

Before Arbitrator Emily Hall

MARINE ENGINEERS' BENEFICIAL)	
ASSOCIATION,)	
)	
Union,)	
)	FMCS Case No. 220725-07931
and)	Grievance No. 22-01
)	
WASHINGTON STATE DEPARTMENT)	
OF TRANSPORTATION/FERRIES)	
DIVISION,)	
)	
Employer.)	

For the Employer:

Elizabeth Delay Brown
Senior Counsel, Labor & Personnel Division
AG of Washington

For the Union:

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Hearing Date: April 26, 2023

Hearing Location: Zoom Platform

INTRODUCTION

Washington State Department of Transportation, Ferries Division (“State” or “Employer”), and the Marine Engineers Beneficial Association (“Union”) are parties to Collective Bargaining Agreements for Licensed and Unlicensed Engineers (“Contracts” or “Agreements”). The Union filed a grievance on February 9, 2022, alleging violations of the Licensed and Unlicensed Agreements after the Employer denied overtime compensation to Grievants Chris Schneider and Blaise Armstrong. They were scheduled for twelve-hour, ten-minute watches, and surpassed the threshold of four overtime hours by ten minutes on the seventh day of their watch. The Union claims the employees were entitled to twelve minutes of incremental overtime pay. The Employer argues the Agreements both provide that the final ten minutes of the scheduled twelve-hour, ten-minute watch are supposed to cycle per Section 9(k)(5) of the Agreement. The Employer argues time worked over twelve hours in a shift scheduled for up to twelve hours and thirty minutes is cycled to shifts scheduled for less than twelve hours during an eight-week period. The parties were unable to resolve the grievance through the grievance resolution process of the Agreements. The matter was set for arbitration.

At the hearing, the parties presented opening statements, evidence, and testimony, and submitted post-hearing briefs. The hearing was transcribed.

BACKGROUND AND TESTIMONY

The Union began its case with the testimony of Grievant Chris Schneider. Grievant Schneider began working for Washington State Ferries in 2011 and is a chief engineer. He is currently assigned as the alternate staff chief on the vessel *Issaquah*. Grievant is the licensed engineer representative on the safety committee, serves as an alternate on the maintenance management committee, and is on the vessel familiarization committee. He has been a shop steward and on the negotiating committee for almost his entire employment with the State.

Grievant explained his work schedule as an engineer on a vessel in the ferry system. A work period is defined as a two-week period in which employees work seven days on and seven days off. Employees alternate between day shifts and night shifts, working seven day shifts followed by seven days off, then seven night shifts followed by seven days off. The employees then repeat the cycle. Each shift is roughly 12 hours, but due to the

nature of transportation, the shifts are not always evenly divided into 12 hours. Grievant described a long watch week as having shifts longer than twelve hours, varying from twelve hours and ten minutes up to twelve and one-half hours. A short watch week would have eleven-hour and fifty-minute shifts if the long watch was twelve hours and ten minutes, or eleven hours and thirty minutes if the long watch was twelve hours and thirty minutes.

Grievant stated he typically would work up to 87.5 hours in a long watch week, and the corresponding short watch week would be 80.5 hours. A watch week with 12 hours and zero minutes would be an 84-hour work week. Grievant testified the schedule is set for eight weeks at a time, but is always subject to change.

Grievant described the dispute that gave rise to the grievance as how employees are paid for time worked beyond twelve hours on the seventh day.

So we work normally 12 hours and the first 8 hours we're paid at straight time, 4 hours overtime from 80 to 84 hours, and then time worked beyond that is the time that's in question.

Grievant believes the contract is clear that employees should be paid at the overtime rate, but that employees have not been paid that way in all circumstances.

So the circumstances were: It was the 7th day of our regularly assigned workweek, we had worked a --we were scheduled a 12-hour-and-10-minute watch which we had worked; we -- I submitted for 8 hours straight time, 4 hours overtime, and then 10 minutes of overtime at the 6-minute increment rate, and I had been denied pay for the incremental overtime for the last 10 minutes of that shift.

Grievant stated Section 9(i)(3) of the Licensed Engineers Agreement is clear and states time worked beyond the mandatory 4 hours of overtime between 80 and 84 hours should be paid at the incremental rate.

Grievant's shift for December 21, 2021, was from 6:20 am to 6:30 pm, a long watch of twelve hours and ten minutes. Grievant submitted his timecard for December 21, 2021, with four hours of overtime from 2:20 pm to 6:20 pm, with the code 4M for mandatory overtime. Grievant marked the last ten minutes of his shift as non-cyclable overtime, which is paid in six-minute increments. He testified the State did not approve his timecard as submitted, changing 2:20 to 2:30 pm to cyclable overtime, and 2:30 to 6:30 pm to mandatory overtime.

Grievant explained the process for engineers to submit their timecards. Beginning in March 2021, the State switched from a paper-based timecard system to a web-based platform called DOT Time. DOT Time is an online system in which employees log in to their accounts to enter their time. Before March 2021, employees would enter their time on a fillable PDF and either mail or email the form to the payroll office.

Following the introduction of DOT Time in March 2021, Grievant testified on two other occasions he had claimed, and been paid for, overtime worked more than twelve hours on the seventh day. On April 13, 2021, Grievant was scheduled for a twelve-hour and ten-minute shift, 4:55 am to 5:05 pm. He claimed straight time for the first eight hours of the shift, 4:55 am to 12:55 pm, followed by four hours of mandatory overtime. He then submitted ten minutes of overtime from 4:55 to 5:05 pm with a code of 88 because it was a twelve-hour, ten-minute watch. Grievant also claimed unscheduled overtime with a code of 59 from 5:05 pm until 5:41 pm, 36 minutes total. According to Grievant, code 59 means Vessel Off-Schedule (VOS), and employees receive compensation for VOS when poor weather, delayed off-loading, and other delays result in employees being held beyond their regularly scheduled hours.

On May 11, 2021, Grievant was scheduled for a twelve-hour, ten-minute watch, from 5:00 am to 5:10 pm. He submitted for straight time from 5:00 am to 1:00 pm, four hours of mandatory overtime from 1:00 to 5:00 pm, and then overtime with a code of 88 from 5:00 to 5:10 pm. Grievant was paid for his entries on May 11, 2021.

On cross-examination, Grievant described cycle time. Cycle time applies to the first 80 hours in a workweek, and occurs over an 8-week period. Time in the workweek beyond the 80 hours of straight time, and before the 4 hours of mandatory overtime, is put into the bucket of time to be cycled within the 8-week cycle period. At the end of 8 weeks, the goal is to have 320 hours worked. The short watches and the long watches are averaged out so that the employee receives 320 hours of straight time. The employee is paid overtime at the end of eight weeks if he has over 320 hours. Grievant acknowledged multiple entries for cycle time earned in his payroll records.

The Union next called Jeff Duncan, the Seattle Branch Agent for the Union. After working for Washington State Ferries from 1999 to 2005, Mr. Duncan began working for the Union as a representative, later becoming a patrolman. He has been the branch agent since 2014 and is involved in contract enforcement, day-to-day operations at the union

hall, and contract negotiations. He has participated in contract negotiations since the 2003-2005 bargaining cycle.

Mr. Duncan testified during the 2011-2013 bargaining cycle, the overtime provisions in Section 9(i) (3) were bargained down from double time to time and a half. According to Mr. Duncan, a local news story in 2010 called "Waste on the Water" targeted Washington State Ferries:

[The reporter had] done an exposé, a multipart exposé called Waste on the Water which was targeted at Washington State Ferries. So in that bargaining cycle, we got through our collective bargaining, and once we were finished, the legislature came back into session, and in the Senate transportation committee, bills began to be dropped that would have limited our ability to collectively bargain just about everything in the CBAs. So we went back to the bargaining table with the state to address the issues the legislature had with our CBAs. For instance, at the time, our overtime was paid at double time. We bargained that down to time-and-a-half in this cycle because that's -- that's what the legislature was coming with. So, you know, we kind of bargained with a gun to our head to address all of the issues that the transportation committee had, and the governor said that she would sign whatever came out of that committee.

Mr. Duncan stated the language in Section 9(i)(3) changed from the 2009-2011 Agreement to the 2011-2013 agreement because the state insisted on adding language for incremental overtime. Otherwise, according to Mr. Duncan, on the last day of the workweek, once an employee was into his four hours of overtime, anything in excess would have been hour-for-hour overtime. The language has not changed since the 2011-2013 agreement. Mr. Duncan described how he understood Section 9(i)(3) to operate:

So this is how we deal with the 7th day of the work -- of the workweek, the typical workweek. So once you've reached your 80-hour threshold and now you've done your 4 hours of overtime, how do we deal with any excess time beyond that. And that's what this section deals with, is once we've reached that -- the 80 hours and the 4 hours of mandatory overtime, how do we deal with any extra time.

He stated employees could not have been claiming overtime for days one through six, because those are cycle days, but that day seven is always entered as eight hours of straight time followed by four hours of overtime.

On cross-examination, Mr. Duncan testified that generally, cycle time is designed to balance out short watches and long watches. When asked what Section 9(i)(3) applies to, Mr. Duncan replied it applied to the excess hours on the seventh day. According to

Mr. Duncan, day seven is always eight hours into the cycle bank, but since the employee will already be on overtime at the end of the seventh day, it should be paid as overtime.

Following the testimony of Mr. Duncan, the Union rested.

The State called Eben Phillips, deputy director of vessel engineering for Washington State Ferries. Mr. Phillips is responsible for the maintenance and preservation of the 21 Washington State Ferries and the 406 licensed and unlicensed engineers operating the vessels. He is also responsible for the vessel shipyard and its 130 employees, and the 70 persons on the engineering staff at the headquarters office. He has participated in two bargaining cycles, 2021-2023 and 2023-2025. During both of those bargaining cycles, there was no change to the definition of cycle time in the Agreements,

Mr. Phillips explained the 8-week, 320-hour cycle period. This period consists of a combination of long and short watches, and four weeks off. He explained the nature of the vessel operational schedules makes dividing the watches into twelve hours difficult. In making the schedule, they must comply with contract requirements to “have the relief between 5 and 9 a.m. and 5 and 9 p.m.” A long watch week, according to Mr. Phillips, will never have a day scheduled for over twelve hours and 30 minutes, in compliance with Coast Guard standards. A typical short-watch week would be scheduled for less than twelve-hour days.

On cross-examination, Mr. Phillips testified employees are paid every two weeks. They are paid for the straight time and overtime they are owed, but some of the cycle time could carry beyond that pay period.

The State next called Molly Merrikan, the auditor for the engine room time sheets. Before holding this position, Ms. Merrikan was the engine room payroll processor for six and a half years. Ms. Merrikan stated she is very familiar with the collective bargaining agreements for both licensed and unlicensed staff, and very familiar with the concept of cycle time. Ms. Merrikan helped to develop the current payroll system, DOT Time, which replaced the cycle time logs and timesheets previously used by payroll. The program has rules in place to help employees input time and comply with the contract.

Ms. Merrikan described the engine room schedules, which divide the 24/7 operation into long and short watches. At the end of eight weeks, the employee should have an equal number of short and long shifts, which balance each other equally to 320 hours. According to Ms. Merrikan, it is technically 336 hours but “we’re all in agreement

that 16 hours of that is being paid at the overtime rate; even though it's part of their scheduled shift." If an employee is scheduled for a twelve-hour, ten-minute shift, each day they put the twelve hours and ten minutes down as straight time, with four hours of mandatory overtime at the end of the week. Ms. Merrikan stated it is inaccurate that the seventh day will always be recorded as eight hours:

As the person who reviews the cycle time log, if a watch is scheduled for 12 hours and 10 minutes on that final day, I would always expect to see this one include those 10 minutes. Because as you'll see on the short week watch, we don't record 8 hours there either...So in this example, I've put 12-hour-and-10-minute watches and 11-hour-and-50-minute watches just to be the closest to the grievance that was submitted. They have -- this is the short week where they have 11 hour and 50 minutes scheduled each day. Final day, they're still scheduled for 11 hours and 50 minutes, but we know they're getting paid 4 hours overtime, so we put this as 7 hours and 50 minutes instead.

Ms. Merrikan explained what would happen if an employee claimed ten minutes of unscheduled overtime for Vessel Off-Schedule, for instance, on a day when the employee was scheduled for twelve hours and ten minutes. The employee would record the twelve hours and ten minutes of their scheduled time. The employee would separately record and be paid for the Vessel Off-Schedule unscheduled overtime during that pay period.

Ms. Merrikan clarified the concept of a cycle bank. If an employee is scheduled for long watches that are over twelve hours, but under twelve hours and thirty minutes, the extra time worked beyond twelve hours is put into the cycle time bank. The employee is paid for 12 hours of straight time, and the ten extra minutes are placed into the cycle time bank. If an employee is scheduled for short watches that are under twelve hours, then minutes are deducted from the cycle bank. An employee scheduled for eleven hours and fifty minutes will be paid for twelve hours of straight time, but ten minutes is deducted from the cycle bank. If there is no bank balance, the employee will have a negative balance. The balance increases and decreases depending on whether the employee works long or short watches.

At the end of the eight-week cycle period, payroll reviews the cycle bank balance. If there is a zero balance, the employee worked 320 hours, and nothing happens. If there is a positive balance, the employee is paid overtime in one-hour increments, whether the positive balance is ten minutes or three hours. If the employee has a negative bank balance, which means they worked mostly short-watches, the employee was still paid for

320 hours even though they technically worked less than 320 hours. The bank balance is reset to zero, and no time or overpayment is recouped, because the parties agreed that employees will be paid 320 hours.

Ms. Merrikan explained the term “scratched,” which is also sometimes called “redlining.” When an employee has submitted something on their timesheet that either payroll or the auditor determines not to be payable, the timesheet is adjusted. Ms. Merrikan recalls processing Grievant Schneider’s payroll for December 2021, including scratching the 10 minutes he submitted for overtime. According to Ms. Merrikan, since Grievant was scheduled for a watch lasting twelve hours and ten minutes, she scratched the ten minutes to cycle:

...he had been paid for 8 hours of straight time...That's hours paid at the straight-time rate of pay. So he had been paid for the beginning of the shift from 6:20 a.m. to 2:20 p.m., he was paid for 8 hours of straight time pay; and then from 2:20 p.m. to 2:30 p.m. he had 10 minutes...so that 10 minutes went into the cycle time earned. So that 10 minutes went into the cycle time bank to be calculated later at the end of the 8-week period, and then he was paid for the mandatory 4 hours of overtime on that day for being -- for working 84 hours.

On cross-examination, Ms. Merrikan was asked about an email she received from Grievant Schneider in 2020 concerning cycle time. Ms. Merrikan admitted she did not have as thorough an understanding of cycle time when she responded to the email and should have verified her answer with the port engineer's office before responding as payroll. She was part of the team that developed the DOT Time online payment system and consequently became more familiar with the system:

So basically what I was a part of, was the team that reviewed each and every rule of the contract. We had -- anything that wasn't already established, we had negotiated with labor relations with MEBA. There were a few rules that did involve that. And I think -- I don't know for sure, I believe one of the exhibits is one of the rules between -- one of the e-mails between labor relations and Eric Winge at MEBA that occurred shortly after DOT Time. I think that one of the exhibits is, but I'm not quite sure.

Ms. Merrikan explained unscheduled overtime would trigger Section 9(i)(3) overtime pay in six-minute increments. After DOT Time was implemented in March 2021, there were many exchanges between the State and the Union concerning the system.

On re-direct, Ms. Merrikan testified concerning emails she exchanged with Union official Eric Winge in March 2021. In the exchange, Mr. Winge stated:

On the issue of cycle time, I want to make sure I understand you correctly. When a watch is scheduled for 12 hours and 30 minutes on their 7th day and the vessel is off schedule (VOS) by 5 minutes, some employees are putting in for 36 minutes of overtime instead of cycling the 8 hours and 30 minutes and putting in for 6 minutes of VOS overtime? If that is what you are saying then yes, that last 30 minutes should cycle. This applies to permanent employees per Appendix B, Rule 1.04(c).

In these emails, Ms. Merrikan confirmed Mr. Winge was correct in his understanding, and admitted this contradicted the guidance she had given to Grievant Schneider in 2020:

When we had to sit down and look at every single rule, we had to spend a very large amount of time on cycle time because the contract has very little information on the day-to-day basics of how cycle time actually works. I had to learn a lot about it. I learned a lot of it from the port engineers who -- I don't know if all of them at the time, but a lot of them had worked under MEBA either licensed or unlicensed, and they explained it to me a lot better, and that's in part how we ended up developing the system how we did, which matches what Eric says here. Because we also then verified between labor relations and MEBA that we were all in agreement that that's how the system should be set up.

On re-cross, Ms. Merrikan stated Eric Winge emailed again several months later, in which he rescinded his previous statement.

Following Ms. Merrikan's testimony, the State rested.

ISSUE

Whether the Employer violated Section 9(i)(3) of the Licensed Engineer Agreement and Rule 1.04(c) of the Unlicensed Engineer Agreement when it did not pay overtime for time worked in excess of 12 hours on the employee's seventh day of the workweek. If so, what is the appropriate remedy?

RELEVANT CONTRACT PROVISIONS

Licensed Engineers Collective Bargaining Agreement, Section 9—Hours

Licensed Engineers Collective Bargaining Agreement, Section 23-Grievance Procedure

Unlicensed Engineers Collective Bargaining Agreement, Appendix B, Rule 1- Hours of Employment, Overtime and Assignment

Unlicensed Engineers Collective Bargaining Agreement, Rule 16-Grievance Procedure

POSITIONS OF THE PARTIES

The Union

The Union argues the language of the contract dealing with overtime is clear, and the language must be given its plain meaning. Section 9(i)(3) and Rule 1.04 (c) of the Agreements both state

Time worked beyond the extra four hours will be paid at the overtime rate of pay in six (6), twelve (12), eighteen (18) ... minute increments.

The dynamic operational nature of the Employer's ferry operation is governed by a bargained-for framework, in which the parties agree that Engineers who work the seven-day-on, seven-day-off eighty-four-hour workweek schedule will be paid eighty straight time hours and four overtime hours. This is true regardless of whether employees work the short watch week or the long watch week. The Union argues the Agreements require that any time worked past the four hours of overtime on the seventh day of the shift be paid as incremental overtime.

The Union argues the Employer breached the Licensed Agreement Section 9(i)(3) and the Unlicensed Agreement Appendix B, Rule 1.04(c) when it denied the Grievants' claim for overtime compensation. Both employees were scheduled for a twelve-hour, ten-minute watch. On the seventh day of their schedule, this included eight hours of straight time, four hours of overtime, plus ten additional minutes. The employees logged their ten additional minutes as overtime. The Employer changed the final ten minutes of their December 21, 2021, watch from overtime to "Cycle Time Earned."

The Union refers to the unrebutted testimony of MEBA Seattle Branch Agent Jeff Duncan. Mr. Duncan explained the change in the language of the Agreement in its 2011-2013 iteration, following a 2010 news exposé called "Waste on the Water." Mr. Duncan testified the parties modified the language in Section 9(i)(3), adding incremental overtime language because the Employer was concerned that time worked beyond the eighty-four-hour workweek would be payable in one-hour increments under Section 6(f). According to the Union, the bargaining history confirms the second sentence of both provisions was intended to be triggered when an Engineer works beyond the 84-hour threshold of the scheduled workweek.

The Union also points to past practices by the Employer in support of their argument. In Employer Exhibit 9, the Union identified two separate instances under circumstances they argue are identical to the December 21, 2021 shift. The Employer paid Grievant Schneider following his claim for incremental overtime pay on both April 13, 2021, and May 11, 2021.

The Union acknowledges the concept of cycle time is relevant to explaining the Employer's dynamic operation and the need to balance out long and short watches. However, the Union argues Section 9(k)(5) and Rule 1.26, which describe cycle time, are void of any language which governs how time worked over 12 hours on the employee's seventh day is to be accounted for and compensated. In fact, in both those sections, the final sentence confirms that overtime is not considered cycle time. The Union contrasts these sections with the language in Sections 9(i)(3) and Appendix B, Rule 1.04(c), which the Union describes as clear and unambiguous. According to the Union, these sections trigger incremental overtime after the twelfth hour on the seventh day, and the Employer's argument fails to reckon with the interplay of these two provisions.

The Union also criticizes the reliance of the Employer on the testimony of a single payroll auditor, Molly Merrikan. Ms. Merrikan testified she participated in the rollout of the Employer's new DOT Time timekeeping program, which debuted in March 2021. However, Ms. Merrikan was not present during the negotiations which led to the current versions of Section 9(i)(3) and Rule 1.04(c). She admitted she gave Grievant Schneider contrary guidance in August 2020. The Union argues her testimony should be given little weight.

Finally, the Union argues if the Employer's imprecise cycle time argument is adopted, it renders the second sentence of both Section 9(i)(3) and Rule 1.04(c) meaningless. The Employer offers a generalized cycle time argument and offers the example of vessel off schedule (VOS) as a circumstance in which overtime payment in the six-minute increment would be applicable. The Union argues this underscores the weakness of the Employer's argument, as VOS overtime payment is an entirely different set of circumstances than what is at issue in this grievance.

The Union requests the Arbitrator sustain the Grievance and issue an appropriate remedial order finding the Employer breached the Agreement, order the Employer to cease its wrong interpretation, and order a make whole remedy.

The Employer

The Employer presents the issue as whether the cycle time provisions of the Agreements were correctly applied to Grievants' claimed ten additional minutes of overtime on December 21, 2021. The Employer argues the ten additional minutes were correctly categorized as cycle time, and the payroll staff properly scratched the Grievants' claim for incremental overtime. It does not matter which week in the eight-week cycle the employee is in for the determination of cycle time and whether the time goes into the cycle bucket or gets paid out as incremental overtime.

According to the Employer, the Union incorrectly cites the Agreement provisions applicable to the grievance. While the Union admits that cycle time applied to Grievant's schedule in December 2021, they attempt to carve out an exception. The State claims the Union incorrectly argues the seventh day at the end of the eight-week cycle is a stationary part of the work schedule and is always entered as eight hours of straight time and four hours of overtime. The Union argues any additional time worked past those four hours of scheduled overtime should be paid out as incremental overtime. However, the Union also presented testimony through Mr. Schneider which refers to both cyclable and non-cyclable overtime. Vessel off-schedule (VOS) and other types of unscheduled overtime are examples of non-cyclable overtime. Mr. Schneider explained the concept of the cycle bucket, in which time is "kind of thrown into a bucket" and at the end of eight weeks, the short and long watches average out to 320 hours. Mr. Schneider stated at the end of the eight-week cycle, any time that the employee has over 320 hours is paid as overtime.

The State argues the Union's theory does not account for the cycle bank concept, and that the Union fails to consider the entire Agreement. Section 9(a) and Appendix B, Rule 1.01 state that normal watch schedules will be arranged so employees do not work more than eighty hours per two-week period, plus four hours of mandatory overtime. Section 9(c) and Appendix B, Rule 1.02 both state:

Overtime shall be payable, pay period by pay period, for time worked beyond the scheduled shift[,] and overtime shall be payable, pay period by pay period, for time continuously worked beyond twelve and one-half (12 1/2) hours.

Section 9(k)(5) and Appendix B, Rule 1.26 both state:

The term “cycle time” refers to the recording of hours to account for scheduled deviations in the length of watches due to a vessel’s operational schedule. Vessel schedules do not always permit a 24-hour day to be divided evenly into 12-hour watches thereby causing Engineer Officers/employees to alternate between an equal number of short and long watches. Cycling occurs when a permanent Engineer Officer/employee works long and short watches over an eight (8) week, three hundred twenty (320) hour cycle period. The scheduled long watches of twelve and one half (12 1/2) hours or less are offset by the short watches to equal three hundred and twenty (320) hours over the eight (8) week cycle period. Cycle time does not include any overtime otherwise recorded on a weekly timesheet.

The Employer explains all the language in the contract must be considered together to understand the concept of cycle time and how overtime is appropriately calculated. The purpose of cycle time is to even out the number of short and long watches worked over an eight-week cycle to equal 320 hours total. The Employer explained how the employees are to be compensated for scheduled and unscheduled overtime:

A long watch will be 12 and a 1/2 hours or less. Overtime is payable when an employee works beyond 12 and 1/2 hours. Overtime is also payable if an employee works beyond 84 hours in a work week (80 hours straight time plus 4 hours of overtime). If an employee covered by these two CBAs works less than 12 1/2 hours in a workday and/or if they work less than 84 hours in the workweek, they are not eligible for overtime; however, their time does cycle. Therefore, [Grievants] were compensated correctly when their requested time from December 21, 2021, was cycled rather than paid as overtime.

The Employer also argues the Union, who bears the burden, fails to prove the contract was violated. The Union admitted that the term “cycle time” in the Agreements does not call out different days in the cycle for different treatment. The Union’s theory does not account for the cycle bank concept, which cannot be captured in one section of contract language. The Union’s position that incremental overtime should be paid on day seven for work over twelve hours is unsupported by any provisions in the Agreements. The Employer requests the grievance be denied.

ANALYSIS

In a contract interpretation grievance, the burden is on the party asserting the violation of the contract to prove the violation. Here, the Union bears the burden on the substantive issue of the grievance: whether the Employer violated Section 9(i)(3) of the Licensed Engineer Agreement and Rule 1.04(c) of the Unlicensed Engineer Agreement when it did not pay overtime for time worked in excess of twelve hours on the employee's seventh day of the workweek?

The Agreements contain several provisions which pertain to the payment of overtime. The language in both Agreements is identical. The various provisions must be taken in the context of the complete agreement. The parties both agree that the concept of cycle time exists and that the combination of long and short watches over eight weeks averages out to 320 hours of straight time and sixteen hours of mandatory overtime. The parties also agree that unscheduled overtime, such as Vehicle Off-Schedule, is paid in incremental amounts per section 9(i)(3) and Appendix B Rule 1.04(c) of the Agreements. The question is whether the scheduled overtime on the seventh day of a long watch week is treated as incremental overtime, or is placed into the cycle bank.

The Cycle Bank

The Agreements establish an eighty-hour per two-week schedule. Section 9(a) of the Licensed Agreement states:

The eighty (80) hours per two (2) week period is hereby established. For all practical purposes, eight (8) or twelve (12) hours shall constitute one (1) day's pay. No one who is a permanently employed Engineer Officer shall receive less than eighty (80) hours pay per two (2) week period. The Employer agrees that a scheduled work day constitutes either the eight (8) or twelve (12) hour day which will be adhered to depending upon the vessel's schedule. Normal watch schedules will be arranged so that Engineer Officers do not work in excess of eighty (80) hours per two-week period, plus four (4) hours of mandatory overtime necessitated by the seven (7) day work week.

Grievant Schneider, Mr. Duncan, and Mr. Phillips testified concerning the scheduling of watches. The evidence shows short watches are scheduled for under twelve hours and long watches are scheduled for over twelve and up to twelve and one-half hours. Alternating long and short watches best supports vessel operations and makes it easier to comply with Coast Guard regulations for watch turnover. All three witnesses, as well as

auditor Ms. Merrikan, testified the goal of long and short watch assignments is to average out to 320 hours of straight time over eight weeks. The cycle bank is used to store the time over twelve hours on scheduled long watches.

Per the Agreements, and the testimony of Ms. Merrikan, employees receive pay for 80 hours of straight time and four hours of scheduled overtime each pay period regardless of whether the employee is on a short watch or a long watch. Pay periods are every two weeks, and it is undisputed that unscheduled overtime is paid out in the period earned. Section 9(c) of the Licensed Agreement states:

c) Overtime shall be payable, pay period by pay period, for time worked beyond the scheduled shift and overtime shall be payable, pay period by pay period, for time continuously worked beyond twelve and one-half (12½) hours.

The Agreements specifically refer to paying overtime in each pay period for time worked “beyond the scheduled shift” and for time “continuously worked beyond twelve and one-half” hours.

The Agreements explain the term “cycle time” and how employees alternate between long and short watches. Ms. Merrikan testified at length concerning the cycle bank and the payment of employees. Section 9(k)(5) and Appendix B Rule 1.26 both state:

The term “cycle time” refers to the recording of hours to account for scheduled deviations in the length of watches due to a vessel’s operational schedule...Cycling occurs when a permanent Engineer Officer/employee works long and short watches over an eight (8) week, three hundred twenty (320) hour cycle period. The scheduled long watches of twelve and one half (12 1/2) hours or less are offset by the short watches to equal three hundred and twenty (320) hours over the eight (8) week cycle period. Cycle time does not include any overtime otherwise recorded on a weekly timesheet.

For long watch weeks, on days one through six, the time worked each day beyond twelve hours is not in dispute. The parties agree that time goes into the cycle bank. The parties disagree on the payment of overtime for the seventh day of a work week on a long watch.

The Union relies on Section 9(i)(3) and Rule 1.04(c) of the Agreements, which both state:

Time worked beyond the extra four hours will be paid at the overtime rate of pay in six (6), twelve (12), eighteen (18)...minute increments.

According to the Union, this entitles employees to incremental overtime on the 7th day for time worked beyond their four hours of mandatory overtime.

On December 21, 2021, at the end of their long watch week, both grievants had already worked six twelve-hour and ten-minute shifts. On those first six days, the ten minutes beyond the first twelve hours of their scheduled shifts went into their cycle bank accounts, to be redeemed during a short watch week.¹ On the seventh day, they submitted their time sheets to reflect eight hours of straight time, four hours of mandatory overtime, and twelve minutes (two six-minute increments, to account for the ten other scheduled minutes) of additional overtime. Since Section 9(i)(3) and Rule 1.04(c) of the Agreements state “[t]ime worked beyond the extra four hours will be paid at the overtime rate,” the Union argues that the seventh day of the long watch week should be treated differently than the first six days. On the seventh day, the Union argues employees always enter eight hours of straight time, four hours of mandatory overtime, plus incremental overtime for anything over twelve hours. However, this argument does not take into account all the sections on scheduled and unscheduled overtime and cycle time in the Agreements.

Construing the Agreements as a Whole

Section 23.1(d)(1) of the Licensed Agreement states the arbitrator will “have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this Agreement.” In construing the contextual meaning of the various sections of the Agreements, it must be presumed that the words used in the contract have meaning, and further, that they were not intended to be in conflict.² A specific provision will prevail over a general provision, but it is not required that one provision be found to trump another. An interpretation that avoids conflict between provisions is preferred, especially if one interpretation would render another section meaningless. The sections concerning

¹ Per the testimony of Ms. Merrikan, if an employee had a negative balance in his cycle bank account because he had first worked short watches during the same eight-week period, then the time beyond twelve hours for their scheduled watches would replenish their cycle bank balance. At the end of the eight weeks, any negative balance would be zeroed out, and any positive balance would be paid out as overtime.

² “All words used in an agreement should be given effect. The fact that a word is used indicates that the parties intended it to have some meaning, and it should not be declared surplusage if a reasonable meaning can be given to it *consistent with the rest of the agreement*.” *Armstrong Rubber Co.*, 87 LA 146, 150 (Bankston 1986)(emphasis added). *See also* *New Brunswick (Department of Natural Resources) v. Pinder* (2012), 222 L.A.C.(4th) 1 (N.B. C.A.); *U.F.C.W. Local 401 v. Real Canadian Superstore* (2008), 172 L.A.C. (4th) 289 (ALTA, C.A.).

the scheduling of watches or shifts, payment of scheduled and unscheduled overtime, and the concept of cycle time must all be considered together.

The Union argues the plain language of the Licensed and Unlicensed Agreements, in Section 9(i)(3) and Rule 1.04 (c), respectively, require payment of incremental overtime for any time worked over twelve hours on the seventh day of a long watch week. The Union also offered testimony of Mr. Duncan concerning the negotiation of the 2011-2013 Agreements. The Union argues the addition by the State of incremental overtime provisions during that round of collective bargaining shows the intent of the parties. According to the Union, the second sentence of both provisions “was intended to be triggered” when an employee works beyond the 84-hour threshold of his scheduled workweek. However, this interpretation conflicts with Section 9(c), which states:

c) Overtime shall be payable, pay period by pay period, for time worked beyond the scheduled shift and overtime shall be payable, pay period by pay period, for time continuously worked beyond twelve and one-half (12½) hours.

This section provides for overtime to be paid for time worked beyond the *scheduled* shift, and to be paid overtime for time worked continuously beyond twelve and one-half hours. The evidence shows the parties understood, during the bargaining process, that scheduled shifts on a long watch week may be up to twelve and one-half hours. There is no special exception for the seventh day of a long watch week.

This interpretation of paying incremental overtime on the seventh day of a long watch does not account for the provisions of the Agreements and the evidence presented by the parties concerning cycle time. The evidence shows the parties partially agree concerning deposits and withdrawals of time into the cycle bank over eight weeks. The language in the Agreements concerning cycle time, Section 9(k) in the Licensed Agreement and Paragraph 1.069b) of Appendix B in the Unlicensed Agreement, both explain how long watches are offset by the short watches. The time that is cycled “does not include any overtime otherwise recorded on a weekly timesheet.” In other words, *unscheduled* overtime is not cycled and is paid in the pay period earned. As stated in Section 9(c), overtime is payable beyond the *scheduled shift*, beyond up to twelve and

one-half hours of *scheduled* time. Paragraph 1.06(b) of the Unlicensed Agreement states the following:

In scheduling of employees under this Rule, Employee Work Schedules for any vessel may be arranged so as to result in an average of eighty-four (84) hours per two (2) week period during a scheduling cycle of not more than four (4) two (2) week periods (eight [8] calendar weeks), provided, however, such schedules shall not result in a normal expectancy of overtime for employees. If a schedule violates this principle, overtime shall be paid for excess hours. **Overtime shall not be payable for normal work time under such schedules, but shall be paid whenever employees perform work in excess of the scheduled hours in accordance with Rule 1.01, Appendix B.** [emphasis added]

Paragraph 1.06(c) of the Unlicensed Agreement states:

Employees shall be paid for eighty (80) hours per two (2) week work schedule; but shall report the actual number of hours and minutes worked. All straight-time hours and minutes actually worked shall be cycled as part of the current cycling period.

The language of the Agreements takes into account the fact that an employee may have a long watch shift scheduled for up to twelve and one-half hours and provides that any *unscheduled overtime* beyond their scheduled shift shall be paid in incremental, six-minute amounts. Other than the four hours of scheduled overtime each week the scheduled watches are considered straight-time hours and minutes which “shall be cycled.”

The parties agree that employees are guaranteed to be paid for 80 hours of straight time and four hours of overtime in each two-week pay period, regardless of whether they are scheduled for a short or long watch. The evidence shows the time over twelve hours for a scheduled shift on a long watch week should go into the employee’s cycle bank account, whether it is the first or seventh day of the watch. The evidence also shows the State pays employees 320 hours of straight time and sixteen hours of overtime over an eight-week period, and if the employee has worked mostly short-watch weeks, the employee is never penalized. The negative balance in the cycle bank account is zeroed out, while a positive balance at the end of eight weeks is paid as overtime. There is no special exception for the seventh day of a long watch week. To conclude

otherwise would be to negate the concept of cycle time, which the Union has not shown it bargained for.

Employer versus Union Watch Math

Consider an eight-week period in which an employee is scheduled for two short watches (eleven-hour and fifty-minute watches) and two long watches (twelve-hour and ten-minute watches). No unscheduled overtime was earned. Each pay period, the employee is guaranteed to be paid 80 hours straight time and 4 hours overtime. The Employer's calculation would be as follows³:

Week 1: Short Watch

Seven (7) eleven-hour and fifty-minute shifts. Days 1 through 6 are submitted as 11:50 straight time. Day 7 is submitted as 7:50 straight time and four hours overtime. Ten minutes each day are subtracted from the Cycle Bank Account.

Cycle Bank Account= -70 minutes.

Week 2: Off week

Week 3: Long Watch

Seven (7) twelve-hour and ten-minute shifts. Days 1 through 6 are submitted as 12:00 straight time and ten minutes of cycle time. Day 7 is submitted as 8:00 straight time and 4:00 overtime, and ten minutes of cycle time. Ten minutes each day are added to the Cycle Bank Account (70 minutes total).

Cycle Bank Account= 0 minutes.

Week 4: Off week

Week 5: Short Watch

Seven (7) eleven-hour and fifty-minute shifts. Days 1 through 6 are submitted as 11:50 straight time. Day 7 is submitted as 7:50 straight time and

³ See Transcript pgs. 89-91.

four hours overtime. Ten minutes each day are subtracted from the Cycle Bank Account.

Cycle Bank Account= -70 minutes.

Week 6: Off week

Week 7: Long Watch

Seven (7) twelve-hour and ten-minute shifts. Days 1 through 6 are submitted as 12:00 straight time and ten minutes of cycle time. Day 7 is submitted as 8:00 straight time and 4:00 overtime, and ten minutes of cycle time. Ten minutes each day are added to the Cycle Bank Account (70 minutes total).

Cycle Bank Account= 0 minutes.

Week 8: Off week

At the end of eight weeks, the employee has been paid 320 hours of straight time, 16 hours of overtime, and the cycle bank account is at zero. The time worked over twelve hours during the long watch weeks was averaged out to 320 hours total by the time worked under twelve hours in the short watch weeks.

The Union argues for the following calculation:

Week 1: Short Watch

Seven (7) eleven-hour and fifty-minute shifts. Days 1 through 6 are submitted as 11:50 straight time. Day 7 is submitted as 7:50 straight time and four hours overtime. Ten minutes each day are subtracted from the Cycle Bank Account.

Cycle Bank Account= -70 minutes.

Week 2: Off week

Week 3: Long Watch

Seven (7) twelve-hour and ten-minute shifts. Days 1 through 6 are submitted as 12:00 straight time and ten minutes of cycle time. Day 7 is

submitted as 8:00 straight time and 4:00 overtime, and twelve minutes of incremental overtime. Ten minutes on days one through six are added to the Cycle Bank Account (60 minutes total).

Cycle Bank Account= -10 minutes.

In addition to being paid 80 hours straight time, and 4 hours overtime, the employee is also paid 12 minutes incremental overtime.

Week 4: Off week

Week 5: Short Watch

Seven (7) eleven-hour and fifty-minute shifts. Days 1 through 6 are submitted as 11:50 straight time. Day 7 is submitted as 7:50 straight time and four hours overtime. Ten minutes each day are subtracted from the Cycle Bank Account.

Cycle Bank Account= -80 minutes.

Week 6: Off week

Week 7: Long Watch

Seven (7) twelve-hour and ten-minute shifts. Days 1 through 6 are submitted as 12:00 straight time and ten minutes of cycle time. Day 7 is submitted as 8:00 straight time and 4:00 overtime, and twelve minutes of incremental overtime. Ten minutes on days one through six are added to the Cycle Bank Account (60 minutes total).

Cycle Bank Account= -20 minutes.

In addition to being paid 80 hours straight time, and 4 hours overtime, the employee is also paid 12 minutes incremental overtime.

Week 8: Off week

If the Union's interpretation was adopted, employees would be paid 24 additional minutes of overtime, and the cycle bank would end in the negative, rather than zero, whenever an employee worked an equal number of short and long watches. As the Employer does not penalize employees for a negative cycle bank balance at the

end of eight weeks, and zeroes it out, the Union's argument would go against the stated goal of the Agreements, to "alternate between an equal number of short and long watches" which offset each other to average 320 hours of straight time.

The State did not violate violated Section 9(i)(3) of the Licensed Engineer Agreement and Rule 1.04(c) of the Unlicensed Engineer Agreement when it did not pay overtime for time worked in excess of 12 hours on the employee's 7th day of the workweek. The State correctly cycled ten minutes of the grievants' scheduled twelve-hour and ten-minute shift on December 21, 2021. Unscheduled overtime has been and should be paid per the Agreements. Scheduled long watch weeks may include, per the Agreements, time worked over twelve hours, up to twelve and one-half hours. The scheduled time over twelve hours should be cycled.

Past Practice

The Union presented evidence of two occasions, in April and May 2021, in which Grievant Schneider was paid incremental overtime for time worked past twelve hours on the seventh day of his long watch week. However, the evidence shows this occurred shortly after the implementation of DOT Time, the new online system. Ms. Merrikan testified there were many exchanges between the Union and the State following DOT Time's implementation. The two occasions the Union offers as evidence of past practice are indicative of an administrative oversight during the transition between a paper-based system and a new, online payroll system. Mistakes by a payroll clerk do not establish a past practice of the State to pay incremental overtime as argued for by the Union.⁴

CONCLUSION

Grievance denied.



Emily Hall, Arbitrator

July 14, 2023

⁴ "Erroneous administrative procedure by one department though carried on for 10 years did not bind the company as a practice where no rational basis for the procedure was shown. US Indus. Chems. Co., 47 L.A 651, 654 (McGury, 1966). Also see Arbitrator Mewhinney in 76 LA 603, 606 (a mistake by a payroll clerk "does not in itself constitute a binding past practice")...Two incidents did not suffice in York Bus Co., 24 LA 81, 87 (Loucks, 1955)." *How Arbitration Works*, Elkouri and Elkouri, pg. 650.