

STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before Commissioner John P. Sullivan

DISTRICT NO. 1, MARINE)	
ENGINEERS BENEFICIAL)	MEC Case No. 3-00
ASSOCIATION on behalf of FLOYD)	
MCLAUGHLIN,)	
)	DECISION NO. 238 –MEC
Grievant,)	
)	DECISION AND AWARD
v.)	
)	
WASHINGTON STATE FERRIES,)	
)	
Respondent.)	

Parè Abbott, MEBA/WSF Union Representative, appearing for and on behalf of District No. 1 Marine Engineers Beneficial Association and Floyd McLaughlin. (Mr. McLaughlin did not attend 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 Floyd McLaughlin, asserting that Washington State Ferries (WSF) denied Mr. McLaughlin placement on the Engineers' Seniority List, also known as the Oilers Promotional Roster or List.

MEBA has certified that the grievance procedures in the MEBA/WSF collective bargaining agreement 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 arbitrator conducted a hearing in this matter on April 25, 2000. Briefs were timely filed on June 2, 2000.

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. McLaughlin.

THE ISSUES

When Mr. McLaughlin was hired as an Oiler by WSF on April 28, 1998, he possessed a United States Coast Guard License, Issue Number 1-3, as a Licensed Engineer. This USCG License permitted him to sail on motor vessels of not more than 4000 horsepower as a Chief Engineer or Second Assistant Engineer, and on steam vessels of not more than 6000 horsepower as a Third Assistant Engineer.

There is no disagreement between the WSF and MEBA as to the questions to be resolved by these proceedings before the designated Arbitrator. In considering the application of the 1997-1999 MEBA/WSF Unlicensed Engine Room Employees' Collective Bargaining Agreement (CBA), Rule 21 Seniority and Assignments, the parties agree that the issue to be decided is:

Did the USCG License held by Mr. McLaughlin on April 28, 1998--the date he was hired by WSF--qualify him to be placed on the Engineers' Seniority List/Oilers Promotional Roster or List as of that date?

POSITIONS OF THE PARTIES

Position of MEBA

Mr. McLaughlin was hired on April 28, 1998 as an Oiler by WSF. At the time of hiring, he held a USCG issued License as a vessel Marine Engineer and he should have been placed on the

Engineers' Seniority List/Oilers' Promotional Roster or List pursuant to the applicable MEBA/WSF Unlicensed CBA and specifically Rule 21.10(d).

Position of WSF

On April 28, 1998, Mr. McLaughlin possessed a USCG Marine Engineers' License, but the license had horsepower limitations that prevented him from sailing as an Assistant Engineer on motor vessels of more than 4000. Thus, he was not qualified to be placed on the WSF Seniority List to become an Assistant Engineer. On September 25, 1998, the USCG removed the limitation on his Marine Engineers' License, so he could then sail as an Assistant Engineer and he was placed on the Engineers Seniority List/Oilers' Promotional Roster or List, as of that date.

DISCUSSION

WSF operates approximately 25 ferries in the Puget Sound area on various routes as well as a route from Anacortes, Washington through the San Juan Islands to Sydney, British Columbia. Vessel standards are set by the United States Coast Guard, which issues a Coast Guard Certificate of Inspection for each vessel that indicates the number of Licensed Engineers to be on duty in the Engine Department. The license for each engineer must cover the horsepower of the vessel; the license can be issued for a specific horsepower, i.e. not more than 4000 horsepower, or it can be for unlimited horsepower.

A seaman working the engine room of a vessel as an Oiler may be eligible to take the test given by the USCG to see if he can qualify for a license, depending upon his service time in the engine room and his technical knowledge. The test is not given by WSF management. If the seaman passes the USCG test as to his knowledge, skills and qualifications, he is issued a Marine Engineer License.

If there is a horsepower limitation on an Engineer's License as to his rating, the seaman could not sail in his rating on a vessel with horsepower in excess of the limitation on his license. If the Engineer's License is limited to not more than 4000 horsepower, the Engineer could not sail as a Licensed Engineer on a vessel with engines in excess of 4000 horsepower.

Licenses are issued for motor or steam vessels based upon sailing experience. One license might indicate the holder could sail as a Third, Second, First Assistant Engineer and Chief Engineer on motor or steam or both and for various horsepower for each rating and on different bodies of water. WSF's fleet of vessels are motor vessels, not steam vessels.

When WSF hires or promotes a seaman to a Licensed Marine Engineer, the license must have an endorsement to equal or exceed the horsepower of the vessel assigned to or the USCG would not permit the vessel to sail.

FINDINGS OF FACT

1. When Mr. McLaughlin was hired as an Oiler by WSF on April 28, 1998, he was an experienced engineer who had raised his initial or original license twice, but there were limitations as to vessels he could serve on as to horsepower. According to Mr. McLaughlin's USCG License, Issue Number 1-3, on his hire date, he was qualified to serve as:

- **SECOND ASSISTANT ENGINEER---ON MOTOR VESSELS OF NOT MORE THAN 4000 HORSEPOWER;**
- **THIRD ASSISTANT ENGINEER ON STEAM VESSELS OF NOT MORE THAN 6000 HORSEPOWER;**
- **CHIEF ENGINEER (LIMITED-NEAR COASTAL) ON STEAM AND MOTOR VESSELS OF NOT MORE THAN 4000 HORSEPOWER;**
- **DESIGNATED DUTY ENGINEER ON STEAM AND MOTOR VESSELS OF ANY HORSEPOWER**

2. Mr. McLaughlin was employed under the 1997-1999 collective bargaining agreement between MEBA and WSF, covering unlicensed engine room employees. Applicable excerpts from that CBA include the following:

RULE 21 – SENIORITY AND ASSIGNMENTS

21.01 The Employer recognizes the principle of seniority in the administration of promotions, transfers, layoffs and recalls. In the application of seniority under this Rule, if an employee has the necessary qualifications and ability to perform in accordance with the job requirements, seniority by classification shall prevail.

...
21.10 Engineer Officer Vacancies

(a) A temporary vacancy in the position of Assistant Engineer Officer shall be filled in the following manner:

...
(b) Two (2) out of every three (3) permanent vacancies in the position of Assistant Engineer shall be offered to those WSF Oilers on the promotion list, and those Oilers that obtain their original Assistant Engineers license within the term of the 1991-1993 contract. When the last Oiler, as defined in this provision, has exhausted his/her promotional privilege, then every other permanent vacancy in the position of Assistant Engineer shall be filled by promoting the qualified Oiler, if any, who has the earliest seniority date and has a bid for the position on file. All other permanent vacancies shall be filled in accordance with Section 2(a) of the Licensed Engineer Officers Agreement.

(c) For purposes of this Rule, “qualified” means possessing the required license and having been signed off by the Staff Chief Engineer or his/her designee as having successfully completed a break-in period and having completed all break-in requirements, which will also be required for any Assistant Engineer from the Union Hall. The Employer will provide break-in requirements and training opportunity in conjunction with the MEBA School.

(d) For purposes of this Section, an employee’s seniority date shall be the employee’s initial license date or date of hire by the Employer, whichever is more recent. The Union and the Employer shall meet to determine the initial seniority list under this Paragraph.

Section, 21.01, refers to “qualifications” as a necessary element to obtain seniority, that would be that the seaman had a license with the proper horsepower to serve as an Assistant Engineer on those vessels which carry Assistant Engineers. WSF does not operate vessels that would carry an Assistant Engineer with a 4000 horsepower limitation on their license. The “Issaquah Class” ferries have the lowest horsepower of any vessel that carries an Assistant Engineer and that is 5000 horsepower. WSF operates approximately 15 vessels that carry Assistant Engineers. The approximately 12 other vessels in the WSF fleet are under 4000 horsepower, but they do not carry an Assistant Engineer. Of the 12 vessels that do not carry an Assistant Engineer, 9 vessels carry a Chief Engineer and 3 vessels, the passenger only, carry only oilers and no licensed engineers.

When Mr. McLaughlin was hired, he held the following endorsement on his license:
“Chief Engineer (limited-near coastal) on steam and motor vessels of not more than 4000 horsepower. . .”

Mr. McLaughlin was qualified to serve as Chief Engineer on the 9 vessels that were under 4000 horsepower. The Chief Engineers come from the Licensed Engine Room employees’ contract between MEBA and WSF.

“Section 20 – Seniority” of the Licensed CBA indicates that the date the engineer is permanently assigned as Chief Engineer Officer shall be used in determining the promotional, transfer and open position rights as to seniority.

The other source for a Chief Engineer position is the “Licensed Assistant Engineer Promotional Roster” (Section 20(a)(3)(ii) using the most recent date of hire to a permanent Licensed Engineer Officer position.

Mr. McLaughlin would first have to be hired as an Assistant Engineer and develop seniority before he could be considered as a Chief Engineer, but he could not qualify as an Assistant Engineer when hired on April 28, 1998.

3. There is no question that Mr. McLaughlin, at the time of his hire on April 28, 1998, had an endorsement of only 4000 horsepower for motor vessels, which did not qualify him as an Assistant Engineer. He needed at least 5000 horsepower for motor vessels. While Mr. McLaughlin had an endorsement on his license as a Third Assistant Engineer on steam vessel of not more than 6000 horsepower, WSF does not operate any steam vessels. That endorsement would therefore not be considered in his employment with WSF.
4. Qualification is a vital element to becoming placed on the Engineers’ Seniority List/Oilers Promotion Roster or List. Mr. McLaughlin required a USCG License as a Marine Engineer of a motor vessel of 5000 horsepower or more, and he did not have such

a license when he was hired. However, he did have such a license on September 25, 1998, after he showed the USCG he had additional experience to remove the restrictions as to horsepower.

Qualification is defined as follows: “That which is required before a person is legally entitled to do something.” The Oxford Companion to Law 1022 (1980). Also, “Quality or circumstance that is legally or inherently necessary to perform a function (qualification for office).” West’s Legal Thesaurus/Dictionary 623 (1986).

In a Marion County, Indiana case, a position of surveyor carried the provision that the employee hired would be paid 50% more than his base salary if he was a qualified licensed engineer. Mr. Ryan took office on January 1, 1939, but he was not a licensed professional engineer under the laws of Indiana. Subsequently on February 7, 1939, he was licensed to practice professional engineering in Georgia. Mr. Ryan brought suit seeking the 50% increase in salary. The trial court found for Mr. Ryan. On appeal, the court reversed the holding, stating that he was not in fact a qualified licensed engineer in Indiana and thus not entitled to the 50% increase which applied to those who met the necessary requirements to engage in the profession in Indiana. Ralston v. Ryan, 29 N.E.2d 202 (1940).

In Bozer v. Central Pennsylvania Quarry, Strip & Const. Co., 73 F. Supp. 803, 811 (D.C. M.D. Penn. 1947), the court stated: “Petitioner was admittedly a competent truck driver and qualified for the position offered but he was not qualified for the position demanded in view of the requirement that ‘all employees be members of the United Mine Workers of America.’”

Webster’s New International Dictionary (2d ed.) defines “qualified” as, *inter alia*, “Having complied with the specific requirements of precedent conditions for an office, appointment, employment, etc.”

In Defense Distribution Region West, 114 LA 329, 332, 333 (Goodman, 2000), Grievant Yount was promoted to WL-08 position as Motor Vehicle Operator Leader. The Arbitrator's conclusions included the following:

One of the requirements of the WL-08 position was to be able to drive all vehicles including a semi. At the time of her selection Yount was not licensed to drive a semi. A review of the job description includes the requirement that she train others. She could not train others to drive a semi if she was not licensed to drive one herself.

...

The simple fact is that employees selected MUST meet the qualifications for the position at the time of selection, not most of the requirements, not some of the requirements, but ALL.

...

All that is required is that the person selected meets the qualifications of the position.

...

I have determined Yount was not qualified.

The Arbitrator ordered a rerun of the selection process declaring that Yount would not be considered, as she was not qualified at the time the vacancy was filled.

5. Mr. McLaughlin was not qualified on the date he was hired by WSF. The question as to Mr. McLaughlin's seniority is based upon the 1997-1999 MEBA/WSF Unlicensed Contract, Rule 21 – Seniority and Assignments and Section 21.10 Engineer Office Vacancies, particularly 21.10(d) which reads:

For the purpose of this Section an employee's seniority date shall be the employee's initial license date or date of hire by the Employer, whichever is more recent. The Union and the Employer shall meet to determine the initial seniority list under this Paragraph.

The 1997-1999 MEBA/WSF Unlicensed Contract contained the above wording of 21.10(d). This Arbitrator takes judicial notice of the fact that 21.10(d) from the 1993-1997 contract between the parties contained the same language. This language was not a part of the two previous contracts, 1991-1993 or 1989-1991.

6. The phrase “initial license date” is ambiguous. Does it mean the first or original license or does it mean the license the employee held at the time WSF hired the employee? It is unclear what the parties intended when they used this phrase in describing a marine engineer’s USCG License.

It may be possible to resolve this ambiguity by reverting to the parties’ past practice. How the parties act under an agreement may be just as important as what they say in it. To borrow a well-known adage, “action speaks louder than words.” From the conflict and accommodation which are daily occurrences in workers’ lives, there arises “a context of practices, usage, rule-of-thumb interpretations which gradually give substance to the ambiguous language of the agreement.” Eastern Stainless Steel Corp., 12 LA 709, 713 (1949). A practice, once developed, is the best evidence of what the language meant to those who wrote it.

Also, 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, a 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.

Mr. Mark Nitchman, former Port Engineer and now Director of Maintenance for WSF brought impressive credentials to the witness chair. In addition to very responsible positions at WSF for a number of years, he holds numerous USCG Licenses in both the Deck and Engineering Departments, including Chief Engineer, limited oceans any horsepower.

Mr. Nitchman testified without contradiction that since 1992, once or twice each year the WSF Dispatch Office asks him to review a Marine Engineer’s License to see if the employee is qualified to be placed on the Engineers’ Seniority List. His rulings have been consistent over the past eight years, in that the USCG License must have the endorsement

as to the horsepower for the WSF vessels that carry Assistant Engineers. Otherwise, the employee's name could not go on the Seniority List.

During the past eight years, the practice of denying seniority to those who did not have the required horsepower endorsement meets the standard that makes the practice binding in that the practice was: 1) clear, 2) consistent, 3) followed over a reasonably long period of time, and 4) shown by the record to be mutually accepted by the parties.

In the eight years since the language in 21.10(d) was included in the MEBA/WSF Unlicensed Collective Bargaining Agreement, a continuous practice has existed that to be placed on the Engineers' Seniority List, an employee must have an endorsement on his license of enough horsepower to work as an Assistant Engineer. This practice emphasizes the parties' history over eight years; what they have found to be proper and agreeable. It is noted that this practice has not been grieved prior to Mr. McLaughlin's present grievance.

Mr. Nitchman testified that the Marine Engineer would not have to complete Rule 21.10(c) to be placed on the Engineers' Seniority List. He stated that once an Oiler has a Marine License with the proper horsepower, that Oiler is placed on the Engineers' Seniority List/Oilers' Promotional Roster or List. Once on the Seniority List, the Oiler can complete all the break-in requirements required for any Assistant Engineer per Rule 21.10(c). Successful completion of these requirements, is then indicated by an asterisk after the Oiler's name on the Seniority List.

CONCLUSIONS OF LAW

1. In reliance on particular evidence adduced at the hearing in this case, as reviewed with the foregoing paragraphs, and finding supportive foundation in the material facts, exhibits and the "authorities" cited above and in the arguments submitted, it is concluded that when Mr. McLaughlin was hired as an Oiler on April 28, 1998, he was not qualified by

his USCG License to be employed as an Assistant Engineer on any WSF vessel that carries an Assistant Engineer.

2. There was an existing contract in place between MEBA unlicensed members and WSF that included Rule 21-Seniority and Assignments; Section 21.10 Engineer Officer Vacancies; and Subsection 21.10(d). The essence of the CBA is that an employee must be qualified to be placed on the Engineers' Seniority List/Oilers' Promotional Roster or List.
3. To be placed on the list, a qualified Oiler must have a USCG License with a horsepower rating adequate to be employed on a WSF vessel that carries an Assistant Engineer.
4. The phrase "the employee's initial license date" from Rule 21.10(d) is vague and ambiguous; however, for the past eight years, the parties have interpreted it to mean that to be on the seniority list to move up to Assistant Engineer, an employee must have a USCG Marine Engineers' License with adequate horsepower required, to be employed as an Assistant Engineer on a WSF vessel.
5. Mr. McLaughlin appeared before the U.S. Coast Guard on September 25, 1998 and had his Chief Engineer and Third Assistant Engineer License endorsements upgraded to "motor vessels of any horsepower."
6. Mr. McLaughlin should be placed on the Engineers Seniority List as of September 25, 1998.

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AWARD

The grievance to place Floyd McLaughlin on the Engineers' Seniority List or Oilers Promotional Roster or List, as of April 28, 1998 is denied.

DATED this _____ day of June 2000.

MARINE EMPLOYEES' COMMISSION

JOHN P. SULLIVAN, Arbitrator

HENRY L. CHILES, JR., Chairman

DAVID E. WILLIAMS, Commissioner