

BEFORE THE ARBITRATOR

In the matter of the arbitration
of a dispute between

WASHINGTON STATE FERRIES

and

INLANDBOATMEN'S UNION OF THE
PACIFIC

CASE 25257-A-12-1526

ARBITRATION AWARD
(Jerry Manes Grievance)

Attorney General Robert W. Ferguson, by *Morgan B. Damerow*, 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) effective from July 1, 2011 through June 30, 2013. The CBA provides for final and binding arbitration of grievances. On October 31, 2012, the union filed a request for grievance arbitration with the Public Employment Relations Commission. The Commission assigned Claire Nickleberry to serve as arbitrator of this grievance. I conducted a hearing on February 4, 2014, in Seattle, Washington. The parties filed post-hearing briefs on March 20, 2014, to complete the record.

At the hearing the parties stipulated that I would form the precise statement of the issue. Each party provided a statement of the issue for my consideration.

The employer's statement is: Did the employer violate the CBA when it assigned work to on call employee John McElhose, rather than year round employee Jerry Manes? And if so, what is the appropriate remedy? The employer believes that the appropriate rules in the CBA are 10.02, 10.08, and Appendix B, Rule 1.02 and 1.06 (B) (2) (b).

The union's statement is: Did the employer violate the CBA by failing to assign the grievant, Jerry Manes, to available work on July 10, 2012? If so, what is the appropriate remedy? The union stated that the relevant CBA rules are 10.02, 10.08, and Appendix B, Rule 1.02.

ISSUE

I find the issue statement to be: Did the employer violate the CBA when on July 10, 2012, it assigned work to an on call employee rather than a year around employee Jerry Manes? If so, what is the appropriate remedy?

STRUCTURE OF CONTRACT

It is valuable to note the structure of the CBA. The CBA contains a master contract, also referred to as the general contract. The general contract is made up of rules numbered 1 through 35. The general rules are followed by Appendices A through D which are followed by numerous addendums and letters of understanding. Appendix B applies to the terminal personnel which are the group of employees represented by the union in this arbitration.

The Preamble to Appendix B states that Appendix B rules control over the general contract rules if 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 CONTRACTUAL PROVISIONS

The sections of the CBA relevant to this issue are:

RULE 10 – MINIMUM MONTHLY PAY AND OVERTIME

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10.02 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.

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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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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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**APPENDIX B
TERMINAL DEPARTMENT**

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RULE 1 – HOURS OF EMPLOYMENT, OVERTIME, AND ASSIGNMENT

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1.02 Overtime for year around employees shall be paid whenever the employee performs work in excess of the scheduled shifts as specified above.

An employee who wishes to be called for overtime on his/her regularly scheduled day(s) off will submit his/her name to be posted on an overtime availability list in the Terminal Supervisor’s office. Employees will be called by seniority when overtime is available, starting with the most senior employee. Once an employee has been dispatched for an overtime opportunity, his/her name will be checked off for that pay period. At the beginning of each pay period, the Supervisor will begin the dispatch starting with the most senior employee on the overtime availability list in accordance with the process set forth.

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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:

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2. Daily Assignments
 - a. Daily vacancies will be offered to Part-time and on call employees, by seniority based on their availability schedule as defined in Appendix B, Rule 1.06 (B) (1) (b), when the number of hours of the vacancy is greater than their daily hours and will be restricted to one (1) reassignment per day. In the event all Part-time and on call employees refuse the offer, the Supervisor will assign the employee with the least date of hire. Failure of the employee to respond to a call placed by the Supervisor within fifteen (15) minutes will allow the Supervisor to offer the vacancy to the next senior employee in line.
 - b. The Supervisor will use their discretion in filling of vacancies that occur outside of the scheduled Supervisor hours or when notified within four (4) hours prior to the start of a shift. If possible, the most senior available unassigned Part-time or on call employee should be notified first.

BACKGROUND

Jerry Manes, the grievant, has worked for the employer continuously since 1993 and currently holds the position of ticket seller at the Fauntleroy terminal. Manes holds a year around position which is defined by rule 1.11 of the CBA as “eighty (80) hours of scheduled straight time work within a two (2) week work period, which is expected to exist, during periods of the lowest level of scheduled service.” During the summer of 2012, Manes was scheduled to work Sunday, Monday, Friday and Saturday, ten hours per day.

The employer also has relief employees, part-time employees and on call employees. The position relevant to this arbitration is the on call employee. Rule 1.16 the CBA states: “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.”

Employees are allowed to sign up for overtime by indicating on the "Overtime Signup Sheet" which days of the week they would be available to work. If an employee has not indicated a willingness to work overtime on a day of the week the overtime comes available, they will not be called. Manes had indicated on the overtime sheet for the summer of 2012 that he was available to work any day of the week.

The terminal supervisors maintain a schedule for year around employees for the sailing season. There is also a weekly schedule to fill known absences from the year around positions. There are also daily dispatch shifts that may become available, usually from unknown absences or extra work. A terminal supervisor fills these vacancies with on call employees. If no on call employees are available, the supervisor would hold someone over or go to the overtime list to call someone in to work the hours.

On July 10, 2012, Manes was on a scheduled day off. The supervisor responsible for daily dispatching during that week was Shawn Vogt. There were four hours of work on the daily dispatch list for July 10, 2012, from 2:30 P.M. to 6:30 P.M. Vogt filled those hours with an on call employee.

On July 17, 2012, the union filed a grievance on behalf of Manes claiming that the on call employee was called for an overtime shift and Manes was bypassed although Manes had signed up for overtime on his scheduled days off and was senior to the on call employee. The employer denied the grievance at earlier steps of the grievance procedure, resulting in this arbitration proceeding.

PRINCIPLES OF CONTRACT INTERPRETATION

A contract term is said to be ambiguous if it is susceptible to more than one meaning, that is, if "plausible contentions may be made for conflicting interpretations." ELKOURI & ELKOURI, *How Arbitration Works* 9-8 (7th ed. 2012).

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 so-called “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 & ELKOURI, *How Arbitration Works* 9-8 (7th ed. 2012).

When contracts are silent or ambiguous about a matter, arbitrators look to other evidence, including the parties’ bargaining history and “past practice.” ELKOURI & ELKOURI, *How Arbitration Works* 9-26 (7th ed. 2012).

The custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the parties’ intent is most often manifested in their actions. ELKOURI & ELKOURI, *How Arbitration Works* 12-20 (7th ed. 2012).

ANALYSIS

The union relies on language in Appendix B, Rule 1.02 to support its argument that Manes should have been called in to work the four-hour shift on July 10, 2012, as overtime. The language of this contract section refers to when and how a year around employee will be called for overtime. It does not address how available hours are categorized as overtime. The union believes the hours in question should be overtime and therefore should have been assigned to Manes since he has seniority over the on call employee that worked the hours, and Manes should therefore receive the minimum eight hours overtime pay in Rule 10.08 of the CBA as well as the three-hour straight time call-in pay as stated in Rule 10.02.

The burden of proof that the union has to establish is that the relevant four-hour shift on July 10, 2012, was overtime. The contract is not clear on when hours are declared to be overtime. The only reference is how they are handled when they are overtime and how many hours an employee has to work to qualify for overtime. The CBA is actually silent on how available work hours

become overtime except as it relates to the threshold of daily and weekly hours worked by an individual.

As stated above, there are several ways hours get on a schedule. There is the year around seasonal schedule that is bid on by year around employees. There is a weekly schedule that indicates known absences from the year around schedule. Then there is a list of daily dispatch hours of primarily previously unknown absences that need to be covered in the weekly schedule. The weekly schedule and daily dispatch hours are filled in by relief, part-time, and on call employees.

In the absence of clear contract language that outlines when available hours are scheduled as overtime, I must look to the established scheduling practice. The supervisor responsible for scheduling the daily dispatch hours at the Fauntleroy terminal during the time in question was Shawn Vogt. Vogt testified that the practice for the daily dispatch hours since at least 2009 was to look at the weekly schedule, determine who was not working or working fewer hours. He would then look at the on call list for someone to fill those hours. If there were no on call employees available, he would then go to the overtime sign-up list. He stated that he would never go to the overtime sign-up list before the on call list. He did state that sometimes he would ask a year around employee to hold over if they happened to be there when the hours became available.

In analyzing the contract language, when it is silent and/or ambiguous as mentioned above, I must look to the contract language as a whole and the common practice. The hours in question in this case are daily assignment hours. The union business agent, Jay Ubelhart, confirmed that the hours were an "on call" shift. There is no dispute that the hours were daily assignment hours. The contract provision that addresses daily assignments is in Appendix B, Rule 1.06 (B) (2).

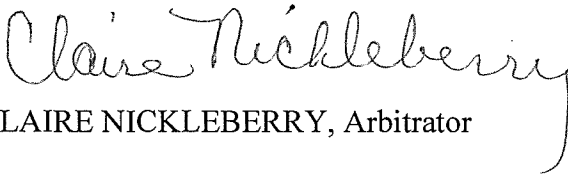
In a previous arbitration award regarding a grievance filed by John McElhose, the on call employee who worked the shift in dispute, the arbitrator states that McElhose, was called and offered the shift the morning of July 10, 2012. That being the case, I believe the applicable rule would be Appendix B, Rule 1.06 (B) (2) (b), which allows the supervisor discretion to fill the shift with the most senior available unassigned part-time or on call employee. That also seems to reflect the practice described by Vogt.

The union contends that the hours were overtime hours because the McElhose arbitration awarded the grievant overtime for those hours. Actually the arbitrator in that case awarded overtime for the fact that McElhose worked forty-four hours in that week, not because he worked four hours on July 10, 2012. McElhose did not reach the overtime threshold until the end of the work week.

AWARD

Based on the foregoing, and the record as a whole, it is the award and decision of the undersigned that the grievance of Jerry Manes is DENIED. The employer did not violate the collective bargaining agreement when on July 10, 2012, it assigned the 2:30 P.M. to 6:30 P.M. work shift to an on call employee rather than year around employee Jerry Manes.

ISSUED at Olympia, Washington, this 6th day of June, 2014.


CLAIRE NICKLEBERRY, Arbitrator