 – 21:55 (8 hr)
WED	cont from Tues	DAY OFF
THU	DAY OFF	DAY OFF
FRI	12:55 – 20:55 (8 hr)	04:55 – 12:55 (8)
SAT	15:50 – 22:50 (7 hr)	6:50 – 14:50 (8 hr)
Week 2		
SUN	13:50 – 22:50 (9 hr)	05:50 – 13:50 (8 hr)
MON	12:55 – 20:55 (8 hr)	04:55 – 12:55 (8 hr)
TUE	21:55 – 05:55 (8 hr)	04:55 – 12:55 (8 hr)
WED	cont from Tues	DAY OFF
THU	DAY OFF	DAY OFF
FRI	12:55 -20:55 (8 hr)	13:55 – 21:55 (8 hr)
SAT	15:50 – 23:50 (7 hr)	15:50 – 23:50 (8)

<u>Scoring</u>	<u>WSF</u>	<u>Unions</u>
Shift Change	10	4
Red zone start or finish	6	10
Multi day off	2	-4
Gap in start time	<u>8</u>	<u>4</u>
Total	26	14

The Arbitrator emphasizes again that in applying the penalty point system, the higher the number of points the more difficult the schedule from the standpoint of health and safety. Based on his review of all the data and discussion, the Arbitrator determines that schedules that exceed 15 to 18 penalty points are in violation of the MOU. Obviously it is not

possible to assign a specific break off point as there are too many variables to be precise and the Arbitrator has no way to run tests on the system. At the same time, a reasonable judgment can be made.

Ultimately the Arbitrator determines, based on the penalty point system, that Anacortes E and Mukilteo G are over the number of penalty points allowed. As such, The Arbitrator will proceed to provide guidance as directed by the MOU.

Guidelines

The Employer acknowledges in its arguments that the Unions' schedule is the better from an employee health perspective but not financially viable. Thus the Employer rests its case on the phrase "reasonably consistent" found in the MOU and its efforts to deal with the worst budget situation in 37 years (testimony Rodgers). Ultimately the Arbitrator agrees with the Employer that the term "reasonably consistent" has to be viewed in the immediate financial context. While the Union has made an effort to show that suggested changes on the three watches are not unduly expensive, the Arbitrator finds that the costs are sufficient to keep him from simply directing the Employer to implement the Unions' proposed changes.

Moreover, this award is primarily about the watches currently being constructed as existing watches are soon to

expire. The Arbitrator finds no reason for the Employer to make any changes to the existing schedule. What the Arbitrator is directing the Employer and the Unions to do is outlined in the following paragraphs.

In the well known book on negotiations title *Getting to Yes*, the authors encourage the parties to a dispute to develop a set of objective criteria that can be fairly applied to a problem and thus resolve the matter (see chapter 5). In the instant case, the problem the Arbitrator sees is that the phrase "reasonably consistent" is subject to a broad range of interpretations and that the Parties will frequently find themselves in disagreement over the application of that phrase to the work schedules.

It seems to the Arbitrator that the Parties have one of two choices if they wish to reduce the conflict over watches. The Parties can renegotiate the language and come up with a more precise term than the phrase "reasonably consistent;" one that is objective and more easily measured. Or, the Parties can develop and implement a set of objective criteria that are the measure of the phrase "reasonably consistent."

This second alternative, as previously set forth, is what the Arbitrator has attempted. He developed a set of objective criteria related to work schedules and health and safety issues that could be applied to the watches and provide the Parties a

measure that would tell them whether a watch violated the MOU. It also gives the Employer, as it fashions the watches, a way to actually consider health and safety issues at the time the watches are being built.

The Arbitrator emphasizes that the objective criteria system he fashioned can undoubtedly be improved upon by the Parties and they are encouraged to do so. They have much greater insight into day-to-day operations of the ferry system and are in a position to refine and fine tune the penalty point approach. If not, then the Parties have the system developed by the Arbitrator that can be used to determine compliance with the MOU.

Ultimately, the MOU directs the Arbitrator to give guidance in the event that he finds that the watches in question are not reasonably consistent with health and safety standards. The Arbitrator's guidance directs the Employer to redevelop Anacortes E and Mukilteo G watches so that the penalty points do not exceed 18. In carrying out this directive, the Employer should use the scheduling committee in the same fashion it would for the development of all the watches.

In the alternative, the Employer and the Union are encouraged to refine the penalty point system and then apply it to the development of the watches.

In either case, as stipulated by the Parties, the Arbitrator retains jurisdiction to resolve any additional dispute over the schedule for Anacortes E and Mukilteo G.

Finally, in its arguments' the Employer asserts that in bringing forth the instant grievance, the Unions are inviting the Arbitrator to overstep his authority by interfering with a traditional management right, an employer's prerogative to schedule employees. The Employer argues that the Arbitrator's authority to decide the grievance is limited to the deciding whether management acted unreasonably in exercising its managerial discretion. The Arbitrator is mindful of the limits to his authority and believes that his approach, as outlined above, does not inappropriately interfere with a traditional management right for the following two reasons.

First, the Arbitrator agrees with the Union's position that, historically, work schedules have been subject to the negotiation process. Although it may not have been the case at WSF, unions do frequently negotiate limits on or financial consequences of employees being required to work the more demanding schedules. This practice is consistent with labor laws which grant unions the right to negotiate regarding wages, hours and working conditions. In the Arbitrator's opinion, onerous working schedules constitute a term and condition of employment subject to the negotiation process.

Second and more importantly, the Arbitrator believes that his decision is consistent with the MOU agreed to by the Employer. As the Parties recognize, one intention behind the MOU and the committee process it outlines is to grant the Unions a substantial amount of involvement in the design of work schedules. The MOU specifically states that in the event that "the Employer and the Unions [do] not reach agreement over the proposed crew deck schedules" the matter may be subject to expedited arbitration. This language clearly supports the Unions' position that, when there is disagreement regarding whether schedules proposed by the Employer are reasonable, that is a matter properly to be submitted to the Arbitrator.

CONCLUSION

The Arbitrator has concluded that the best approach to determining whether the three Watches in question violated the terms of the MOU is to fashion a system for measuring those elements of the work schedule that have been found to contribute to health and safety problems. The Arbitrator constructed such a system and applied it to the three Watches. One of the Watches (Anacortes B) was found to be "reasonably consistent" with health and safety standards. Two Watches (Anacortes E and Mukilteo G) were found not to be "reasonably consistent" with health and safety problems. Consistent with the authority

extended to the Arbitrator by the MOU, guidance was provided the Parties as to how to bring the two Watches into compliance.

An award is entered consistent with these findings and conclusions.

IN THE MATTER OF THE ARBITRATION)	ARBITRATOR'S
)	
BETWEEN)	AWARD
)	
THE INLANDBOATMEN'S UNION)	
OF THE PACIFIC, PUGET SOUND REGION)	
)	
THE INTERNATIONAL ORGANIZATION OF)	
MASTERS, MATES AND PILOTS)	
)	
"IBU AND MM&P" OR "THE UNIONS")	
)	
AND)	
)	
WASHINGTON STATE FERRIES)	Work Schedules
)	Grievance
"WSF" OR "THE EMPLOYER")	

After careful consideration of all arguments and evidence, and for the reasons set forth in the Opinion that accompanies this Award, it is awarded that:

1. The Anacortes E Watch and the Mukilteo G Watch are in violation of the Parties' MOU regarding the effects of the elimination of touring watches. The Anacortes B Watch is not in violation. The grievance is upheld in part and denied in part.
2. The MOU at 3,C,iv provides that "if the Arbitrator finds the schedule not reasonably consistent with health or safety standards, the Arbitrator will provide the parties guidance as to the changes necessary to bring the schedule into compliance." The Arbitrator's guidance is found at pages 36 to 40 of this award.
3. As stipulated, the Arbitrator retains jurisdiction with regard to implementing the guidance provided in this decision.
4. Rule 14.03 Section E Part 1 of the CBA between the Employer and IBU and Rule 22.03 Section E Part 1 of the CBA between the Employer and MM&P provide that "The expenses and fees of the arbitrator, and the cost (if any) of the hearing room, will be shared equally by the parties." Accordingly, the Arbitrator assigns his fees one half to each party.

Respectfully submitted on this, 19th day of February, 2010 by

Timothy D.W. Williams
Arbitrator