

In the Matter of Arbitration between:

MARINE ENGINEERS' BENEFICIAL
ASSOCIATION – LICENSED,

Union,

and

FMCS No. 18-0220-01731

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION,
FERRIES DIVISION,

Employer.

OPINION AND AWARD

Arbitrator: Rita G. Siegel

Appearances: *For the Union:* Jack Holland
Reid, McCarthy, Ballew & Leahy, LLP

For the Employer: Elizabeth Delay Brown
Assistant Attorney General, Washington State
Labor & Personnel Division

Also Present: Dave Knutsen
Eric Winge
Jeff Duncan
Jerry Holder
Matthew von Ruden
Shawna Skjonsberg-Fotopoulos

Pursuant to the Collective Bargaining Agreement between the State of
Washington and District No. 1 – Pacific Coast District, Marine Engineers' Beneficial
Association, AFL-CIO ("MEBA"), Licensed Engineer Officers, effective July 1, 2017

through June 30, 2019 (the "Agreement"), the undersigned was designated the Arbitrator to hear this dispute. A hearing was held on November 29, 2018, in Seattle, Washington.

During the hearing, the parties were given an opportunity to participate, present evidence, testimony and argument in support of their respective positions. A verbatim transcript of the hearings was taken by Elizabeth Patterson Harvey, RPR, CCR 2731.

The following witnesses testified under oath and were subject to cross-examination: (a) for the Union: Jeff Duncan and Dave Knutsen; (b) for the Employer: Jerry Holder, Matt von Ruden and Shawna Skjonsberg-Fotopoulos. Twenty-one (21) exhibits were admitted into evidence. The parties stipulated that this matter is timely and arbitrable.

The Arbitrator received post-hearing briefs on February 15, 2019, at which time the record was closed.¹ The Arbitrator has considered and weighed the testimony and evidence offered by the parties and has carefully considered the parties' final arguments in reaching her decision.

ISSUE

The parties were not able to stipulate to a statement of the issue before the Arbitrator. Therefore, the Arbitrator frames the issue as follows:

Did the Employer violate Section 20(l) of the Agreement when it appointed Thomas Fraczak to fill a Staff Chief Engineer vacancy? If so, what is the appropriate remedy?

¹ The Arbitrator requested an extension of time to submit her award, which request the parties granted.

THE CONTRACT

This matter is governed by the Agreement, the relevant provisions of which provide:

SECTION 20 – SENIORITY

Subsection (a) – Seniority Roster

There shall be four (4) separate seniority rosters maintained for the various affected classifications of Licensed Engineer Officers as follows:

- (1) Engineer Officer Seniority List:
This list shall be used in determining vacation periods and certain other rights which affect all Licensed Engineer Officers uniformly and identically.... This list shall also be utilized for reductions in force....
- (2) Chief Engineer Officers:
This list, which is to include Staff Chief Engineer Officers... shall be used in determining promotional, transfer and open position rights of all Chief Engineer Officers for Chief Engineer Officers positions only.
- (3) Licensed Assistant Engineer Promotional Roster:
This list shall be used under Subsection 20(f) to fill Licensed Chief Engineer Officer vacancies. This list shall show for every Licensed Assistant Engineer Officer, one of the following two (2) dates, whichever is the more recent: (i) the date he/she first acquired a Chief Engineer's license, or (ii) the most recent date of hire to a permanent Licensed Engineer Officer position.
- (4) Qualified Alternative Staff Chief Candidates List:
This list shall be used under Subsection 20(m) to fill Alternative Staff Chief vacancies when necessary.

Subsection (e)

Open positions for each of the seniority classifications due to retirement, termination, separation or when crewing new or retrofit vessels, will be filled by using the seniority roster and on-file applications for transfer and reassignment....

Subsection (f)

When a permanent Licensed Chief Engineer Officers opening occurs the most senior Licensed Chief Engineer Officer in that classification (as per Subsection 20(a)(2)) with a request on file for that job shall be promptly offered the position and assigned within twenty (20) days of the date the position is vacated.... If the most senior Licensed Chief Engineer Officer in that classification with a request on file refuses the assignment, it shall be filled as follows:

- (1) It shall be offered to the next most senior Licensed Chief Engineer Officer in that classification (as per Subsection 20(a)(2)) with a request on file until all such requests have been exhausted, then;
- (2) It shall be offered to the most senior Licensed Assistant Engineer Officer with a request on file for a promotion until all such requests on file have been exhausted....

Subsection (l) – Appointment of Staff Chief

When a Staff Chief Engineer position vacancy exists, the Employer will designate the Staff Chief Engineer for that vessel by transfer of existing Staff Chief Engineer(s) or from the Staff Chief candidate pool as soon as is possible. *Such candidates must have been permanently employed as a Chief Engineer Officer with the WSF.* This provision will not apply to decommissioned vessels provided normal and regular maintenance work is not being done on board the vessel. (Emphasis added).

SECTION 23 – GRIEVANCE PROCEDURE

Subsection 23.2 – Terms and Requirements

- (a) Grievance Definition A grievance is an allegation by an employee...that there has been a violation, misapplication, or misinterpretation of this Agreement....

Subsection 23.3 (d) – Authority of the Arbitrator

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

SECTION 30 – MANAGEMENT CLAUSE

Except as modified by the Agreement, the Employer retains all rights of management, which, in addition to all powers, duties, and rights established by constitutional provision or statute, will include but not limited to, the right to:

- (a) Determine the Employer's mission and strategic plans;
- (b) Determine the Employer's budget and size of the agency's workforce and the financial basis for layoffs;
- (c) Direct and supervise employees;
- (d) And all other rights to manage and operate the Ferries Division in an effective, efficient, safe, and fiscally prudent manner within the Ferries Division fiscal budget;
- (e) The Union reserves the right to intercede on behalf of any employee who feels aggrieved because of the exercise of this right and to process a grievance in accordance with Section 23;
- (f) The existence of this clause shall not preclude the resolution of any such grievance on its merits.

BACKGROUND

Washington State Ferries ("WSF") is the largest ferry system in the United States. It operates twenty-three (23) vessels covering ten (10) routes. In 2018, it carried more than 24 million passengers.² WSF is a division of the Washington State Department of Transportation.

MEBA represents (3) bargaining units at WSF: Licensed Engineering Officers; unlicensed engine room employees; and Port Engineers. This dispute arises under the Licensed Engineering Officers Agreement. This Agreement covers three (3) principle job classifications: Staff Chief Engineer, Chief Engineer and Assistant Engineer.³

Each vessel is assigned one (1) Staff Chief Engineer ("Staff Chief"). The Staff Chief is responsible for the safety, operation and maintenance of the vessel's engine plant. This position is at the top of the licensed engineer hierarchy with respect to responsibility, authority and pay. The hourly wage of a Staff Chief is more than twenty-five percent (25%) higher than that of a Chief Engineer, the next highest position.

Promotion to from Assistant Engineer to Chief Engineer is governed by strict seniority, subject to appropriate licensure. When a position opens for a Chief Engineer, the most senior licensed Assistant Engineer on the promotion roster moves up. However, promotion to Staff Chief is not governed by seniority. Section 20(l) of the Agreement covers appointment of a Staff Chief – when a Staff Chief position opens, the Employer has the option of transferring a Staff Chief from another vessel to fill the vacancy, or appointing an engineer from the Staff Chief Engineer Candidate Pool

² Transcript, pages 124-125.

³ Other positions covered by the Agreement are: Alternate Staff Chief Engineer, Relief Chief Engineer and Relief Assistant Engineer.

("Candidate Pool"). The Candidate Pool is comprised of pre-vetted employees who meet certain criteria and qualified for inclusion into the Pool. The Employer may select any employee from the Candidate Pool to fill a Staff Chief position. The operation and protocols of the Candidate Pool are not covered by the Agreement. The Candidate Pool is not seniority based.

The Staff Chief Selection Committee manages the Candidate Pool. The Committee is composed of 8-10 individuals, including the Director of Vessels, Staff Chiefs and Port Engineers. To be considered for entry into the Candidate Pool, an employee must first apply and submit a resume, references and the like. The Committee reviews applicant qualifications, conducts interviews, checks references and evaluates each candidate. At the end of this process, the Committee determines whether an applicant should be admitted into the Candidate Pool.

Periodically, the Committee opens the Candidate Pool to new applications. Typically, employees holding the position of Chief Engineer apply; occasionally, an Assistant Engineer will apply. In late 2015, the Staff Chief Candidate Pool was opened to new applications. There were seventeen (17) applicants – fifteen (15) Chief Engineers and two (2) Assistant Engineers. Of these, two (2) were added to the Candidate Pool.

In the fall of 2017, a position for a Staff Chief opened on the *M/V Cathlamet*. Here, the Employer opted for appointing the Staff Chief from the Candidate Pool and selected Tom Fraczak ("Fraczak") for the position. Fraczak's appointment as Staff Chief was effective October 1, 2017. Although in the Candidate Pool, at the time of his appointment Fraczak held the position of Assistant Engineer.

Fraczak had worked for WSF from 1988 until he resigned in 2012. WSF rehired Fraczak in 2015. During his first term of employment, Fraczak held the position of Staff Chief Engineer on the *M/V Chelan* from 2004 until he resigned in 2012. However, when Fraczak was rehired in 2015, he was placed into an entry level position of Assistant Engineer, at the bottom of the seniority rosters. Under the Agreement, with a resignation, an employee forfeits all accrued seniority. If rehired, that employee starts anew.

When the Staff Chief Candidate Pool was opened to new applications in late 2015, Fraczak applied. Given his prior experience and high evaluation rating, he was accepted into the Candidate Pool. Witnesses did not recall an earlier situation where an Assistant Engineer was qualified for entry into the Candidate Pool. Although Committee members expressed some concern with admitting Fraczak to the Candidate Pool due to his current position of Assistant Engineer, Fraczak was a "stellar candidate" and had been permanently employed with the WSF as a Chief Engineer Officer. Thus, Fraczak was not barred from the Candidate Pool under Section 20(l).

Fraczak's qualifications and abilities to hold the position of Staff Chief are not in question. The Committee's vetting process is not at issue. What is at issue is whether the Employer's appointment of Fraczak, who at the time was a an Assistant Engineer not Chief Engineer, to the position of Staff Chief Engineer, violated the Agreement.

On October 5, 2017, the Union grieved Fraczak's appointment to Staff Chief on the *M/V Cathlamet*. This arbitration followed.

POSITIONS OF THE PARTIES

The Union contends that the Employer violated Section 20 of the Agreement by appointing an Assistant Engineer directly to the position of Staff Chief thereby circumventing the Assistant Engineer promotion roster and the seniority of currently employed Chief Engineers. The Union further contends its intent in agreeing to the language ultimately added to Section 20(l) in the 2009-2011 Agreement was to ensure that a Staff Chief was selected from the chief engineer roster.

The Employer's rationale for selecting Fraczak is straightforward. Among the employees in the Candidate Pool, he was the most suitable for the open position of Staff Chief. The Employer denies that in doing so, it violated the Agreement. This is not a question of seniority, but rather one of its right to appoint an employee from the Candidate Pool. The Employer affirmatively asserts that it followed the dictates of Section 20(l) in its selection process. Fraczak had held the position of Chief Engineer Officer as a permanent employee with WSF and he met the qualifications for and was accepted into the Candidate Pool.

DISCUSSION

This is a contract interpretation case. There are no material facts in dispute.

In questions of contract interpretation, arbitral authority favors construing language in relation to the contract as a whole to best give effect to the intentions of the parties.⁴ Arbitrators seek to determine the intent of the parties from several sources, such as, the express language of the contract, bargaining history and past practice.

⁴ See, e.g., Elkouri & Elkouri, *How Arbitration Works (Sixth Ed.)*, pp. 434-464, and the cases cited therein.

As a general rule, words should be given their ordinary and common meaning using “reasonable person” or “fair and equitable” standard in interpreting a collective bargaining agreement; provided that doing so does not create an absurd or unworkable result. However, it is not the Arbitrator’s function to rewrite the parties’ contract -- the Arbitrator’s role is limited to ascertaining and giving effect to what the parties intended.⁵

Here, the parties cite the same contract language in support of their divergent positions -- Section 20(l) – entitled *Appointment of Staff Chief*. The parties’ argument focuses on the meaning and application of the third sentence of Section 20(l) which was negotiated in 2008 and added to the 2009-2011 Agreement:

Such candidates must have been permanently employed as a Chief Engineer Officer within the WSF.

The Union argues the above language is ambiguous and therefore the Arbitrator must look to bargaining history and the parties’ practice to determine intent. The Employer argues to the contrary -- the disputed language is clear and unambiguous and therefore should be given its ordinary meaning.

There are no other provisions of the Agreement which decide the dispute.⁶ As to ambiguity of the language, I look to the underlying factors. First, the bargaining history: The testimony and evidence show the Union initially proposed revisions to Section 20 which would extend promotion by strict seniority to include the position of Staff Chief, eliminating the Staff Chief Candidate Pool. The Employer insisted on retaining its long term selection process of Staff Chief from the non-seniority based Candidate Pool. Proposals and counters were exchanged. Discussions of the appointment of Staff Chief

⁵ *Id.*; see also Arbitrator M. Benewitz, *National Broadcasting Co.*, 86 LA 586, 591-592 (1986).

⁶ There is no contract language regarding applications to the Candidate Pool nor prevents an Assistant Engineer from being accepted into the Candidate Pool.

turned to address two specific incidents concerning the Union. These involved an outside employee and a current employee outside of the bargaining unit who were directly appointed to a Staff Chief position, bypassing the Candidate Pool. This concern was satisfied with the addition of the third sentence to Section 20(l).⁷

The parties concur that circumstances such as the facts in this case were never discussed or contemplated during the 2008 or subsequent negotiations. By its nature, a collective bargaining agreement is a comprehensive, but necessarily flexible agreement governing relations between the parties. The fact that an agreement contains a grievance provision covering interpretation of its provisions recognizes that even the most experienced negotiators cannot anticipate all exigencies that may arise during its term.⁸

Second, past practice: There is no past practice to enlighten this issue. This is a case of first impression. The facts of this case are unique, and based on the evidence, not likely to recur.

Third, as to clarity, I find that placing the disputed language in context resolves any ambiguity. Use of the phrase "must have been permanently employed" does not require the employee be currently employed as a Chief Engineer at WSF at the relevant time, only that the employee had once been so employed. In effect, this provision protects the integrity of the Candidate Pool by requiring candidates for appointment to Staff Chief to be selected from the bargaining unit.

⁷ Formerly numbered Section 20(m).

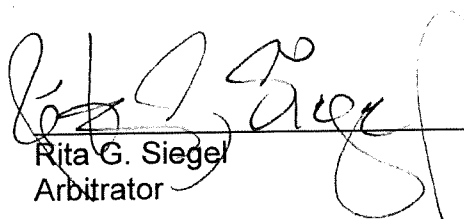
⁸ *Id.*

Finally, the parties' intent during the 2008 negotiations – the Union sought to have seniority be the sole criteria for promotion to Staff Chief; whereas, the Employer sought to preserve its selection from the Candidate Pool, independent of seniority.

The parties chose the words in the Agreement. What is clear from the record is that neither contemplated the unique facts presented by this case. A plain reading of the language favors the Employer – as long as an employee currently holds the position of Chief Engineer or once held the position of Chief Engineer, that employee is eligible to be considered for inclusion in the Staff Chief Candidate Pool. Fraczak qualified for placement into the Candidate Pool. There are no provisions in the Agreement which otherwise limit the Employer's right to this appointment.

AWARD

Accordingly, I find the Employer did not violate Section 20 (I) when it appointed Thomas Fraczak to the position of Staff Chief on the *M/V Cathlamet*. The grievance is denied. This Award is limited to the specific facts of this case.



Rita G. Siegel
Arbitrator

July 23, 2019
Albuquerque, New Mexico