In the Matter of the Federal Mediation and Conciliation Service
Arbitration Between

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES & PILOTS

Grievant,

and FMCS 120514-55638-6

STATE OF WASHINGTON, DEPARTMENT OF
TRANSPORTATION, FERRIES DIVISION

Respondent.

ARBITRATION DECISION
AND AWARD

BEFORE: Lawrence E. Little

Arbitrator
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Bremerton, WA 98312

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HEARING HELD: January 25, 2013
Seattle, WA

Introduction

The short hearing was transcribed and a transcript (T) was timely received by this arbitrator. The parties having met and conferred for a substantial period of time immediately prior to beginning the hearing, on their initiative asked and stipulated to nsubmit this case to the arbitrator for his consideration upon the exchange of affidavits and Memorandum of Law, similar to a Summary Judgment Motion" (T-4) The parties further agreed to, exchanged and made available to the arbitrator at the hearing, all proposed exhibits. The exhibits were often identical yet numbered differently by the parties, and when identical will hereafter be referred to by either or both identifiers, for example State 1 (S-1) or Union 2 (U-2). The parties also agreed to a simultaneous exchange of witness declarations (which was done on April 18, 2013), and then a later simultaneous submission of a Memorandum of Law (which was also timely done, and the record closed on May 10, 2013)

Issue

The parties stipulated (T-5; Union Brief (UB)-2; State Brief (SB)-3)(with minor language differences) that the issue is:

Whether the State violated Rules 8.01 and 9.01 with regards to Relief Deck Officers overtime entitlements when on a single-day dispatch? If so, what is the appropriate remedy?

Relevant Contract Provisions

U-2/S-1

1.02 Intent of the Parties

The terms and provisions herein contained constitute an entire contract which is fully integrated with respect to each of its terms and provisions.

2.01.28 Straight Watch

The term "Straight Watch" is any watch other than a touring watch as defined in Subsection 2.01.31 of this Agreement.

2.01.31 Touring Watch

The term "Touring Watch" is a watch in which the Deck Officers assigned thereto are on duty for two (2) work shifts not to exceed sixteen (16) hours within one (1) twenty-four (24) hour tour.

8.1 Establishment of Work Periods

1. The principle of the eight (8) hour day is hereby established. For all practical purposes, eight (8) consecutive hours shall constitute one (1) work day. Forty (40) hours shall constitute a work week, and eighty (80) hours shall constitute a two (2) week work schedule. The following work schedule shall be observed:..

2..B. If schedules include offsetting eight (8) hour shifts, the WSF agrees to pay, no less than eight hours pay for working the short shift for all employees on single day dispatch.

3….C.iv…. All Deck Officers working regular assignments shall receive in wages not less than eighty (80) times the base straight-time rate for each two (2) week work period; provided, however, that such Deck Officers are available for work at the time scheduled by the Employer. Travel time, if any, shall be included within the scheduled work day, to the extent possible,

when Deck Officers are assigned to move vessels to a different terminal or to a repair yard, and such vessel moves do not occupy the entire work day.

9.01 Extended Work Days

All overtime worked by an employee will be paid at one and one half (1) times the employee 's straight time rate of pay. Actual time will be reported but overtime will be paid in the following six (6) minute increments based on the following increments, six [6] minutes, twelve [12] minutes, eighteen [18] minutes, twenty-four [24] minutes, thirty-six [36] minutes, and forty-eight [48] minutes) for the first hour. For time worked in excess of one (1) hour, overtime will be paid at one and one half (1) the employee 's straight time rate of pay, in one (1) hour increments.

If the extended assignment exceeds five (5) hours, pay for such work shall be at the overtime rate with a minimum of eight (8) hours. Such extended work shifts shall not be scheduled on a daily or regular basis. The Employer shall not abuse the use of overtime to avoid scheduling another crew.

Year round employees, excluding Relief employees, who are called in to work on a scheduled day off and have a minimum of eighty (80) non-overtime compensated hours in the work period will be compensated at the overtime rate of pay. In addition, they will receive three (3) hours of pay at their straight time rate of pay regardless of the length of the overtime shift or the hours actually worked.

Relief employees that work an additional day beyond a defined eighty (80) hour work period and have a minimum of eighty (80) non-overtime compensated hours in a work period will be compensated at their overtime rate of pay. In addition, they will receive three (3) hours of pay at their straight time rate of pay regardless of the length of the overtime shift or the hours actually worked. On-call employees with less than 80 hours compensated time will not receive the three (3) additional hours pay (see examples below).

Relief Employees

Relief Employees called to work and have between seventy-six (76) and seventy-nine (79) hours:

- X hours of straight time to eighty (80) hours

- X hours of overtime above eighty (80) hours
- Three (3) hours call back at straight time

EXAMPLE: Employee has worked seventy-six (76) hours in a work period. Employee is called into work on their scheduled "free day" for eight (8) hours of work. The employee receives four (4) hours straight pay and four (4) hours pay at time and a half (1)of their straight time rate. Employee receives three (3) hours call back at their straight time rate.

9.1.1 An employee may opt to accrue compensatory time off in lieu of overtime pay for any shift, or equivalent, which they would otherwise be guaranteed a full shift of overtime pay, as described in Rule 9. Employees may elect comp time, or overtime, or a combination thereof equivalent to the overtime rate of pay.

9.1.2 Relief Deck Officers shall be paid straight time for all scheduled hours worked until they exceed in excess of eighty (80) hours in a work period or ten (10) shifts in a work period. All other (scheduled) work hours not in the printed Deck Schedule (eg. boat moves, sea trials, etc.) shall be considered an eight (8) hour shift and shall result in overtime based of the eight (8) hour day and Rule 9.

9.1.3 A Deck Officer who is entitled to earn overtime pay under provisions in this agreement may opt to accrue compensatory time in lieu of receiving the overtime on an hour for hour basis for overtime hours worked in increments of two (2) hours or more.

22.3 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;

3. The decision of the arbitrator will be final and binding upon the Union, the Employer and the grievant(s).

Background

As noted by the State of Washington, Department of Transportation, Ferries Division (hereinafter Employer) in their Respondent's Memorandum of Law (SB), the Washington State Ferries (WSF) is the largest ferry system in the United States and the third largest in the world, carrying more than 24 million passengers each year. The WSF has about 2,000 employees, 23 vessels and 20 ferry terminals, and employs about 250 members of the Union grieving in this matter, the International Organization of Masters, Mates & Pilots (MM&P, hereinafter Union), serving as "Masters, Mates, Chief Mates, Second Mates, Extra Relief Mates and Temporary Mates," under the parties Collective Bargaining Agreement (CBA)(S-1/U-2). The WSF also employs about "900 to 980" members of the Inland Boatman's Union (IBU) under a separate CBA (U-9), mostly serving as deckhands and terminal employees.

This grievance was filed as a "Class Action all Relief Deck Officers," and reads as follows:

"Relief Deck Officers have worked a single day 7 hour shift and have turned in for 8 hours of pay per rule 8.01 #2 and have included that 8 hours of pay towards their 80 Straight Time commitment as per Rule 9.01.02. WSF auditors are redlining OT when a relief goes over 80 hours using that single 8 hour day as only 7 hours which is not what was agreed to in negotiations concerning "Elimination of Touring Watches" which was later captured in the current CBA under Rule 8.01."

The remedy sought is:

"Stop red lining of pay orders and make whole all RDO for nonpayment of earned OT. Reliefs that work over 80 hours and the short shift of 7 hours that is paid as 8 hours should be included in the total for calculating the over 80 hours OT payment."

The parties agree that after the United States Coast Guard ruled that "Touring Watches" had to be eliminated, in the Union's words, "...the parties entered into bargaining to establish schedules for those former Touring Watches," (UB-5) and

in the Employer's words, "…WSF and the unions began meeting in late 2008 in an effort to devise new shifts that limited impacts on service, while being agreeable to employees." (SB-3-4)

The parties met and ultimately agreed to a Memorandum of Understanding (MOU) (U-4) which noted that it is "…addressing the effects of the elimination of the touring watches." That MOU provided in part:

"The WSF and the Unions have worked diligently to include alternative shift lengths in the Fall Working Schedules and toward the reduction or elimination of offsetting eight-hour shifts. If schedules include offsetting eight-hour shifts, the WSF agrees to pay, no less than eight hours pay for working the short shift for all employees on a single day dispatch. IBU Relief and on-call employees shall be paid overtime on the long shift when working single day dispatch."

Position of the Parties

Union

The Union argues that both parties admit that in negotiations the Union "…clearly conveyed that extension of the historic pay practices engaged by IBU members and that the seven hour day was a make or break issue for the Union," (UB-8) in effect extending the existing IBU provision to the Union for seven-hour shifts providing for eight hours of pay, and counting all eight hours for the threshold for overtime. They further raise several arguments supporting their grievance: first, the language in the CBA and the MOU; second, the Employer's past practice in counting all "compensable time" towards the 80 hours overtime; third, impacts on other contractual provisions if the Employer's interpretation controls; and fourth, their memory that the parties discussed during negotiations that the Employer would '…consider all hours in pay status when determining whether overtime is owed.' (UB-13)

Employer

The Employer first argues that the Union bears the burden of proof. Then they argue that CBA Rule 8.01 is not ambiguous and provides that a relief employee is to be ***paid*** "…for eight hours when he works a single-day seven-hour shift. It does not state, as the MM&P asserts, that the employee is also to be credited for *working* eight hours when calculating his overtime entitlement." (SB-9) Furthermore, they argue that nowhere in the CBA language in Rule 8.01 does it relate, "…in any way to the manner in which overtime for work over 80 hours in a pay period shall be calculated for relief employees" (SB-7). In addition they argue that the language in Rule 9.01 supports the Employer's argument that "…employees are to be paid overtime based on the hours actually worked" (SB-8), and importantly it doesn't state that they are to be credited for eight hours for overtime entitlement. They argue that the example in Rule 9.01 is of "particular importance." (SB-9) They also argue that if employees got credit for working eight hours they would, "…in effect, be paid twice for the 'eighth hour' of each short shift," (SB-9) and that the Union has misplaced reliance on the IBU CBA terms, especially as to the definition of Licensed Deck Officer and the different IBU contract provision for Relief Employee overtime pay.

Affidavits and Declarations

As the parties proposed and stipulated to submitting this grievance arbitration to the arbitrator without testimony, and solely on exhibits, briefs and declarations/affidavits, an examination of those declarations and affidavits is particularly important.

The Employer submitted two declarations, one from their Director of Marine Operations and the other from their prior counsel. The Union submitted three affidavits, one from their Regional Representative and one from the IBU's Regional Director, and one from a Relief Mate.

As noted in the affidavit of Tim Saffle, a Union Regional Representative, former Master and former Port Captain, he was involved in the 2009-2010 negotiations at the time the Touring Watches were ended. He noted that those negotiations were in a coalition setting, with both the Union and the IBU negotiating with the Employer. He states that a key issue for the Union was that they wanted comparable language for the Union to the

preexisting IBU language, which IBU language "...provided for seven hour shifts to be credited as an eight hour day and nine hour shifts to be credited as an eight hour day with one hour of overtime for their relief and on-call members" (Saffle Affidavit, p. 2) in order to cut down on "...confusion and errors and simplify timesheet auditing for the State." (Saffle-2)

That affidavit argues that "compensable time" includes "guaranteed time," and that the Employer is only "...choosing to disallow the use of Guaranteed Time on the 7-hour day; in all other instances of Guaranteed Time the State is using the calculation towards the 80 hour threshold for Overtime." (Saffle-3) He also argues that as to the seven hour day the Employer was not counting the full eight hours in other contexts, such as towards the "...threshold for dispatching these relief employee in accordance with Addendum K of the parties' contract." (Saffle-4)

He noted that, "The State has reinterpreted the contract so that this one hour isn't even considered compensable time for the overtime threshold, even though the agreement was that it was to be treated as an eight hour day. MMP sees this as a violation as the State is treating this day as a seven hour day, not as the eight hour day that it is always been treated as under the IBU agreement." (Saffle-5)

Saffle also mentions the "Quick Note" that the WSF's Steve Rodgers sent and that, "At the time, IBU members were still receiving..a guaranteed eight hours of pay for the seven hour day, in accordance with our MOU agreement." (Saffle-4) and that Rodgers had noted that the State needed to track the "...additional hour of pay on the seven hour dispatched assignments for cost analysis purposes." (Saffle-3)

He noted that he had,

> "..prepared Exhibit U-15 to provide examples to better illustrate the implications of the State's misinterpretation of the contract. Example 1 shows an employee who works six ten hour shifts on one boat; works one eight hour shift; and then works one seven hour shift which is compensated as eight hours for a total 76 hours meeting his threshold for work accomplished in the work period in accordance with Addendum K. He would then put in for four hours of guarantee time to be compensated for his 80 hours of guarantee pay. The state is saying on this example that the employee should have put in for seven hours and one hour of guarantee time, and that his actual

total of hours would have been 75 not 76 hours. This interpretation by the state is where they are double dipping..." (Saffle-5)

In his conclusion he notes:

"These are all illustrations of what I would say are WSF's inconsistencies in the application of the contract and in pay roll auditing. It shows where they have chosen to interpret the MOU to their favor in some cases, but they are not consistent with their practices of paying fairly when not in their favor." (Saffle-7)

In the affidavit of Dennis Conklin, the IBU Regional Director, he states that, "During the 2009-2010 negotiations the State wanted an agreement which would treat MMP and IBU members similarly after the elimination of the touring watches." (Conklin-2) He noted that, "The State expressed the need for flexibility in these negotiations and the unions provided that one quid pro quo for that flexibility would be the continuation for IBU, and the application of that agreement to MMP, that shifts of less than eight hours would be treated as eight hours of work and compensated as such." (Conklin-3)

He further stated that as the IBU representative he:

"...specifically clarified during the negotiations and mediation with the State over the end of the touring watches that the State would consider all hours in pay status when determining whether overtime is owed. The State never took the position that this time would be considered as anything other than compensable time and time work for the purposes of reaching the 80 hour overtime threshold." (Conklin-4)

In the third affidavit offered by the Union, Greg Faust, a Relief Mate notes that he participated in negotiations and mediation as a delegate representative of MMP. He noted that, "At no time in the negotiations or mediation discussions did either party identify the additional hour for an employee dispatched to a seven hour day as 'guarantee time.' (Faust-3)

He further noted that:

"After the parties entered into the Memorandum of Understanding I was paid in accordance with the unions' understanding of the agreement and consistent with the manner asserted by MMP in this grievance. I worked relief

on a seven hour day. I was paid eight hours for that day. The eight hours were then added to my other time worked in the pay period and I was paid over time based upon the inclusion of that additional hour as time worked." (Faust-3)

Continuing to refer to U-13, Faust notes as to his pay submissions for October 1-15, 2012:

"This page shows I received and worked a seven hour shift on October 14, 2012. Per the MOU and my prior practice I put in for 8 hours of work and pay for that date. Page 3 shows the auditor change my paperwork from 8 hours straight time pay to 7 hours of straight time pay and the addition of one hour of guaranteed time. During that work cycle I worked 77 hours, including the additional hour, but the state treated this pay period as if I worked 76 and provided me with four hours of guarantee time. This is not consistent with the parties' agreement which is that I should have received 77 hours of pay for work and three hours of guaranteed time."(Faust-4)

In the first affidavit offered by the Employer, Steven Rodgers, their Director of Marine Operations, noted that he learned:

"In early 2010, that relief and on-call deck department personnel and relief deck officers were not properly filling out their pay orders. In response, I issued a Quick Notice to clarify the procedures for documenting their time. I reminded them that MM&P relief employees who are dispatched to a single seven-hour watch are to document their time as seven hours of straight time and one hour of guarantee pay..."(Rodgers-4-5)

In the declaration of David Slown, offered by the Employer, he notes that he was counsel to the WSF from 1998 to 2010 and that after the elimination of the touring watches, "Due to the popularity of touring watches, both MM&P and IBU resisted their elimination fiercely, from the start." (Slown-2) He further stated that,

"..we were aware that in the IBU, reliefs and on calls on single day dispatch were paid eight hours, seven straight time and one guaranteed time, when they worked the seven-hour end of a "flexed" shift, and eight hours of straight time and one hour of overtime when they worked the nine

hour end. Management did not want to extend this practice to MM&P ..." (Slown-4)

He further stated that,

"At no time during any mediation session was there any discussion of the effect of paying eight hours of pay for a seven-hour shift upon an employee's entitlement to overtime based upon exceeding eighty hours of work in a pay period. The subject never came up. The assumption of the management team, had the subject being discussed, would most certainly have been that on a seven-hour dispatch, the employee would be paid seven hours straight time and one hour of guaranteed time. I say this because guaranteed time was the type pay used whenever any WSF employee was paid for time not actually worked. This was not an uncommon occurrence, as all relief employees in IBU and MM&P were guaranteed 80 hours pay per pay period, even if 80 hours of work were not offered to them." (Slown-5)

Discussion

Burden of Proof

The Employer argues that the Union must meet a burden of a preponderance of the evidence, citing the arbitration award of City of Mattoon, 128 LA 1753 (Szutzer, 2011). As they note, in that award the union in such an alleged contractual violation arbitration bears the initial burden of presenting evidence "beyond the mere assertion of a position."

A major labor arbitration treatise notes that, "In general, the party asserting the claim has the burden of proving it." Elkouri & Elkouri, "How Arbitration Works," (7lli Ed. (2012)(hereafter Elkouri), p. 8-102. Furthermore, that treatise cites an award where it is noted that, "...the parties are aware that the initial burden of proof lies with the Union. This is to say that the aggrieved must come forward and show that its position is supported by a preponderance of the evidence." Hercules Galion Prods., 52 LA 1026, 1027 (Mcintosh, 1969).

Many arbitrators in contract interpretation cases require that the union carry the burden of proof by a "preponderance of

the evidence." Dept. of Veterans Affairs/AFGE Local 2663, 2010 WL 8269063 (Gear); or stated otherwise, by simply the "greater weight of evidence." Kroger Co./United Industrial Workers, 2012 WL 2620614 (Simeri).

However other arbitrators have focused on a burden-shifting concept, where in our case the burden would shift from the Union to the Employer after the Union, "presents sufficient evidence to justify a finding in its favor on the issue." (Elkouri, p. 8-103-4, citing County of Monterey, Cal. 93 LA 64 (Riker, 1989); Vons, 121 LA 741 (Gentile, 2005)).

Other arbitrators have held that,

> "...resolution of the grievance turns more on a careful evaluation of the facts than on fine distinctions regarding burdens of proof and burdens of going forward."

Fred Weber Inc./Teamsters Local 682, 2006 WL 6823265 (Suardi)

As this arbitrator has mentioned before and will do so again, what gives this arbitrator a unique tasking is the parties' desire and stipulation to have this arbitrator decide the matter without witness testimony. Witnessing live testimony is typically where credibility can best be examined, and "careful evaluation" more easily accomplished.

Here such distinction must be made based on the written word alone, and as noted by the Employer the proper burden of proof is the standard of preponderance of the evidence. With the Fred Weber language in mind, the Union will have that initial burden; and if it meets that burden, it will shift to Employer to rebut that showing.

However, it is important to note that the burden of a preponderance of the evidence is a very minimal burden. Furthermore, as live testimony did not occur, even greater emphasis than usual will be given to inference and circumstantial evidence drawn from the written submissions, as will be discussed further.

Another unique aspect of this arbitration is the reference to a summary judgment. The Employer notes in its brief, "At the hearing, the parties agreed to submit the case to the Arbitrator for his consideration upon the exchange of affidavits and Memoranda of Law, similar to a Summary Judgment Motion." (SB-2) The Union, after reading into the record the parties' desire to have the arbitrator consider the case, "...similar to a Summary

Judgment Motion," (T-4) noted in their brief that, "At the hearing the parties conferred and agreed to submit the matter to Arbitrator Little pursuant to an exchange of affidavits and written closing argument." (UB-2)

It is obvious that the parties ' intent as expressed at the hearing, in their exhibits, written statements and briefs, is that this arbitrator rule after examining the substance of this arbitration, rather than literally decide a labor arbitration grievance strictly as a neutral would hear a summary judgment motion.

However, keeping in mind the general nature of a summary judgment motion helps to reinforce for this arbitration the concept of sifting burdens and what the Union has to initially establish,

> "A motion for summary judgment may be granted when there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A material fact is one that affects the outcome of the litigation. When a defendant moves for summary judgment, it bears the initial burden of showing the absence of any issue of material fact. If a defendant makes that initial showing, then the burden shifts to the plaintiff to establish that there is a genuine issue for the trier of fact."

Millson v. City of Lynden, 298 P. 3d 141 (Wash. App. Div. 1 2013)

Stated in Washington State appellate decision terms, in our case the Union must establish the validity of a material fact that affects the outcome of the case. If they do so, then the burden shifts to the Employer.

Contract Interpretation

Essentially both parties argue that the pertinent language in their CBA is clear and unambiguous and supports their position. The Union further argues that the MOU at the conclusion of the negotiation and a letter from the mediator

after the negotiations over the ending of the touring watches, both also support their position.

For purposes of establishing their interpretation of the CBA, the Union argues that the language in Rule 8.01, "For all practical purposes, eight (8) consecutive hours shall constitute one (1) work day," and the sentence, "If schedules include offsetting eight (8) hour shifts, the WSF agrees to pay, no less than eight (8) hours pay for working the short shift for all employees on a single dispatch," establish the principle of the eight hour day.

The Union also argues that, "The parties did not stipulate in the language of Rule 8.01 that the eight hour day would be treated as [seven] hour[s] of work with one hour of guarantee time, with the hour of guarantee time not counting toward the 80 hour threshold as asserted by the State." (UB-10-11)

To support their position regarding the language of the CBA, the Employer argues that "...nowhere in Rule 8.01 of the CBA is there language which relates in any way to the manner in which overtime for work over 80 hours in a pay period shall be calculated for relief employees," (S-7) After noting the example in Rule 9.01 referring to the word "worked" in the phrase "Employee has worked...," the Employer argues that "...nowhere in Rule 9.01 is there language which supports that [the Union's]argument. In fact, Rule 9.01 supports the State's position that MM&P relief employees are to be paid overtime based on the hours actually worked." (SB-7-8)

As to the MOU, both parties essentially point to the same language which reads, "If schedules include offsetting eight hour shifts, the WSF agrees to pay, no less than eight hours pay for working the short shift for all employees on a single day dispatch." (U-4/S-19) (SB-6-7;UB-5-6)

As to the mediator's letter, neither party focuses on any specific language in her letter. The Union argues that the MOU "codified the mediation agreement as outlined by Arbitrator Ford in her closing letter after settlement." (UB-6)

The Union argument based on language interpretation essentially rests on the Rule 8.01 phrases concerning the principle of an eight hour day, and the agreement to pay no less than eight hours of pay for working the short shift on a single day dispatch.

The key phrase is, "WSF agrees to pay, no less than eight hours pay for working the short shift..."

In the context of qualifying for the overtime threshold, the phrase's plain meaning, without considering extrinsic evidence, infers that the short shift qualifies for eight hours credit; first, because the focus is on the shift, not the number of hours, and second, because there is no mention of guaranteed time. For example as essentially pointed out by the Union, the phrase is not, "WSF agrees to pay, no less than seven hours worked and one hour of guaranteed pay for a total of 8 hours of pay..." A reasonable inference is that the language means that the WSF will consider all hours of the short shift as working hours, because the pay of eight hours is not for the hours but for the shift, and the non-working hour term or terms (for example "guarantee pay") are not used-- thus by inference a short shift is worth eight hours both for pay and for other entitlements.

Focusing on Washington State appellate decisions, the Union is quite correct in citing basic interpretation language from decisions such as Dice v. City of Montesano, 131 Wn. App. 675, 128 P. 3d 1253 (2006),where the court noted:

> In construing a written contract, the basic principles require that (1) the intent of the parties controls; (2) the court ascertains the intent from reading the contract...as a whole; and (3) a court will not read an ambiguity into a contract that is otherwise clear and unambiguous." Mayer v. Pierce County Med. Bureau, 80 Wash. App. 416, 420, 909 P. 2d 1323 (1995)

Furthermore, in general such decisions as Tanner Electric v. Puget Sound, 128 Wn 2d 656, 674, 911 P2d 1301 (1996), cited by the Union, are helpful in labor grievances, when that court noted:

> "The touchstone of contract interpretation is the parties' intent. [Citation] In Washington, the intent of the parties to a particular agreement may be discovered not only from the actual language of the agreement but also from 'viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.'

[Citation] quoting Berg v. Hudesmanr 115 Wash.2d 657, 663, 667, 801 P.2d 222 (1990)."

The controversial Berg decision contains some language which reflects the general evolution of interpretation decisions in the labor context,

> "...interpretation...depends on the credibility of extrinsic evidence or on a choice among reasonable inferences to be drawn from extrinsic evidence...Any determination of meaning or ambiguity should only be made in the light of the relevant evidence of the situation and relations of the parties, the subject matter of the transaction, preliminary negotiations and statements made therein, usages of trade, and the course of dealing between the parties."

In the labor arbitration context,

> "A contract term is said to be ambiguous if it is susceptible to more than one meaning, that is if 'plausible contention may be made for conflicting interpretations.' The well-established majority view remains that the existence of an ambiguity must be determined from the 'four corners of the instrument' without resort to extrinsic evidence of any kind. This is the 'plain meaning rule,' which states that if the words are plain and clear, conveying a distinct idea, there is no occasion to resort to interpretation, and their meaning is to be derived entirely from the nature of the language used." (Elkouri, p. 9-8)

Language in one of the seminal labor arbitration decisions, United Steelworkers v. Warrior & Gulf Navigation Co. 363 U.S. 574 (1960) has been picked up in numerous recent decisions,

> "...a collective bargaining agreement is more than a contract; it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate...The collective agreement covers the whole employment relationship. It calls into being a new common law the common law of a particular industry or of a particular plant..."

Spirit Airlines Inc/ALPA, 2008 WL 8578940 (Nolan).

As noted in the Spirit Airlines decision, "collective bargain agreements should be interpreted in light of practices as well as specific words."

Viewed in the context of the issue of qualification for the overtime threshold, the language in both 8.01 and 9.01, the MOU and the mediator's letter, while susceptible of two plausible interpretations, and thus hardly "plain and clear," and in traditional terms ambiguous, if viewed with "careful evaluation" can validly be read to support the Union's position for three reasons:

First, the language does support the idea that an eight hour day is established as a principle.

Second, the implication of the key language, "...eight hours pay for working the short shift..." is that it's not the working hours that is the focus, but working the shift.

Third, in that key language there is no mention of a different type of pay or time crediting, such as guaranteed pay.

Since the Union has addressed several "material facts" with plausible arguments based on reasonable inferences, the burden as to this language-focused discussion now rests on the Employer.

In effect the Employer response is to focus on the term "working" in the above-noted key phrase, and argue that as the employee isn't at work during the eighth hour, they are simply being paid for an hour they weren't at work, and nothing else--such as overtime entitlement--applies.

The Employer also emphasizes that the example in Rule 9.01 is of "particular importance," (SB-9)yet that example is unclear. Again by inference it seems to simply not address the short shift overtime credit.

The Employer rebuttal also fails in part because it seems to rely on definitions which are not available. There are no definitions presented to this arbitrator of key terms such as "working," "guaranteed time " or "compensable time." Some of the statements do make note of such terms, such as the mention in the Saffle affidavit that "Compensable time includes all sick, vacation, compensatory time and guaranteed time," (Saffle-3)and in the Slown declaration where he writes that, "...guaranteed time was the type of pay used whenever any WSF employee was paid for time not actually worked." (Slown-5) The Employer's rebuttal is clearly weakened due to its reliance on apparently undefined terms.

An additional argument the Union can make as to language interpretation is to address language in the mediator's letter of July 3, 2009. While the Union argument that the mediator's comment in that letter fully supports the recollection of the IBU lead negotiator is clearly not substantiated, the phrase she used as to the WSF's Conditional Proposal that, "...the WSF will agree to pay overtime...on a single day shift" is circumstantially revealing as to what was likely discussed and perhaps also what might have been the intent as to overtime crediting.

However, although inferences can be made from the language itself, ultimately we are left with a need to fill in gaps, because a very valid argument is that the CBA is silent on our issue.

As the Elkouri treatise notes,

> "It frequently happens that there is no language in the contract applicable to a particular situation that has arisen." (Elkouri, p. 9-15)

There are various approaches at this point: fill in with a provision that comports with good faith or "reasonable under the circumstances," or make an estimation of what the parties would have intended had they foreseen the situation.

In the arbitration award of Georgia Power Corp./IBEW Local _§_!, 2011 WL 7790935 (Abrams,Chester,Price), the panel cited the City of Mattoon decision (cited by the Employer in our case) for the proposition that clear and unambiguous language must be given its ordinary meaning. However quoting an earlier decision of Sara Lee Corp, 129 LA 1 (Holley, 2011) it was noted in Georgia Power that:

> The parties' intent is generally found in the words that they used in the collective bargaining agreement. However, the imperfection of language frequently makes it impossible to know the parties' intention without examining the circumstances and the parties' objectives. Accordingly, extrinsic evidence found in the bargaining history and the parties' administration of the contract may also be helpful.

With similar pertinent language is the decision of Dept. of Veteran Affairs, where it is noted:

> "...if the language is ambiguous, and arbitrator will (1) assess bargaining history. (2) examine previous practice by

the parties related to the subject, and (3) consider the traditional rules of contract interpretation. When direct evidence is not available, circumstantial evidence may be determinative."

Bargaining History

Having now examined and found valid by inference several contract interpretation arguments raised by the Union, the next step is to look at extrinsic evidence from the parties' bargaining history to see if that evidence supports the Union or Employer arguments.

Unfortunately, in regard to assessing what the parties' bargaining history might reveal, due to the absence of testimony, in both examination and cross examination, this arbitrator is essentially left with two conflicting written statements concerning whether the parties discussed the issue at hand, and if so what they might have implicitly agreed to.

In our situation we have two declarations/affidavits, one from the then key Union negotiator saying that the issue was raised in bargaining and one from the Employer counsel, also present, saying it was never raised in mediation. Furthermore, there seems to be no mention of the subject that either party could point to in several exhibits in the form of "Meeting Minutes." Those Meeting Minutes reflect dialog in some of the bargaining sessions. In a review of those meeting minutes, some mention of overtime occurred (see the April 17, 2009 minutes, S-15, p. 3 of 5) but the issue at hand in this arbitration didn't seem to be mentioned.

Both Mr. Conklin and Mr. Slown made what appear to be credible yet conflicting written statements about whether the matter was discussed. However, the statement by Mr. Conklin is more detailed; yet neither statement provides sufficient detail to establish exactly when the matter may have been discussed, which side may have made a proposal directly or indirectly related to the issue, and what happened to any such proposal.

At first examination, our situation appears similar, in respect to the lack of helpful bargaining history, to the decision of Lakeland Community College, 39 LAIS 7, (Murphy, 2010) where the arbitrator noted that, "The parties' bargaining

history did not establish an express or implied shared understanding ..."

The Union argues that,

> "The State never took the position that this time would be considered as anything other than compensable time and time worked for the purposes of reaching the 80 hour threshold…. Mr. Slown echoes Mr. Conklin's memory of the negotiations. IBU and the Union bargained to maintain the payroll practices regarding the treatment of the seven hour day as eight hours worked and, in exchange, IBU gave up the right to automatically receive one hour of overtime on the nine hour day, agreeing instead, to the 80 hour threshold. (UB-6-7; Conklin-2-4)

While this Union argument is not conclusive, it does bolster their argument based on language. In effect the Union can effectively argue by inference that when the Employer conceded on the payment for the short shift all reasonably related issues would flow from that concession, unless expressly omitted.

While we cannot be sure that the issue of relief officers overtime entitlements on a single day dispatch was discussed or even mentioned, or whether terms such as "working" or "guarantee time" were even discussed within a common framework of understanding, we are left with many instances where the issue of overtime entitlement is at least discussed outside the context of the seven hour single day dispatch.

Overtime entitlement is mentioned in the MOU dated September 3, 2009 in regard to IBU; in the mediator's letter of July 3, 2009, where she mentions both parties 'proposals apparently left on the table; extensively in both Rule 8.01 and 9.01, and at least somewhat noted in the Minutes of Meetings. As noted in the Saffle affidavit,

> "The State is only choosing to disallow the use of Guaranteed Time on the 7 hour day; in all other instances of Guaranteed Time the State is using the calculation towards the 80 hour threshold for Overtime. Due to USCG and MMP contract rules, an employee is entitled to Guaranteed Time and as such the employer recognizes that Guaranteed Time in the calculation of overtime." (Saffle-3)

While it would have been helpful to this arbitrator to have testimony explain this statement and provide definitions, we are once again left with having to examine by inference.

An inference can be drawn that more likely than not the issue of overtime entitlement in some form was at least an implicit conversation as to all shifts, an inference which favors the Union arguments.

What is noted in the Department of Veteran Affairs arbitration seems very pertinent here,

> "When direct evidence is not available, circumstantial evidence may be determinative."

The question remains whether these examples of circumstantial inference have any valid support in any possible past practice.

Past Practice

The Union argues that,

> "…for at least two years, the State also honored the parties 'Agreement and counted all hours of compensation as eight hours toward the contractual eight hour threshold for overtime. In 2011, however, the State unilaterally altered the Agreement and counted only seven of the eight hours towards the overtime threshold. The State 's practice was not the agreed upon practice…."(UB-1)

They also argue that,

> "There is no dispute that the State had historically counted those eight hours in the overtime threshold for IBU members, and that no changes were made in the agreement to modify that practice or benefit." (UB-6; Conklin-3-4)

In addition they argue that,

> "It is uncontroverted that the parties ' longstanding practice has been to count all compensable hours, including vacation, sick, compensatory time and guaranteed time as time worked." (UB-16)

The Employer argues that the subject never came up in the mediation sessions, and if it had the management perspective would have been to,

> "..pay seven hours of straight time and one hour of guarantee time. I say this because guarantee time was the type of pay used whenever any WSF employee was paid for time not actually worked." (SB-5)

As noted in the Gospel Truth Pictures arbitration,

> "..if a contract is silent and a practice [granting a benefit] has arisen..most arbitrators would conclude that such a benefit, continued over a reasonable period of time, has become part of the working conditions and may not be unilaterally discontinued."

In our situation it appears that the Employer did credit at least some relief officers with the eighth hour on a single shift for overtime purposes from the time of the negotiations in September of 2009 at least until the issuance of the Quick Notice in March of 2010. The Saffle affidavit adequately explains why the Quick Notice (U-7) cannot be taken as proof of an agreed interpretation of the overtime crediting. (S-3-4)

However, following the guidelines factors written by Richard Mittenthal in "Past Practice and the Administration of Collective Bargaining Agreements," 59 Mich. L. Rev. 1017 (1961), it appears to this arbitrator that, the Union has not fully met its burden to establish a binding past practice because:

First, no proof was offered that the practice was clear and consistent.

Second, the duration is unclear.

Third, the pattern of the practice was not acceptable.

Fourth, there was no mutual acknowledgement of the pattern by the parties.

However, the Union has shown, primarily by way of the affidavits of Tim Saffle and Greg Faust, that there was a substantial period when the Employer credited the overtime on the short shift for relief officers.

An issue raised by both parties was that unintended consequences would occur if the other parties' interpretation applies. In the decision of Independent School District

2168/Minnesota Ed. Assoc., 1997 WL 34824924 (Remington), unintended consequences were found to occur if one side's interpretation applied.

This arbitrator finds that while neither party conclusively established that the adverse unintended consequences of the other parties ' interpretation were a problem to a significant degree, the Union did show credible examples of impact. The only statement in the affidavits and the declarations addressing the issue is the detail in the Saffle affidavit which does point to the potential with the Employer's interpretation of "double dipping," and other results, "…outside of all terms of the agreement." (Saffle-5-6)

Conclusion

The Union has established, without adequate rebuttal, sufficient inferences and circumstantial evidence. Viewed within this unique arbitration's need for a "careful evaluation" in the context of a preponderance of the evidence standard of proof, and within the limits of this arbitration's stipulations, the Union has established several material facts and thus the validity of their grievance, for the following reasons:

First, as to contract interpretation, the key CBA and MOU language by inference focuses on the shift not the hours, and thus supports the idea that the WSF is crediting eight hours for a short shift for all employees on a single day dispatch, not for a particular number of hours worked, supporting the Union argument that such credit applies to the overtime threshold.

Second, also as to contract interpretation, that key CBA and MOU language does not use the terms "guaranteed" hours or other qualifying language, also supporting the Union argument.

Third, as to bargaining history, the mediator's concluding letter's language supports by inference the idea that overtime was extensively discussed, pointing to the credibility of the Conklin affidavit and thus argument of the Union.

Fourth, also focusing on bargaining history, the Employer's offer that resulted in the settlement, implicitly, and by inference, more likely than not contained all interrelated aspects, unless they were excluded, also favoring the Union perspective.

Fifth, while not raising to the level of a binding past practice, the Union has shown that the Employer paid relief officers as the Union argued it assumed from the MOU, for at least several months, supporting the credibility of their arguments.

Sixth, while both parties note unreasonable and unintended impacts if their interpretation is not followed, the Union showed credible examples ranging from impacts on employees to adverse impacts on the Employer.

Seventh, the Employer's counter argument to virtually all Union arguments is that the issue wasn't discussed; however that argument fails to be detailed and corroborated to the extent of the Union's arguments concerning language, bargaining history and a limited past practice, thus do not supply adequate rebuttal.

Decision

The answer to the question is yes. The State violated Rules 8.01 and 9.01 with regards to Relief Deck Officers overtime entitlements when on a single-day dispatch.

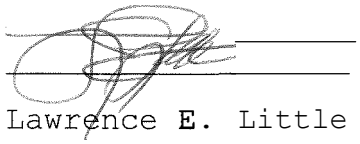
Award and Remedy

As to Relief Deck Officers, the Employer will count all eight hours of a single dispatch to the short shift as hours worked; and the Employer will recalculate and repay, without interest, all Relief Deck Workers any overtime owed since September 3, 2009 as a result of this award.

The arbitrator will retain jurisdiction for sixty days from the date of this award for the purpose of addressing matters dealing with either the remedy or the stipulations in this arbitration.

As specified in U-2/S-1, 22.03 E. 1 the expenses and fees of this arbitrator shall be shared equally by the parties.

Dated this 19th day of June 2013



Lawrence E. Little
Arbitrator