BEFORE THE ARBITRATOR

In the Matter of the Arbitration of a Dispute Between

INLAND BOATMEN'S UNION OF THE PACIFIC

and

FMCS Case No. 190529-07590

STATE OF WASHINGTON (DEPARTMENT OF TRANSPORTATION, FERRIES DIVISION)

Appearances:

Susan Barton, Assistant Attorney General, appeared on behalf of the State and its subdivisions.

Robert Lavitt and Benjamin Berger, Barnard, Iglitzin & Lavitt, LLP, Attorneys at Law, appeared on behalf of the Union.

ARBITRATION AWARD

Inland Boatmen's Union of the Pacific (herein "Union") and State of Washington, Department of Transportation, Department of Ferries (herein as "Employer") jointly selected the undersigned from a panel of arbitrators from a list provided by the Federal Mediation and Conciliation Service to serve as the impartial arbitrator on June 20, 2019, to hear and decide the dispute specified below. I held a hearing in the above matter on December 12, 2019, in Seattle, Washington. The parties each filed post-hearing briefs, the last of which was received December 3, 2019.

ISSUES

The parties stipulated to the following statement of the issues:

1. Did the Employer violate the Collective Bargaining Agreement when it paid AB Relief Employees at the Shore Gang rate of pay rather then the applicable AB Relief rate for work performed on annual vessel inspection at Eagle Harbor and for Shore Gang work performed at Eagle Harbor and/or other locations?

2. If so, what is the appropriate remedy?

FACTS

The Employer is a state agency that operates a ferry system in Puget Sound. The Union is the collective bargaining representative for about 950 employees, including employees in the Deck Department, Terminal employees and the Eagle Harbor

maintenance facility's non-trades employees. The parties have a long-standing collective bargaining relationship.

The bargaining unit includes employees in the classification listed in Rule 17 below. It includes Ordinary Seaman (OS) who are entry level deck employees operating a vessel. The next classification, Able Bodied Seaman (AB), are higher skilled employees who have the requisite number of at-sea days and passed the qualifying test. OS's ordinarily work the passenger cabin whereas AB's ordinarily work the deck. AB's have more important roles in emergencies than OS's. Quartermasters and Bosons are not in the bargaining unit, but there are special pay rates listed below when AB's work in place of Bosons or Quartermasters. The unit also includes employees who are OS or AB Relief employees. There are few OS Reliefs.[1] The AB and OS Reliefs are not assigned to specific vessels. They are guaranteed 80 hours of work per pay period. They fill in for absent employees on various vessels. The relief positions require that the employees be experienced on all vessels operated by the Employer.

The Employer maintains a maintenance facility at Eagle Island. The Shore Gang performs regular maintenance tasks other than those assigned to the trade. They work at Eagle Harbor or as assigned for maintenance work other places. Each vessel must undergo a Coast Guard annual inspection which is ordinarily performed at Eagle Harbor. The inspection requires that each deck employee assist in reviewing each required piece of equipment aboard a vessel to the satisfaction of inspectors.

The parties' prior collective bargaining agreements did not provide a specific wage rate for the AB Relief position. They were paid the AB rate of pay ordinarily with other additional pay. If they substituted for a Quartermaster or Bosun they were paid the AB Bos'n/AB Quartermaster rate specified in Rule 17. The AB Reliefs were paid travel time and mileage for any job they did outside of their home ports. A political situation occurred in which the Employer and other unions who had employees who were paid travel time were forced to reconsider that pay structure. The parties agreed effective with the 2011-13 agreement to eliminate travel time pay and pay a premium called "assignment pay" to AB and OS Relief employees. The assignment pay was a premium of 17.5% (later. 20%) of pay they received for the day at the applicable pay rate (AB, AB Bos'n/Quartermaster). They also received a mileage supplement for their travel expense outside their home port. The assignment was paid even if AB Reliefs worked at their own home port. The purpose of the institution of assignment pay was to average out the travel time pay which had caused the political reaction.

Under Appendix A, Rule 4.02 all of the employees (OS, AB and Reliefs) were paid the Shore Gang pay rate while working at Eagle Harbor. The Shore Gang rate was always higher than the OS and AB rates in Rule 17. The purpose for this provision was to eliminate the incentive to erode the work of the Shore Gang by assigning it to the other employees. Under that system, AB Relief employees who worked at Eagle Harbor received the Shore Gang wage rate. They also received assignment pay at 20% of the Shore Gang rate. They also received mileage. The increase of receiving the Shore Gang

[1] The affected OS Reliefs, if any, are included in the reference to AB Reliefs.

rate over the AB rate always resulted in the AB Relief's receiving a premium over that which they receive when performing other relief work.

The Employer sought to change the way OS and AB Reliefs were paid in the negotiations leading to the 2017-19 agreement (immediately prior agreement.) It took the position that the assignment pay system was too cumbersome for the payroll department because it involved extra computations for each assignment. The parties agreed to eliminate assignment pay and to create two wage rates for the relief employees significantly higher than the non-relief positions, AB Relief and AB Relief -Bos'n/AB-Quartermaster. This was simply a combination of the two rates. The parties reached total agreement as to the entire collective bargaining agreement.[2] The parties had no discussion about how the change would affect AB Relief employees' pay when they worked doing boat annuals. The parties did not make changes to Rule 1.08, Rule 27.11, Appendix A Rule 1.06 and Rule 4.02.

The changed pay structure resulted in the issue in dispute because the Shore Gang wage rate had always been higher than the AB and AB working Bos'n/Quartermaster rates. The new relief rates with the assignment pay "rolled in" were higher than the Shore Gang rate. Thus, the application of Appendix A, Rule 4.02. The negotiators for both sides did not recognize the issue in dispute caused by the roll-in with respect to the application of Appendix A, Rule 4.02.

After the adoption of the 2017-19 agreement, the Employer's payroll department did not address this issue right away. AB Reliefs doing work at Eagle Harbor is a small amount of the work they do. At least some AB Reliefs made payroll entries to be paid at the AB Relief rate of pay rather than the Shore Gang rate of pay. They were then paid the AB Relief rate of pay. In about July 1, 2018, at least some those payroll entries were "redlined" [treated as incorrect] and "corrected" to the lower Shore Gang payrate in the separate auditing department. The payroll department was first notified about this in December 2018. Managers having authority over collective bargaining first learned of this when the grievances were filed herein.

The parties took no action to address the issues in dispute between negotiations for the 2017-19 agreement to those leading to the current agreement. The parties submitted the resolution of their impasse in negotiations for their 2019-21 comprehensive collective bargaining agreement to this arbitrator pursuant to RCW 47.64-300, et seq. (conventional interest arbitration). The hearing in that matter was conducted in August 2018,[3] and award issued September 22, 2018. The Employer proposed a change to Appendix A Rule 4.02 which would have replaced the terms of that provision entirely with the following:

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[2] Similar changes were made for relief position in other collective bargaining units.

[3] During the course of which the parties were forced to submit to the arbitrator's infernal humor. The parties have selected the undersigned to be the interest arbitrator for the successor to this agreement, should that be necessary. Of course, it is assumed that they are highly motivated to resolve that dispute to avoid that infernal humor.

All work performed by designated Shore Gang personnel in shipyards or at Eagle Harbor shall be paid for at the rates set forth in this Agreement for shoreside maintenance work.

The proposal would have ended paying deck personnel at different rates when they worked at Eagle Harbor. There was no discussion of anything which would otherwise have related to the issues in dispute. The arbitrator did not adopt this provision and continued Appendix A Rule 4.02 in its current form.

AB Relief Josh Perry worked in the work week of November 16, 2018, to November 30, 2018. He worked at Eagle Harbor and submitted his class worked as 600, AB Relief, and class paid 602, AB Relief. The payroll department "corrected" this. It applied Appendix A Rule 4.02, to pay class worked, 600, AB relief, but class paid 660, Shore Gang rate. The result was a reduction in pay. He notified the Union. This is the first time the Union recognized that the issue in dispute. It may have had some opportunities to do so before but did not recognize it. The Union filed a grievance on December 20, 2018.

AB Reliefs Matt Williams, Brenda Hering, and Istvan Bikki all worked at Eagle Harbor in the same week as did AB Relief Perry. They had their pay similarly adjusted. The Union filed a grievance protesting that on December 20, 2018.

AB Relief Jay Ubelhart worked at Eagle Harbor in the week of January 10, 2019, to January 15, 2019. He had his pay similarly adjusted. The Union filed a grievance protesting this on January 31, 2019.

The grievances were properly processed in the grievance procedure, consolidated for hearing for arbitration and properly processed to arbitration.

RELELVANT AGREEMENT PROVISIONS

2017-19 AGREEMENT

Rule 1 - Definitions

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1.08 Demotion

"Demotion" is the act of reducing employees in rank from their present classification or pay rate to a lower classification or pay rate.

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1.14 Relief Employee

The term "relief employee" shall be an employee working on a year round basis, offered at least forty (40) hours of work per week in the Terminal Department, and eighty (80) hours of work in the Deck Department per work period, to relieve employees who are not scheduled for work or to work various assigned shifts. A

Relief Deck employee has all necessary qualifications and documents to work any and all routes.

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1.18 Able Bodied Seaman

The term "able bodied seaman" is one with a minimum of an eighteen (18) month merchant marine credential.

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RULE 10 - MINIMUM MONTHLY PAY AND OVERTIME

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10.09 All employees in year round positions shall be guaranteed forty (40) hours of pay per one (1) week work schedule or eighty (80) hours of pay per two (2) week work schedule, as set forth elsewhere in this Agreement.

All employees in designated relief positions as defined in Rule 1.14 shall be offered (40) hours of work per one (1) week work schedule in the Terminal Department or eighty (80) hours of work per two (2) week work schedule in the Deck Department as set forth elsewhere in this Agreement. Reliefs that reject work and fail to accept other comparable work within the one (1) or two (2) week work schedule shall forfeit guarantee pay for the work schedule in which work was rejected.

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RULE 14 – GRIEVANCE PROCEDURE

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14.02 Terms and Requirements

A. Grievance Definition

A grievance is an allegation by an employee or group of employees that there has been a violation, misapplication, or misinterpretation of this Agreement, which occurred during the term of this Agreement. The term "grievant" as used in this Rule includes the term "grievants."

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14.03 Filing and Processing

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B. 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.

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RULE 17 - CLASSIFICATIONS AND RATES OF PAY

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17.01 Wages

Effective July 1, 2017, the wage rates for each classification represented by the Union, shall be increased by four percent (4.0%).

The July 1, 2017 wage rates are:

POSITION	7/1/17
AB*	28.67
AB RELIEF	34.40
AB-BOS'N and AB-QUARTERMASTER	30.19
AB RELIEF WORKING BOS'N/QUARTERMASTER	36.23
OS and OS-EXEMPT	24.77
OS RELIEF	29.72
AUTO TICKET SELLER	27.36
PURSER	27.36
PASSENGER TICKET SELLER	27.36
AUTO TICKET TAKER	24.53
PASSENGER TICKET TAKER	24.53

TERMINAL WATCH/ATTENDANT	23.48
WEB INFORMATION	27.69
INFORMATION AGENT	25.54
SHORE GANG	34.03
SHORE GANG LEADMAN	32.34
SHORE GANG	30.59

*Effective July 1, 2017, the above position of AB shall be increased an additional one dollar and twenty-one cents ($1.21). The percentage differences above between the AB, AB Bos'n, AB Quarter Master and Shoregang classification shall be maintained.

**Effective July 1, 2017, the above positions of, Web Information Agent and Shore Gang Foreman shall increase one (l) dollar ($ I .00).

Entry Level Rates (Deck and Terminal Employees who have worked less than five thousand two hundred (5,200) straight-time hours/ Information Department employees four thousand one hundred sixty (4, 160) straight-time hours)

POSITION	7/1/17
OS and OS-EXEMPT	21.05
AUTO TICKET TAKER	20.86
PASSENGER TICKET TAKER	20.86
TERMINAL WATCHMAN	20.02
TERMINAL ATTENDANT	20.02
WEB INFORMATION AGENT	23.92
INFORMATION AGENT	22.05
TERMINAL TICKET SELLER	23.29
PASSENGER TICKET SELLER	23.29

On-call deck and terminal employees that have completed their probation of one thousand forty (1040) hours and have worked less than five thousand two hundred

(5200) hours, and successfully bid a year round position, or temporary position shall be compensated at the full time rate of pay for that job classification. If the employee returns to on-call status prior to working five thousand two hundred (5200) hours, they shall again be compensated at the entry level rate of pay.

Information Department employees that have completed their probation of one thousand forty (1040) hours and have worked less than four thousand one hundred sixty (4160) hours, and successfully bid a year round position, or temporary position shall be compensated at the full time rate of pay for that job classification. If the employee returns to on-call status prior to working four thousand one hundred sixty (4160) hours, they shall again be compensated at the entry level rate of pay.

17.02 Effective July 1, 2018, the wage rates for each classification represented by the Union, with the exception of entry level rates, shall be increased by one percent (1.0%).

POSITION	7/1/18
AB*	30.02
AB RELIEF	36.02
AB-BOS'N and AB-QUARTERMASTER	31.61
AB RELIEF WORKING BOS'N /QUARTERMASTER	37.94
OS and OS-EXEMPT	25.02
OS RELIEF	30.02
AUTO TICKET SELLER	27.63
PURSER	27.63
PASSENGER TICKET SELLER	27.63
AUTO TICKET TAKER	24.78
PASSENGER TICKET TAKER	24.78
TERMINAL WATCH/ATTENDANT	23.71
WEB INFORMATION AGENT	27.97

INFORMATION AGENT	25.80
SHORE GANG FOREMAN	35.63
SHORE GANG LEADMAN	33.86
SHORE GANG	32.03

*Effective July 1, 2018, the above position of AB shall be increased an additional one dollar and twenty-one cents ($1.21). The percentage differences above the AB and the AB Bos' n and AB Quarter Master shall be maintained.

Entry Level Rates (Deck and Terminal Employees who have worked less than five thousand two hundred (5,200) straight-time hours/Info1mation Department employees four thousand one hundred sixty (4,160) straight-time hours)

POSITION	7/1/18
OS and OS-EXEMPT	21.26
AUTO TICKET TAKER	21.07
PASSENGER TICKET TAKER	21.07
TERMINAL WATCHMAN	20.22
TERMINAL ATTENDANT	20.22
WEB INFORMATION AGENT	24.16
INFORMATION AGENT	22.27
TERMINAL TICKET SELLER	23.52
PASSENGER TICKET SELLER	23.52

On-call deck and terminal employees that have completed their probation of one thousand forty (1040) hours and have worked less than five thousand two hundred (5200) hours, and successfully bid a year round position, or temporary position shall be compensated at the full time regular rate of pay for that job classification. If the employee returned to on-call status prior to working five thousand two hundred (5200) hours, they shall again be compensated at the entry level rate of pay.

Information Department employees that have completed their probation of one thousand forty (1040) hours and have worked less than four thousand one hundred

sixty (4160) hours, and successfully bid a year round position, or temporary position shall be compensated at the full time rate of pay for that job classification. If the employee returns to on-call status prior to working four thousand one hundred sixty (4160) hours, they shall again be compensated at the entry level rate of pay.

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Rule 27 - Working Conditions (General)

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27.11 Employees required to work in a higher classification will be paid at the pay equal to the higher classification for the period equal to the time in which the employee worked in the higher classification; unless more than four (4) hours is worked in a higher classification, then payment will be for the entire scheduled shift at the higher rate of pay. Designated relief personnel responding to an assignment shall receive the Able-bodied Seaman rate of pay.

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Appendix A

Deck Department Personnel

Rule 1 - Hours of Employment, Overtime and Assignment

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1.06 Employees required to work in a higher classification will be paid at the pay equal to the higher classification for the period equal to the time in which the employee worked in the higher classification, unless more than four (4) hours is worked in a higher classification, then payment will be for eight (8) hours at the higher rate. Designated relief AB's responding to an assignment shall receive no less than the Able-bodied Seaman rate of pay.

Rule 4 - Vessel Personnel Assigned to Laid-Up Vessels in Shipyards or Eagle Harbor

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4.02 All work performed in shipyards or at Eagle Harbor shall be paid for at the rates set forth in this Agreement for shoreside maintenance work. These rates do not apply to scheduled crew members on the day the vessel is broken out of its tie-up after having been taken off the run, or to regularly assigned crew members

of extra service vessels. A pay code shall be created for vessel crews doing such work.

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Rule 6 - Travel and Mileage Pay

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Rule 6.08 Relief Employees are required to maintain expertise and knowledge on multiple classes of vessels and are assigned throughout the system as needed. This includes but is not limited to:

1. Familiarization on multiple classes of vessels.

2. Performing documented break-in on multiple classes of vessels.

3. Proficiency in the operation of multiple classes of vessels.

4. Knowledge of specific emergency evacuation plans, safety systems, emergency equipment and ability to take charge of an unfamiliar crew during emergent situations consistent with the Muster list.

5. Ability to perform lead duties over crew on multiple classes of vessels.

Mileage shall be paid only for travel actually performed to a location other than the employee's home terminal according to schedule A, unless otherwise stated in this Agreement.

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POSITIONS OF THE PARTIES

Union:

The Union argues that the Employer violated the collective bargaining agreement by not paying the AB Reliefs in accordance with the pay provisions of the Agreement. The issue is straight forward. The Union believes that Rule 27.11 and Rule 1.06 of Appendix A require the AB Relief be paid at the rates set forth in Rule 17. The proper resolution of this matter requires reading the current Agreement as a whole. Instead of focusing solely on Rule 4.02 to the exclusion of other provisions, the arbitrator should look to the entirety of other provisions in the Agreement. The Employer cannot explain under its interpretation how those various provisions work together. Specifically, its provision reads Rule 27.11 and Appendix A, Rule 1.06 out of the Agreement. It leaves

Appendix A Rule 4.02 in direct conflict with Rule 1.08's definition of "demotion." The Employer's position would have AB Reliefs and AB's receiving the same rate of pay in direct conflict with the concept of paying AB Relief positions a higher amount.

The correct wage rate for the AB Reliefs is found by starting with Rule 27.11 and Appendix A, Rule 1.06. Rule 27.11 refers to all "designated relief personnel" and states that they shall receive the AB rate of pay when responding to an assignment. Appendix A Rule 1.06 exists to reinforce Rule 27.11. Were those two provisions not in the Agreement, there might be circumstances where the AB Reliefs would earn less than the AB rate. The purpose of these provisions is to recognize that AB Reliefs are employees with diversified skills who could fill in for absent other employees in a broad range of positions. Thus, beginning with the introduction of the assignment pay scheme in 2011, the parties have chosen to recognize the added value of AB Relief positions by paying them a uniform premium for all job worked rather than paying them more or less based on the travel expended to reach the various assignments. Rules 27.11 and Appendix A 1.06 are the mechanism to assure that the premium whether added on top or incorporated into the base rate applies uniformly to all assigned work. The reference in Rule 27.01 to "Able-Bodied Seaman rate of pay" is to the AB Relief rate of pay in Section 17.02 as opposed to the AB rate of pay. The reason for this is that there are two rates of pay for AB Reliefs, AB Relief and AB Relief Working Bos'n/Quartermaster. Appendix A Rule 1.06 is properly read as making that distinction and not for referring to the AB pay rate. The Employer's reading of Appendix A Rule 1.06 to set a floor of only the AB pay rate would conflict with Rule 27.11 and Appendix A rule 1.06 because it never read Rule 27.11 and 1.06 that way in any other context. If it were read as the Employer contends, AB Reliefs would be paid only at the AB rate in other contexts as well. Under cross-examination Captain Faust agreed that he does not read either rule to incorporate a single AB wage rate but understand the term "Able-bodied Seaman rate" cross references the applicable rate for an individual AB Relief based upon his or her billeted position. Second, the term "Able-bodied Seaman" is defined in the Agreement by the qualifications to progress from OS to AB.

Appendix A Rule 4.02 does not require a different result. It does not incorporate the AB rate on its face. Instead, it requires the reader to look for "shoreside maintenance work" rates. This term equates the Shore Side Gang rates for non-relief employees. That term is qualified by Rule 27.11 and Appendix A Rule 1.06 for relief employees and locks in their relief pay rate. If there were any ambiguity, the more specific and recent language should be given preference.

Arbitrators choose the meaning of provisions among conflicting meanings which give effect to all of the provisions of an agreement over those which render the other provisions superfluous. The Employer's reading of the Agreement would render Rule 27.11 and Appendix A Rule 1.06 superfluous. Instead, it only applies one of the two AB Relief rates in every circumstance. The Employer only consults Appendix A Rule 4.02 in the boat annual context to find that AB Reliefs get the lower rate because they are still paid more than the AB rate. Captain Faust described those ignored provisions as mere "holdover" from prior Agreements.

Similarly, the Employer's interpretation creates an unnecessary conflict between various provisions of the Agreement. AB Relief's suffer a "demotion" within the meaning of Rule 1.08. However, demotions are allowed under the Agreement only for performance or disciplinary reasons. The Employer's argument that no demotion occurs because employees still retain their classification is without merit. They receive a reduction in their pay rate.

The Employer's position also produces bizarre results. Under the Employer's view, the AB and AB Reliefs get the same rate. This is inconsistent with the entire structure of Rule 17. The very premise of the 2017 additions to the wage schedule is that the AB Reliefs expertise entitles them to extra compensation. This structural difference applies across all of the jobs they do. They have always received additional compensation in some form. There is no evidence that either party ever intended this. The Employer is also relying on an accounting trick, stating that they get the Shore Gang rate by virtue of a pay "class code" and assignment pay is a "pay code." The "pay code" related to assignment pay while the "class code" related to the Shore Gang rate. Thus, in the Employer's view, since the parties eliminated the assignment pay and its associated pay code, the AB Reliefs receive only the Shore Gang rate. This fails for three reasons. First, the Agreement does not contain any reference to those codes. Second, Appendix A Rule 4.02 does not describe the wage rate in terms of a "class code." It actually directs the Employer to establish a "pay code" for doing such work and does not refer to a "class code." Third, the Employer's argument is disingenuous. The fact is that AB Reliefs have always received additional pay when doing boat annuals above the Shore Gang rate.

The bargaining history and the parties' past practice support the Union's position. The bargaining history demonstrates that the parties intended that the consolidation of the wage rate and assignment pay was intended to preserve the same total pay as before. The Employer's own agents admitted that the consolidation, the parties intended that the premium be incorporated into the new AB Relief rate; however, it was not "incorporated" if it must be extracted for boat annuals. The Employer's motivation in the consolidation was for administrative purposes and not to reduce pay. Since AB Reliefs working boat annuals always received a premium on top of their Shore Gang base pay and since the parties had no intention of changing that, the only interpretation that fulfills their actual intent is the Union's position. The Employer's position would otherwise create a harsh and absurd result never intended by the parties.

Since it is the Employer who proposed the consolidation, it created the ambiguity. The ambiguity should be construed against the Employer who created it.

The bargaining history includes the outcome of the interest arbitration. That history weighs heavily in the favor the Union. The Employer proposed to restrict the Shore Gang rate so that that the AB and OS did not receive the Shore Gang rate for maintenance assignments. The arbitrator rejected it. The Union's position is consistent with this result while the Employer's is not. The Employer's contrary position is not credible because the Employer's conduct demonstrates that it was focused only on those

classifications. The Employer did not convey that the Employer had an intention for the Relief AB consistent with its position herein.

The parties' conduct after the current Agreement took effect demonstrates an enforceable practice or, at least, mutual understanding that the Union's position is correct. The Employer paid AB Relief's at the AB Relief rate while working boat annuals for the period July 1, 2017, until December 2018, when the Employer first began demanding reimbursements. The Employer's argument that this is not a binding practice because these payments were mistakenly made and, therefore, do not represent its acquiescence in the past practice, is without merit.

The arbitrator should consider the practical implications of this award. The AB Reliefs would likely stop bidding for this work. AB Reliefs would be guaranteed their regular rate even if they do not accept 80 hours of work in a pay period.

The Union requests that the grievance be sustained, the Employer be ordered to cease seeking reimbursement for overpayments, and that the Grievants be made whole for all lost wages and order that AB Reliefs be paid at the applicable AB Relief rate in the future.

Employer:

The Employer did not violate the collective bargaining agreement. The Union wants it both ways. It wants to apply Appendix A-Rule 4.02 to give both OS and AB employees the higher rate of pay when at Eagle Harbor, but not give the AB Relief the lower rate of pay. All of the applicable provisions of the current Agreement are clear: the AB Reliefs receive the Shore Gang rate. This has been no change in this practice. The only change has been the rates of pay in the current agreement.

The Union has not met its burden of proof to show a contract violation. The only reason there is an issue is because beginning with the 2017-2019 Agreement, the parties created an AB Relief rate of pay by "folding in" the assignment pay into one rate. That resulted in the newly created AB relief rate being higher than that of the Shore Gang. Previously, the AB Relief employees received the Shore Gang rate which was higher than the AB rate plus the supplemental rate, resulting in higher pay than they received with the AB rate. They continued to receive the assignment pay in addition.

The Employer concedes that its construction of Appendix A, Rule. 4.02 results in a significant total pay reduction for the AB Relief for the work in dispute. It also concedes this is the only situation under Appendix A, Rule 4.02 that results in a pay reduction for employees performing work at Eagle Harbor. However, the fact that this result occurs does not point to violation of the Agreement where the language is clear in Appendix A, Rule 1.01 that AB Reliefs do not get paid less than the AB rate. The application of Rule 4.02 does not result in a rate less than the AB Rate. The Union is attempting to read-in to that provision "Relief "to read as follows: "less than the AB Relief rate."

The Employer's actions comport with the clear and unambiguous language of the Agreement. As a general rule, arbitrators give words their ordinary and common meaning using a "reasonable person" or "fair and equitable" standard in interpreting an agreement provided that doing so does not create an absurd or unworkable result. The way in which AB Reliefs get paid for Shore Gang work done at Eagle Harbor is the result of negotiations between the parties for Rule 17 in this Agreement. The parties negotiated increased rates for AB Reliefs working Quartermaster of Bos'n. However, they did not specify a rate in that provision for AB working Shore Gang. The Union is requesting that words be added to the Agreement that are not there. The arbitrator is without authority to do so. Only when a contract clause is ambiguous does an arbitrator have the authority to "interpret" a provision of the Agreement. Simply put, there is no provision anywhere in Appendix A, Rule 4.02 or any other provision of the Agreement providing that Relief AB's should be paid their regular rate when performing shore gang work.

It is important to note that the Union opposed changing Appendix A, Rule 4.06 during the last interest arbitration. This indicates that the it is the obvious intent of the parties that Appendix A-Rule 1.06 (last sentence) and Appendix A, Rule 4.02 affirm that it is the AB rate of pay and not the AB Relief rate of pay that must be assessed. At best this is an oversight of the Union not to negotiate a specific rate of pay for the AB Relief working shore gang.

There is no past practice in this case of paying AB Reliefs the AB Relief rate when working at Eagle Harbor. The witnesses testified that circumstances were different at the time they are alleging. At that time, there was only a AB rate (with the supplemental assignment pay). The assignment pay was added to the Shore Gang rate to determine the wage rate paid the relief employees. There was a change in circumstances when assignment pay was "folded" into the new AB Relief rate of pay. When that occurred, the parties did not negotiate any change to Appendix A, Rule 4.02. Therefore, the evidence does not meet the tests for establishing a "past practice." Accordingly, the grievance should be denied.

DISCUSSION

The issue in this matter relates to the process of harmonizing collective bargaining agreement provisions carried over from prior agreements with the potential effects of newly adopted provisions. A simple example of this is a situation in which parties agree to create some shifts to work 10-hour days, four days per week when previously all employees worked 5-day, eight-hour schedules. They might have to change provisions requiring overtime after 8 hours.

Here it is undisputed that the parties never considered harmonizing Appendix A, Rule. 4.02 and other provisions with the change they made to "fold-in" the assignment pay concept to create the AB Relief's rates of pay. Collective bargaining in most cases involves parties making periodic changes to their long-standing collective bargaining agreements. This makes the harmonizing process very important. Ordinarily, it is the

responsibility of each party after they agree to a new or changed provision in concept to review the entire agreement to harmonize other provisions in accordance with their interests. Parties use differing techniques to harmonize. For example, some parties negotiate through proposals which contain the main change they seek together with corresponding proposed harmonizing provisions. Other parties do this by agreeing to proposed changes in concept and then deal with harmonizing issues later. Some parties to very long-standing agreements do some of their harmonizing by just treating some provisions as no longer having meaning or by changing the meaning through their mutual practice in administering the agreement. It is important to note that the statutory imposition of conventional interest arbitration such as that required of the parties pursuant to RCW 47.64.300, *et seq.* can negatively affect the harmonizing process.

The agreement and testimony demonstrate that the parties have at least on some occasions used the later two approaches. Captain Faust, an Employer negotiator, recognized that some language in the agreement was "historical" or had historical components.[4] See, also, Appendix A, Rule 1.06, discussed below.

In this case, the negotiators from neither side recognized the issue in this case. The Employer did not discover it until December 2018, which was after the interest arbitration award establishing the terms of the parties 2019-2021 agreement. No harmonization took place. Both parties are attempting to achieve that result by redefining the disputed provisions to achieve their respective desired results.

The analysis now turns to the authority and responsibility of the arbitrator. Under Rules 14.02 A and 14.03 D, it is the responsibility and authority of the arbitrator to determine if there has been a "violation, misapplication, or misinterpretation" of the Agreement, but the arbitrator lacks the authority to "add to, subtract from, or modify any of the provisions of this Agreement." This dispute clearly involves the interpretation of Appendix A, Rule 4.02 and how, if at all, it applies to this situation. Otherwise, the AB Reliefs' normal rates of pay specified in Rule. 17 apply.

In this regard, the arbitrator's responsibility is to determine "the intent of parties" which in circumstances in which a clear mutual intent did not exist require the arbitrator to determine what a "reasonable person in similar circumstances …would believe the disputed contractual language to mean."[5]

Arbitrators apply the rules of contract construction ordinarily applied by the courts in seeking "intent." One of the rules commonly recognized by the courts in contract construction is the "parol evidence rule." The Employer's argument is entirely based upon this rule. The parol evidence rule applies to agreements which the parties intend to be "fully integrated." The rule essentially provides that if the terms of an agreement are not "ambiguous," in that they convey a single distinct plausible idea, the arbitrator may not look outside of the agreement to extrinsic evidence to determine its

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[4] See Tr. P. 180, discussing rule 27.11.

[5] St, Antione, Ed., *The Common Law of the Workplace: The view of Arbitrators,* (BNA, 2d Ed.), Section 2.2. See, also, Wilkinson v. Chiwawa Communities Ass'n., 180 Wn.2d 241, 317 P.3d 614 (2014, @p. 619.

meaning.[6] "Extrinsic evidence" is other documents or testimony outside the agreement. Under the parol evidence rule, arbitrators give words their ordinary meaning, but give technical terms their technical meaning. It is important to note that arbitrators and legal scholars have questioned whether this rule is appropriate. Starting with Professor Corbin,[7] other legal commentators have recognized that it is rare that a contract needs no interpretation by resort to extrinsic evidence.[8]

Under the parol evidence rule the converse is true. If language is determined to be "ambiguous" the arbitrator is free to use extrinsic evidence to determine the parties' intent. If language is ambiguous, arbitrators routinely look to the rules of contract construction which have historically been applied by arbitrators and the courts. These rules include determining the meaning by looking to the context of the disputed provision, construing the agreement as a whole, interpreting provisions in the light of their purpose, avoidance of harsh and absurd results, and others.[9] However, where the parties harmonize provisions by giving different meaning to provisions or by allowing them to no longer apply, some of the presumptions in the rules of construction to the contrary cannot be given weight. In that regard arbitrators use extrinsic evidence such as the bargaining history of the current and past agreements and the past practice of the parties to aid in construction.

Ambiguities are of two types, patent and latent. A "patent" ambiguity is one which is obvious from a reading of the agreement itself. A "latent" ambiguity is one which is not obvious from the reading of the agreement but appears when applying the provision to a set of facts. A famous example of a latent ambiguity is when Congress established the boundary between two states as the Mississippi River, but the river subsequently changed course. A dispute arose as to which state owned the land in between the new and old courses.[10]

Appendix A, Rule 4.02 varies terms of employees' regular wage rate under Rule 17. It can be read in three arguably plausible ways. It can be read as setting a minimum wage rate of the Shore Gang rate. Thus, it would no longer apply to the AB Reliefs. Under that construction their pay would remain at Rule 17 levels. It can be read as requiring the AB Reliefs to be paid at the lower Shore Gang rate while working at Eagle Harbor. A third construction is that AB Reliefs would be paid at the Shore Gang rate, plus that part of the AB Relief rate which constitutes the old assignment pay. That construction is explained in the next paragraph.

The third latent ambiguity of Appendix A, Rule 4.02 occurs because the referent to Rule 17's rates is not necessarily clear. It states that work "shall be paid for at the

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[6] This is recognized in Washington law. See, *Hollis v. Garwall,* 137 Wn2d 683. 695 P.2d 836 (1999). Contracts in goods, see RCW 62A.202 (Uniform Commercial Code

[7] 5 *Corbin on Contracts* Sec. 24.7

[8] See, *Restatement (Second) of Contracts*, Sec. 212, May, Ed. *Elkouri & Elkouri How Arbitration Works* (8th Ed., BNA) Ch. 9, Sec. 2(A), *Common Law, supra.* Sec. 2.3.

[9] May Ed., *Elkouri and Elkouri: How Arbitration Works,* (7th Ed., BNA), Ch. 9, 3, etc.

[10] *Mississippi v. Alabama*, 415 U.S. 289 (1974).

rates...for shoreside maintenance work. This can be viewed as "clear and unambiguous" as to what the rate to be paid is, but it is silent as to what the rate to be compared to is. The problem is that the AB Relief and AB Relief Working Bos'n/Quartermaster Rates were a combination of two rates, AB or AB working Bos'n/Quartermaster and Assignment pay. The Employer's position assumes that the referent of the to be "paid to" rate is the numerical number in the relief rates in Rule 17. In this regard there is another reasonably plausible interpretation. The other is that they are paid the comparison to the non-AB Relief rates and that they are also paid the assignment pay differential which is the difference between the applicable relief rate and non-relief rate as the assignment component. It is important to note that neither party is arguing that supplemental components such as mileage should be denied because of Appendix A, Rule 4.02's provision. Basically, this is the meaning it would have if one did not assume that the creation of new rates automatically changed the meaning of Appendix A, Rule 4.02. There is support for treating AB Relief rate as essentially a task rate because the two components can be numerically easily identified. Further, Rule 17 includes another task rate (AB Bos'n and AB Quartermaster)[11]

Similarly, the Employer's redefinition of Appendix A, Rule 1.06 suffers from multiple ambiguities. This provision pre-dates the issues in dispute. In former agreements it required that AB Reliefs receive no less than their pay rate on any job. No one can recall what led to the adoption of this language many years ago, but in the context in which it appears it seems to require that AB Reliefs get their pay rate even if assigned to what is an OS or lower job. The "no less" language in prior agreements would refer to the fact that mileage and travel pay would be paid if due. Those supplements did not apply to all AB Relief assignments under the former agreements. If read as it apparently was originally intended, this provision, at a bare minimum, would not regulate the situation in dispute to authorize a reduction in pay. Instead, it would be read as not applying to it at all.

I conclude that the determinative rules of construction are "avoidance of harsh or absurd results," and construing the agreement as whole consistent with its purpose. The determination is bolstered by sound judgment as to collective bargaining and personnel practices in general. The Employer's interpretation results in a pay decrease for the AB Reliefs. This is a result inconsistent with what any reasonable negotiator would have intended. It is undisputed that the purpose of Appendix A, Rule 4.02 was to ensure that the Employer did not move Shoregang work to lower paid employees while they are at Eagle Harbor. This is one of the common reasons in labor relations why employees are paid more for doing essentially what is their normal tasks. See, Rule 27.11. This use of a pay decrease under these circumstances is highly unusual in labor relations.

The Employer's construction is inconsistent to the point of being harsh and absurd with the agreement when read as a whole, taking into the account the purposes of various provision. The Employer could not articulate why a pay decrease for AB Reliefs would benefit it in any practical way. First, the parties agree that the purpose of creating the relief wage rates was to essentially make the payroll process easier. Assignment pay was

[11] Although, that was created for a different reason.

created to average out travel time pay. Paying employees less than the relief rates undermines the purpose of the relief rates.

Relief employees are higher skilled employees who are valued for their cross-training. The work on annual inspections requires the full skill of the AB and, therefore, the full benefit of the cross-training which AB Reliefs have. It would make no sense to pay them less when the are working at Eagle Harbor.

Next, the general scheme of the relief system is that employees is that relief employees generally select their assignments. It does not benefit the Employer to create a class of work which all relief employees would be reluctant to do.

The better view is that Appendix A, Rule 4.02 sets a minimum wage rate and does not reduce the wages of employees with higher wage rates. Accordingly, the Employer violated Rule 17 when it reduced the AB Relief employees' wage rates under Appendix A, Rule 4.02

The appropriate remedy is to order that the Employer cease and desist from reducing relief employees' wages under Appendix A, Rule 4.02 when working at Eagle Harbor, make all affected employees whole for any lost wages and benefits. I note that the parties are in negotiations for the successor to 2019-21 agreement. Nothing in this award shall preclude the parties from reaching agreement in successor negotiations for a different harmonization of the disputed provision. I reserve jurisdiction over issues arising from the specification of remedy as agreed by the parties.

ARBITRATION AWARD

The Employer violated Rule 17 of the parties' Agreement by misapplying Appendix A, Rule 4.02 to pay the grieving AB Reliefs at the lower Shore Gang rate instead of their regular rate. The Employer shall make the affected employees whole for all lost wages, not seek reimbursement from those who were paid at the AB Relief rate for doing work at Eagle Harbor and pay AB Reliefs at their rate going forward while they work at Eagle Harbor.

Jurisdiction is reserved as to disputes arising from the specification of the remedy if either party requests that I exercise jurisdiction in writing, with a copy to opposing party, within sixty (60) days of the date of this award.

Dated at Sun Prairie, Wisconsin, this 2d day of February, 2020,

Stanley H. Michelstetter, Arbitrator