

STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration  
Before Commissioner John P. Sullivan

DISTRICT NO. 1, MARINE	)	
ENGINEERS BENEFICIAL	)	MEC Case No. 11-00
ASSOCIATION on behalf of	)	
DANIEL DELANEY,	)	
	)	DECISION NO. 247 - MEC
Grievant,	)	
	)	DECISION AND AWARD
v.	)	
	)	
WASHINGTON STATE FERRIES,	)	
	)	
Respondent.	)	

*Mario Micomonico*, MEBA/WSF Union Representative, appearing for and on behalf of District No. 1 Marine Engineers Beneficial Association and Daniel Delaney. (Mr. Delaney attended the hearing.)

Christine Gregoire, Attorney General, by *David Slown*, Assistant Attorney General, appearing for and on behalf of the Washington State Ferries.

THIS MATTER came on regularly before John P. Sullivan of the Marine Employees' Commission (MEC) when District No. 1, Marine Engineers Beneficial Association (MEBA) filed a request for grievance arbitration on behalf of Daniel J. Delaney, asserting that Washington State Ferries (WSF) denied the payment of travel time and mileage for one round trip from his home terminal, Southworth, to Port Townsend, when he was assigned to work on the M/V KLICKITAT on three separate occasions: November 6, 1999, November 20, 1999 and January 8, 2000.

MEBA has certified that the grievance procedures in the MEBA/WSF collective bargaining agreement (CBA) have been utilized and exhausted. MEBA has also certified that the Arbitrator's decision shall not change or amend the terms, conditions or

application of said collective bargaining agreement; and that the Arbitrator's award shall be final and binding.

The parties' agreement as to the parameters of the dispute to be resolved by said Arbitrator is binding on them and on him. Such agreement is accepted, therefore, as the test for determining the rights, in the material circumstances of the parties here, including those of Mr. Delaney.

The Arbitrator conducted a hearing in this matter on August 17, 2000. Briefs were timely filed by October 11, 2000.

## POSITIONS OF THE PARTIES

### Position of MEBA

The grievant, Daniel J. Delaney, is employed by WSF as an "on-call oiler." He has no set schedule and is called to work on short notice whenever there is a need. When an oiler who is permanently assigned becomes sick or is unable to finish his scheduled work shift of seven (7) days, an on-call oiler is called out to finish the shift.

A "permanent assigned oiler" on a vessel operating out of Port Townsend or Anacortes, after working a seven (7) day shift, which is a normal assignment, is entitled to travel time and mileage for one round-trip per week, pursuant to WSF/MEBA CBA Appendix B, Rule 3, "Travel and Watch Relieving Terminals", 3.04.

An on-call oiler who is assigned for one 12-hour day, should be paid the mileage and travel time for that assignment, and not have to work seven (7) days to be eligible for such payment.

On-call oilers have been denied mileage and travel time for a number of years. MEBA wants a clarification as to why they would not be entitled to one round-trip.

### Position of WSF

The language of the 1997-1999 MEBA/WSF CBA does not appear to specifically apply to the on-call oiler who is assigned to a shift of less than seven days. The specific applicable Rule is Appendix B, Rule 3.04 which is ambiguous in its application to an on-call oiler who works less than seven days on assignment to a vessel operating out of Port Townsend or Anacortes. The custom and practice has been enforced for at least eight years, not to pay mileage and travel time to on-call oilers as noted above. This practice has been the intent of the parties through several contracts and several negotiating sessions up to the present time.

### ISSUE

Did WSF violate the 1997-1999 MEBA/WSF Collective Bargaining Agreement, specifically Appendix B, Rule 3.04 by not paying travel time and mileage to an on-call oiler when that oiler worked less than a full seven day shift on a vessel operating out of Port Townsend or Anacortes?

### DISCUSSION

Mr. Delaney has been going to sea in the Engine Department for eight years and has an endorsement on his USCG Merchant Marine Document as a “qualified member of the engine room,” known as “QMED.” He has been with Washington State Ferries for approximately a year and a half as an on-call oiler.

Mr. Delaney, as an on-call oiler, worked under the 1997-1999 Agreement for Unlicensed Engine Room Employees, by and between District No. 1, Marine Engineers Beneficial

Association (AFL-CIO) and Washington State Ferries, operated by Washington State Department of Transportation.

An on-call oiler is the entry-level job as an oiler. After working 1,040 hours, which takes approximately six months, the employee becomes a permanent on-call oiler, but the oiler is not guaranteed any hours per week or pay period or any permanent assignment to a vessel in the fleet. Being on-call means exactly that, you are waiting to be called to work for someone else who has become sick or has taken a vacation or for some reason had to suddenly leave his job as an oiler or unlicensed member of the vessel's engine department. The on-call oiler could be called to work one day or several days or more on any vessel and on any of the 10 routes.

The next step up from being an "on-call oiler" is to be a "permanent employee oiler assigned to a vessel." A permanent oiler stays with the assigned vessel no matter what route the vessel is on. He/she works a 12-hour shift for seven days, then is off seven days. This employee is guaranteed 80 hours per two-week period.

There is a third classification called "permanent relief or vacation relief oiler" that consists of eight to twelve relief employees who have the greatest seniority. They are guaranteed 80 hours in a two-week pay period.

Each oiler on-call, permanently assigned, or permanent relief is assigned a home terminal, which is the one closest to his permanent residence.

The permanent relief could be assigned to any vessel on any route, the same as the on-call person. When the permanent relief is assigned to a vessel that is on a route that does not call at his home terminal, that person receives for each day worked, travel time and mileage to his home terminal.

A permanent oiler assigned to a vessel in Port Townsend or Anacortes, after completing a week's work shift, would be paid mileage and travel time for the round-trip from that

person's home terminal to either Port Townsend or Anacortes. These payments would be paid once per week, not per day.

Having read and carefully considered the entire record, including the request for arbitration, the transcript of the hearing and post-hearing briefs in MEC Case No. 11-00, the Marine Employees' Commission now hereby enters the following findings of fact.

#### FINDINGS OF FACT

1. Daniel J. Delaney has been employed by Washington State Ferries as an unlicensed on-call oiler for approximately one and a half years.
2. WSF and MEBA are parties to a Collective Bargaining Agreement for 1997-1999, which was rolled over through 1999-2001, for the Unlicensed Engine Room Employees. That Agreement specifies MEC as the Arbitrator of unresolved allegations of contract violations.
3. Delaney was an on-call oiler on the ferry M/V KLICKITAT on three separate occasions: November 6, 1999, November 20, 1999 and January 8, 2000. On each of these dates, he worked one day as a replacement for a "permanent employee oiler assigned to a vessel." The vessel was operating on the Port Townsend to Keystone route.
4. Delaney lives in Port Orchard, so the home terminal closest to his home is Southworth. Delaney is asking for one round-trip mileage of 122 miles and travel time of four (4) hours for each of the three dates listed above. The sum total is 366 miles and 12 hours.
5. A "permanent employee oiler assigned to a vessel" on the route out of Port Townsend and Anacortes works a 12-hour shift for 7 days and then is off for 7 days. This employee would be entitled to be paid travel time and mileage for one

round-trip per week from the terminal nearest his/her home, pursuant to the 1997-1999 roll-over CBA, Appendix B, Rule 3.04 which reads as follows:

## **APPENDIX B**

...

Rule 3.04 Employees assigned to vessels on the Anacortes-San Juan Islands-Sidney B.C. routes or the Port Townsend-Keystone route will be paid travel time and mileage for one (1) round trip per week from the terminal nearest their home.

6. When the on-call oiler, Delaney, is assigned to a ferry that operates on a route from Port Townsend or Anacortes to replace a “permanent employee assigned to a vessel,” and works a full seven (7) day week, he is entitled to paid travel time and mileage for one (1) round-trip for that week worked, from the terminal nearest his home terminal as noted in Rule 3.04 above and in Rules 10A.01 and 10A.02 as noted below:

## **RULE 10A – TRAVEL AND MILEAGE PAY**

10A.01 All travel time shall be paid at the employee’s regular straight time pay.

10A.02 No travel time or mileage pay shall be paid to on-call employees, except when an on-call employee is assigned to a temporary assignment and that assignment includes travel to another location which would entitle a regular non-relief employee to travel time and mileage, the on-call employee shall be entitled to such travel time and mileage.

The on-call oiler would have to qualify the same as the person he is replacing. If the permanent employee on the Port Townsend or Anacortes route has to work a week’s shift to be entitled to travel time and mileage, then the on-call oiler would also have to work a week to be entitled to travel time and mileage.

7. Rule 10A.07 does not apply to on-call oilers, but only to vacation relief oilers and their entitlement to mileage and travel time as follows:

10A.07 Employees designated as Vacation Relief Oilers and employees assigned to more than one route or terminal shall be assigned home terminals as close as possible to the employee’s residence. Such employees shall be paid mileage and

travel time, in accordance with Schedule A, for the distance between the home terminal and the terminal to which assigned.

8. The interpretation of the CBA, Appendix B, Rule 3.04, by the parties has been that the on-call oiler must work seven days to qualify for the payment of travel time and mileage from the terminal nearest his/her home. That has been the custom and practice since at least 1992 and possibly since the late 1980's at WSF. The custom and practice of not paying an on-call oiler travel time and mileage when working a one-day assignment at Port Townsend has continued for eight years, which is long enough to establish or create a past practice.
9. Appendix B, rule 3.04 is ambiguous in that it is not clear that an on-call oiler would have to work a full seven day, 12-hour work week shift to be entitled to one round-trip and to be paid travel and mileage from the terminal nearest the oiler's home.

Not paying the on-call oiler for one round-trip to Anacortes and Port Townsend for less than a week's work has, over the years become the established way of doing things. What has become a mutually acceptable interpretation of the agreement, here Rule 3.04, becomes, in effect, contractually correct. Hence, the full meaning of the agreement will depend upon how it has been applied in the past.

10. When there is ambiguity in the agreement, it is possible to resolve this ambiguity through resorting to the practice that the parties have followed for a number of years. How the parties act under an agreement may be just as important as what they say in it. To borrow a well-known adage, "Actions speak louder than words," and gives substance to the ambiguous language of the agreement. A practice, once developed, is the best evidence of what the language meant to those who wrote it, the parties themselves.

Prior to this grievance, MEBA had not grieved WSF's long-standing practice of not paying travel time and mileage for one round-trip per week from the assigned terminal of the on-call oiler to Port Townsend or Anacortes, when the on-call oiler worked less than a seven-day work week shift.

Past practice emphasizes the parties' own history—what they have found to be proper and agreeable over the years and in line with the parties' concept of rightness.

### CONCLUSIONS OF LAW

1. The Marine Employee's Commission has jurisdiction over the parties and subject matter of this case. Chapter 47.64 RCW; especially RCW 47.64.150 and 47.64.280.
2. MEC may not change or amend the terms, conditions or applications of the MEBA/WSF Collective Bargaining Agreement. RCW 47.64.150.
3. The applicable Rule, Appendix B, 3.04, as it applies to on-call oilers like Mr. Delaney is ambiguous regarding the payment of travel time and mileage for working less than seven days consecutively.
4. To indicate the proper interpretation of ambiguous contract language, custom and practice between the parties must be looked at. To be binding, that custom and practice must be 1) unequivocal, 2) clearly enunciated and acted upon, 3) readily ascertainable over a reasonable period of time as a fixed, and established practice accepted by both parties. Elkouri & Elkouri, *How Arbitration Works* 439, n.10 (4<sup>th</sup> Ed. 1985). The parties' action in this matter meets this standard.
5. The parties' actions over a number of years indicate their acquiescence to the practice that Grievant Delaney is presently complaining about.



6. The practice of the parties, MEBA and WSF carried out for over eight years, of not paying on-call oilers, assigned to vessels for less than seven continuous days on routes operating from Port Townsend and Anacortes, for mileage and travel time for one round-trip per week from their home terminal meets the standard for past practice, as defined in *Monroe County School Dist.*, 105 LA 565, 567 (Brodsky 1995).

One well accepted definition of a past practice is “[a] practice is a reasonably uniform response to a recurring situation over a substantial period of time, which is recognized by the parties implicitly or explicitly as the proper response.” Thus, practice can be established if when one circumstance occurs, it is consistently treated in a certain way. The occurrence need not be daily or weekly, or even yearly, but when it happens, a given response to that occurrence always follows.

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AWARD

The grievance of Daniel J. Delaney, to be paid travel time and mileage for one round-trip per week from the terminal nearest his home when he worked less than seven continuous days on the M/V KLICKITAT operating out of Port Townsend on November 5, 1999; November 20, 1999 and January 8, 2000, is denied.

DATED this \_\_\_\_ day of November 2000.

MARINE EMPLOYEES' COMMISSION

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JOHN P. SULLIVAN, Arbitrator

Approved By:

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JOHN D. NELSON, Chairman

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DAVID E. WILLIAMS, Commissioner