

BEFORE THE ARBITRATOR

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In the matter of the arbitration
of a dispute between

INLANDBOATMEN'S UNION OF THE
PACIFIC

and

WASHINGTON STATE FERRIES

Labor Relations Division

CASE 25259-A-12-1528

ARBITRATION AWARD
(John McElhose Grievance)

Attorney General Robert W. Ferguson, by *Don L. Anderson*, Assistant Attorney General, for the employer.

Schwerin Campbell Barnard Iglitzen & Lavitt LLP, by *Terrance M. Costello*, Attorney at Law, for the union.

The Washington State Ferries (employer) and the Inlandboatmen's Union of the Pacific (union) are parties to a collective bargaining agreement (CBA or contract) providing for final and binding arbitration of grievances arising under the contract. On November 1, 2012, the union filed a request for grievance arbitration with the Public Employment Relations Commission, and the Commission assigned me to serve as arbitrator of this grievance. I conducted a hearing on March 27, 2013, in Seattle, Washington, which was transcribed by a court reporter. At the hearing, the parties presented testimonial and documentary evidence. On June 17, 2013, the parties submitted post-hearing written arguments, closing the record in the matter.

ISSUES

At the hearing, the parties stipulated to the following issues to be decided:

Did the employer violate the CBA when it failed to pay the grievant three hours of callback pay and eight hours of overtime pay, for time worked on July 10, 2012?

If so, what is the remedy?

I grant the grievance in part. The employer violated general contract Rule 10.03 of the CBA when it denied the grievant three hours of callback pay at his straight time pay rate for working an additional four-hour shift beyond his scheduled 40-hour work week on July 10, 2012. I deny the remainder of the grievance. The employer did not violate general contract Rule 10.08 of the CBA when it denied the grievant a minimum of eight hours overtime pay for the four-hour shift he worked on July 10, 2012, because that day was not a scheduled assigned day off for the grievant.

RELEVANT CONTRACTUAL PROVISIONS

Contractual Structure

A brief note regarding the structure of the CBA is helpful to understand the analysis below. The CBA is a complex, multi-part document. Two parts are relevant to the grievance at issue in this case. One part contains the “master” rules of general applicability numbered 1 through 35, referred to below as the general contract. The other relevant part of the CBA is Appendix B, containing rules of specific applicability to the terminal department, numbered 1 through 5. As a result, employees in the terminal department, like the grievant in this case, are covered by two Rules 1, 2, 3, 4, and 5; one set in the general contract and one set in Appendix B.

As described in the Preamble to the general contract, when a conflict exists between a general rule and an Appendix B rule, the Appendix B rule controls:

All the following Rules shall apply to the entire Agreement uniformly. Should any Rules in subsequent Appendices, which by this reference are incorporated herein, modify these rules, such subsequent Appendices shall take precedent and apply only to those employees and/or conditions covered by the Appendix.

The Preamble to Appendix B reiterates that Appendix B rules control over general contract rules where a conflict exists:

The following rules are in addition to Rule 1 through Rule 35 and apply to the Terminal Personnel only; when there are conflicting Rules resulting from the general contract or Appendix B, the Rules in this Appendix shall be the applicable Rule governing Terminal Employees.

Relevant General Contract Rules

RULE 1 – DEFINITIONS

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1.16 On Call Employee

The term “on call employee” shall be an employee who may or may not be working on a year around basis, and who is not offered forty (40) hours of straight time pay per week. The employee will be assigned work based on their date of hire and availability.

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RULE 10 – MINIMUM MONTHLY PAY AND OVERTIME

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10.03 Relief and On-Call 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).

On-Call Employees

On-call employees called in to work and have seventy-nine (79) hours or less in a work period:

- A. X hours of straight time to eighty hours
- B. X hours of overtime above eighty (80) hours
- C. Does not receive three (3) hours call back

EXAMPLE: Employees who have worked less than eighty (80) hours and is assigned a shift that puts them over eighty (80) hours they will receive the overtime rate for all hours over eighty (80) and will not receive three (3) hour call back.

On-call employee called in to work and has eighty hours or more in a work period:

- A. All hours above eighty (80) at overtime rate of time and a half
- B. Three (3) hours call back at straight time rate.

EXAMPLE: Employee has worked eighty (80) hours in a work period. Employee is called into work for eight (8) hours of work. The employee receives eight (8) hours at time and a half (1 ½) of their straight time rate. Employee receives three (3) hours call back at their straight time rate.

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10.08 Employees called back to work on their scheduled assigned days off will

receive a minimum of eight (8) hours pay at the overtime rate. This section shall not apply to part-time employees.

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RULE 14 – GRIEVANCE PROCEDURE

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14.03 Filing and Processing

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Step 3 – Arbitration

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D. Authority of the Arbitrator

1. The arbitrator will:

- a. Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement;
- b. Be limited in his or her decision to the grievance issue(s) set forth in the original written grievance unless the parties agree to modify it;

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

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Relevant Appendix B Rules

**APPENDIX B
TERMINAL DEPARTMENT**

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RULE 1 – HOURS OF EMPLOYMENT, OVERTIME, AND ASSIGNMENT

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1.03 Part-time and on call employees shall be allowed to work ten (10) consecutive hours per day. Employees reporting to a shift shall be paid not less than four (4) hours and hour for hour thereafter not to exceed ten (10) hours. Overtime shall be paid whenever the employee works more than ten (10) hours per day or forty (40) hours per one (1) week work schedule.

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1.06 Filling of Temporary Terminal Positions

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B. Temporary Positions – Less than Forty-Five (45) Days
Job openings of less than forty-five (45) days will be filled at the affected terminal in the following manner:

1. Weekly Assignments

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- c. IBU Terminal On Call employees will be assigned two (2) consecutive free days per week that will be repeated every week on the same days. An employee, that chooses to observe all free days for the season shall notify WSF on a form provided by WSF at the beginning of the season. By exercising this option, Dispatch will not be required to call the employee to work on their free days. An employee shall have one (1) opportunity per season, to change from “not being available” to “available” on their free days.

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RULE 5 – TERMINAL PART-TIME AND ON CALL EMPLOYEES

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5.02 Part-time and On Call employees may be employed subject to the following conditions:

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2. All hours worked in excess of ten (10) hours in any day, or forty (40) hours in any one (1) work week schedule shall be paid at the overtime rate, provided that employees who are working in positions which are affected by other overtime provisions in the Agreement or its Appendices shall be paid overtime as provided in such provisions.

BACKGROUND

The employer operates the largest ferry system in the United States and the third largest ferry system in the world. The system is part of the Washington State highway network and transports nearly 23 million passengers annually on 23 ferries to 20 different ports of call throughout Puget Sound, including one port of call in British Columbia, Canada. The ferry system serves as an integral part of Washington’s transportation network and is vital to the state’s economy.

The grievant works as an on-call employee in the employer’s terminal department and is represented by the union. The union represents a bargaining unit of approximately 975 employees. Of these 975, 380 work in the terminal department at issue here. Of the 380 terminal department employees, 178 are on-call employees like the grievant in this matter.

On-call employees fill in scheduling gaps when year-round employees are unavailable to fill a shift. For example, if a year-round employee is on vacation, an on-call employee will fill the

vacant shifts created by the vacation. On-call employees sign up for available vacant shifts on a weekly basis. Each Wednesday, a sign up sheet is posted with available shifts for the following work week. On-call employees then sign up for and are assigned to work shifts based on their date of hire and availability.

In addition to the weekly scheduling procedure, at least twice a year on-call employees bid on work schedules. As relevant to this case, each on-call employee requests and is assigned two consecutive free days off during each work week in the bid period. On-call employees then have the option to make themselves available to be called for work on their free days.

Grievant John McElhose has worked for the employer for six years as a terminal department on-call employee stationed at the employer's Fauntleroy terminal. As an on-call Fauntleroy terminal employee, McElhose worked four jobs: attendant or splitter, ticket taker or scanner, ticket seller for walk on passengers, and ticket seller for vehicle passengers. During the summer of 2012, the time relevant to this grievance, McElhose's schedule included free days on Tuesdays and Wednesdays and he had elected to be available to be called for additional work assignments on those free days.

For the week of Sunday, July 8 through Saturday, July 14, McElhose was scheduled to work, and actually worked ten hours on Sunday, July 8, ten hours on Monday, July 9, ten hours on Friday, July 13, and ten hours on Saturday, July 14 for a total of 40 hours worked. His scheduled consecutive free days were Tuesday, July 10 and Wednesday, July 11. In addition to his two free days, he was not scheduled to work Thursday, July 12.

On the morning of Tuesday, July 10, the employer called McElhose to work a four hour shift from 2:30 P.M. through 6:30 P.M. McElhose worked that four-hour shift on Tuesday, July 10. As a result, in addition to the 40 hours previously scheduled, McElhose worked a total of 44 hours worked during the week. On his July 25 paycheck that covered the week of July 8 through July 14, McElhose received three hours of compensation at his straight time rate of pay coded as callback pay totaling \$59.55. He did not receive any overtime pay on that paycheck. On the following paycheck dated August 10, he received four hours of compensation at his overtime rate

of pay totaling \$124.38. McElhose assumed the overtime payment was to make up for the missed overtime hours resulting from the July 10 shift that he did not receive on his July 25 paycheck. After the employer conducted a payroll audit, \$207.30 was retroactively deducted from McElhose's August 25 paycheck – reversing the payment for both the callback and overtime pay.¹

The union filed a grievance alleging that the employer violated the contract by not compensating McElhose for three hours of straight time callback pay and eight hours of overtime pay for the four-hour shift he worked on July 10. The employer denied the grievance at earlier stages of the grievance procedure, resulting in this arbitration proceeding.

PRINCIPLES OF CONTRACT INTERPRETATION

Where contractual language is clear and unambiguous, it will be interpreted according to the “plain meaning” of the language. ELKOURI & ELKOURI, *How Arbitration Works* 9-8 (7th ed. 2012). Where ambiguity exists, such that the language at issue is susceptible to more than one interpretation, arbitrators look to extrinsic evidence, such as bargaining history, to ascertain the meaning ascribed by the parties in interpreting the ambiguous provisions. ELKOURI & ELKOURI, *How Arbitration Works* 9-26 (7th ed. 2012). Interpretations of ambiguous contract terms that avoid harsh and nonsensical results are favored over interpretations that would result in harsh or nonsensical results. ELKOURI AND ELKOURI, *How Arbitration Works* 9-41 (7th ed. 2012).

DISCUSSION

As explained above, I must analyze two parts of the CBA – the general contract and Appendix B - to determine whether McElhose is entitled to three hours of callback pay and eight hours of overtime pay. Because Appendix B controls over the general contract in the terminal department if conflicts occur, I will first examine Appendix B for rules that may apply to the circumstances

¹ Unlike the three hours that were identified as callback pay on the July 25 paycheck and the four hours that were identified as overtime pay on the August 10 paycheck, the \$207.30 deduction on the August 25 paycheck is only identified as a flat dollar retroactive adjustment. The record does not contain an explanation for why the retroactive adjustment of \$207.30 is greater than \$183.93, the sum of the callback and overtime payments.

associated with McElhose working the four-hour shift on July 10, 2012. I will then look to the general contract for rules that may apply.

Appendix B Overtime Rules

Appendix B Rules 1.03 and 5.02 (reproduced above) provide overtime compensation to on-call employees in the terminal department for hours worked over ten-per-day or forty-per-week. Applying these rules to McElhose's July 8, 2012, through July 14, 2012 work week, Appendix B entitles McElhose to four hours of overtime pay. During that week, he worked 44 hours, including the four hours on July 10 that are at issue here. Therefore, application of the rules in Appendix B requires a conclusion that McElhose is entitled to 40 hours of straight time compensation and four hours overtime compensation for working 44 hours that work week.

While Appendix B does not directly entitle McElhose to three additional hours of straight time pay hours and eight hours of overtime pay sought in the grievance, the last sentence of Appendix B, Rule 5.02, subsection 2 contains the proviso that "employees who are working in positions which are affected by other overtime provisions in the Agreement or its Appendices shall be paid overtime as provided in such provisions." The union argues that two provisions in the general contract apply to the circumstances associated with McElhose's four hours of work on July 10, 2012. Specifically, the union contends that general contract Rule 10.03 entitles McElhose to three additional hours of straight time pay and that general contract Rule 10.08 entitles McElhose to eight hours of overtime pay for the four hours he worked on July 10, 2012. I will examine each general contract rule in turn.

General Contract Rule 10.03 – Three Hour "Callback" Pay

The dispute regarding whether McElhose, an on-call employee, is entitled to three hours of callback pay requires me to interpret and reconcile two conflicting general contract rules. The first, general contract Rule 10.03 (reproduced above), addresses callback pay for on-call and relief employees and references an 80-hour work period. Rule 10.03 contains two explanatory examples related to on-call employees, both of which also reference an 80-hour work period. The second, general contract Rule 1.16 (reproduced above), defines on-call employees with reference to a 40-hour work week. The general contract contains no other reference to on-call employees

working an 80-hour work period and defines them solely in reference to a 40-hour work week. To resolve the conflict created by general contract Rules 10.03 and 1.16, I am faced with two options: (1) strictly construe the 80 hour work period reference in general contract Rule 10.03 thereby rendering it inapplicable to terminal department on-call employees who are defined in reference to a 40-hour work week, or (2) look to the contract as a whole and the parties bargaining history to determine whether there is an interpretation that avoids rendering general contract Rule 10.03 meaningless in its application to terminal department on-call employees.

The parties offer competing interpretations of general contract Rule 10.03. The employer's interpretation is that the plain language reference to an 80-hour work period excludes terminal department on-call employees from three hour callback eligibility. The union's interpretation is that placing the rule referencing the 80-hour work period in the general contract where on-call employees are only defined in reference to a 40-hour work week, makes Rule 10.03 ambiguous. In the union's interpretation, the 80-hour work period referenced in Rule 10.03 incorporates the 40-hour work week referenced in Rule 1.16. Because Rule 10.03 is susceptible to two interpretations, I find it is ambiguous in its application to on-call employees.

Following general principles of contract interpretation discussed above, I will examine extrinsic evidence offered by the parties to ascertain the meaning of an ambiguous contract provision, general contract Rule 10.03. Rule 10.03 is new to the current CBA and was bargained in the context of lowering the overtime rate of pay from double-time to time and one-half. Prior to the current CBA, the overtime rate of pay all employees covered by the CBA, including on-call employees, was double their straight time rate of pay. During negotiations for the current CBA, the employer proposed lowering the overtime rate to time and one-half to make overtime rates consistent with other state employees. The union agreed to this concession, but bargained the inclusion of general contract Rule 10.03 to counteract some of the economic loss to its members resulting from the lowering of the overtime rate of pay.

Given this evidence, I find that on-call employees, who suffered the economic consequences of the reduction in the overtime rate of pay, are intended beneficiaries of Rule 10.03's mitigating callback pay benefit. To find otherwise would result in one group of employees, terminal

department on-call employees, suffering the negative impact of a general concession on overtime rates, but not the corresponding general mitigating benefit from Rule 10.03.

I therefore conclude that the reference to the 80-hour work schedule in general contract Rule 10.03 incorporates the 40-hour work week as referenced in general contract Rule 1.13. In this case, because McElhose worked an additional four hours beyond his defined 40-hour work week for the week of July 8, 2012 through July 14, 2012, he is entitled to an additional three hours of straight time pay.

General Contract Rule 10.08 – Eight Hour Overtime Rule

The union also argues McElhose is entitled to a minimum of eight hours of overtime for the four-hour shift he worked on July 10, 2012, one of his free days. In support of this argument, the union relies upon general contract Rule 10.08, which states that “[e]mployees called back to work on their scheduled assigned days off will receive a minimum of eight (8) hours of pay at the overtime rate.”

Subsection B.1 of Appendix B Rule 1.06 describes the process for assigning temporary work of less than 45 days, such as the work performed by the grievant in this case, with reference to “free days.” General contract Rule 10.08 describes minimum overtime hours awarded to on-call employees who work “scheduled assigned days off.” To find that the grievant is entitled to the minimum eight hours of overtime, I would first need to find that “free days” are the same as “scheduled assigned days off.”

Unlike general contract Rule 10.03, Rule 10.08 is not new to the contract. No evidence was presented of any bargaining history or past practice regarding Rule 10.08. Following general rules of contract interpretation discussed above, I must rely upon the plain meaning of the language in Rule 10.08 as it relates to McElhose. He worked on a “free day.” Rule 10.08 refers to “scheduled assigned days off.” Lacking evidence to the contrary, I find that the wording difference is meaningful. While he was not scheduled to work on July 10, 2012, he also was not on a “scheduled assigned day off” on July 10, 2012. Therefore, he is not eligible for the minimum eight hours of overtime of that day.

Because McElhose was not called back to work on a “scheduled assigned day off,” I conclude he is not entitled to the minimum eight hours of overtime for the four-hour shift he worked on July 10, 2012.

AWARD

I grant the grievance in part. The employer violated the contract when it did not compensate the grievant for three hours of straight time pay in addition to the forty hours of straight time pay and four hours of overtime pay he earned for the week of July 8, 2012, through July 14, 2012.

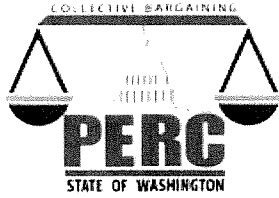
I also deny the grievance in part. The employer did not violate the contract when it did not compensate the grievant eight hours of overtime pay for the four hours he worked on July 10, 2012, one of his free days.

To remedy the violation, to the extent it has not already done so, the Washington State Ferries shall compensate the grievant for forty hours of straight time pay, three hours of “callback” pay at the grievant’s straight time rate of pay, and four hours of overtime pay at the grievant’s overtime rate of pay for the week of July 8, 2012, through July 14, 2012.

Issued at Olympia, Washington this 11th day of September, 2013.



E. MATTHEW GREER, Arbitrator



PUBLIC EMPLOYMENT RELATIONS COMMISSION

112 HENRY STREET NE SUITE 300
PO BOX 40919
OLYMPIA, WASHINGTON 98504-0919

MARILYN GLENN SAYAN, CHAIRPERSON
PAMELA G. BRADBURN, COMMISSIONER
THOMAS W. McLANE, COMMISSIONER
MIKE SELLARS, EXECUTIVE DIRECTOR

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PUBLIC EMPLOYMENT RELATIONS COMMISSION

BY: /S/ ROBBIE DUFFIELD

CASE NUMBER: 25259-A-12-01528 FILED: 10/31/2012 FILED BY: PARTY 2
DISPUTE: ARB INTERPRET
BAR UNIT: MARINE HANDS
DETAILS: John McElhose # 12-35
COMMENTS:

EMPLOYER: WASHINGTON STATE FERRIES
ATTN: RICK HALL
210 11TH AVE SW STE 331
PO BOX 43113
OLYMPIA, WA 98504-3113
Ph1: 360-725-5540

REP BY: DON ANDERSON
OFFICE OF THE ATTORNEY GENERAL
PO BOX 40145
7141 CLEANWATER DRIVE SW
OLYMPIA, WA 98504-0145
Ph1: 360-586-2466 Ph2: 360-664-4167

PARTY 2: INLANDBOATMEN'S UNION
ATTN: DENNIS CONKLIN
1711 W NICKERSON ST STE D
SEATTLE, WA 98119
Ph1: 206-284-5040 Ph2: 206-612-2244

REP BY: ROBERT LAVITT
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT
18 W MERCER ST STE 400
SEATTLE, WA 98119-3971
Ph1: 206-285-2828

REP BY: TERRANCE COSTELLO
SCHWERIN CAMPBELL BARNARD IGLITZIN & LAVITT
18 W MERCER ST STE 400
SEATTLE, WA 98119-3971
Ph1: 206-285-2828 Ph2: 800-238-4231

