STATE OF WASHINGTON
BEFORE THE MARINE EMPLOYEES' COMMISSION

In Arbitration
Before John Swanson

INLANDBOATMEN'S UNION OF THE PACIFIC on behalf of JAY UBELHART et al.,	MEC CASE NO. 4-07
Grievant,	DECISION NO. 506 - MEC
v.	
WASHINGTON STATE FERRIES,	DECISION AND AWARD
Respondent.	

APPEARANCES

Schwerin, Campbell, Barnard and Iglitzin, by *Natalie Teague*, Attorney, appearing for the Inlandboatmen's Union of the Pacific (IBU).

Rob McKenna, Attorney General, by *David Slown*, Assistant Attorney General, appearing for the Washington State Ferries (WSF).

NATURE OF THE PROCEEDING

The Inlandboatmen's Union of the Pacific comes before the Marine Employees' Commission (MEC) with a grievance regarding March 2006 pay practices for work performed in shipyards (Everett) and work performed in Eagle Harbor. The Union alleges Washington State Ferries failed to pay WSF employees covered by the IBU labor agreement the appropriate rate of pay for work performed in Eagle Harbor and shipyards. WSF alleges the Collective Bargaining Agreement (CBA) has historically been applied to pay the shoregang rate of pay only for certain specific work unrelated to vessel work. WSF interprets the language in the CBA Rule 4 – 4.02 to apply to work other than the work performed by Ubelhart et al. in the shipyards or at Eagle Harbor. Their contention appears to mean work unrelated to the work of the vessel crew. IBU

contends that the language is unambiguous and was meant to apply to the circumstances present in MEC Case No. 4-07 and all work performed in the shipyards or Eagle Harbor unless specifically exempted in Rule 4.

ISSUE

Was Washington State Ferries in violation of the Collective Bargaining Agreement (CBA) when Ubelhart et al. were not paid the shoregang rate of pay for work performed in Eagle Harbor in March 2006?

If WSF violated the CBA by paying Ubelhart et al. the improper contract rate, what is the remedy?

RELEVANT CONTRACT PROVISIONS

PREAMBLE

> The Rules contained herein constitute an Agreement between the WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, an agency of the State of Washington, operating Washington State Ferries, hereinafter referred to as the "Employer", and the INLANDBOATMEN'S UNION OF THE PACIFIC, MARINE DIVISION OF THE INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, hereinafter referred to as the "Union", governing wages, hours and other conditions of employment of employees as classified.
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> All of the following Rules shall apply to the entire Agreement uniformly. Should any Rules in the subsequent Appendices, which by this reference are incorporated herein, modify these rules, such subsequent Appendices shall take precedent and apply only to those employees and/or conditions covered by the Appendix.

RULE 1 – DEFINITIONS

> SPECIFIC DEFINITION: Unless the context of a particular section of this Agreement clearly dictates otherwise, the following terms shall have the following meanings:
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> **1.01 AGREEMENT.** The term "agreement" shall refer to the present contract, of which this section is a part, as it presently exists between the Employer and the Union.

1.02 **EMPLOYEE.** The term "Employee" includes all persons in the service of the Employer classified in this Agreement.

. . . .

RULE 2 – UNION SECURITY

2.01 The Employer recognizes the Union as the representative of all employees as classified herein and the sole collective bargaining agency for the purpose of acting for the employees in negotiating and interpreting the Agreement and adjusting disputes.

. . . .

RULE 6 – SCOPE

6.01 This Agreement shall apply to all vessels and facilities of the Employer engaged in the transportation of passengers, automobiles and freight on Puget Sound and adjacent inland waters, the Straits of Juan de Fuca, and the waters adjacent to the San Juan Islands and ports in British Columbia. This Agreement shall apply to all unlicensed employees assigned to the Deck, Terminal, Information Departments and Shoreside maintenance.

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APPENDIX A
DECK DEPARTMENT PERSONNEL

RULE 4 – VESSEL PERSONNEL ASSIGNED TO LAID-UP VESSELS IN SHIPYARDS OR EAGLE HARBOR

4.01 Shoreside maintenance rate of pay will not apply to deck employees standing security watches in a shipyard.

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.

Emphasis added.

RECORD BEFORE THE COMMISSION

The MEC has the following record before it:

1. The request for grievance arbitration.
2. The notice of settlement conference and hearing.
3. The IBU and WSF Collective Bargaining Agreement, 2005—2007.
4. Transcript of MEC Case No. 4-07 January 23, 2007 hearing.
5. Exhibits of both parties accepted into evidence.
6. WSF and IBU post hearing briefs of March 15, 2007 and March 16, 2007 respectively.

FINDINGS OF FACT

1. Eagle Harbor is a WSF repair and maintenance facility on Bainbridge Island.

2. Shoregang personnel have either through attrition, work force reductions, and/or operational conditions been reduced from thirty-five (35) in the 1970's to eighteen (18) including two (2) temporary employees. The reduced shoregang workforce has the potential of additional vessel crew members being required to perform necessary shipyard and Eagle Harbor assignments.

3. Work has been and continues to be performed by IBU members covered by the CBA in Eagle Harbor and Everett and the shoregang rate is not being paid as a general rule.

4. Deck hands working on Eagle Harbor perform the same work as the shoregang. Testimony of Maintenance Shop Foreman (TR 80):

> *Q: Does any deckhand work that you've observed at Eagle Harbor consist of the same type of work that the shoregang personnel does?*
> *A: Deckhands don't do anything we don't do.*
> *Q: Could you just briefly detail that a little bit further?*
> *A: Oh, let's see. Say the Walla Walla was in for an annual inspection and the annual is over and trying to get the boat ready to go back on the run, we would be working side by side. Mopping, cleaning, putting stuff away, et cetera.*

5. Vessel crew members have been discouraged from filing claims for the shoregang rate of pay in Eagle Harbor and shipyards. When the issue was raised, a management representative said something to the effect "go ahead and put in for shoregang rate of pay but I'll tell you right now, this will be the last time you'll ever see this kind of work." (Tr. 69: 14-22)

6. The record supports the fact that there are very few occasions when Pay Code 660 (shoregang pay) appears on a deck department pay order.

7. There is no evidence in the record other than confusion or management resistance as to why Pay Code 660 is seldom used when Pay Code 660 appears on a deck department pay order. This is in spite of the fact that vessel crews and CBA-covered employees are being routinely assigned to work at Eagle Harbor or the shipyards.

8. The record does not offer any reasoned evidence of language ambiguity in the interpretation of Appendix A, Rule 4.

9. There is no evidence that the Union has waived its claim to the shoregang rate of pay for work in Eagle Harbor or Shipyards.

10. The grievant, after returning to the deck crew from his job as an IBU patrolman, was assigned to Eagle Harbor and because of his experience with the CBA, believed that WSF was violating the CBA in denying himself and others the shoregang rate of pay as required by Rule 4.02.

DISCUSSION

While Employer counsel would endeavor to make the case of language ambiguity in Rule 4.02 and support that case with history and past practice, the endeavor falls short of the facts and evidence in the record.

The language is specific as to the conditions when the shoregang is not paid:

(a) when deck crew members are standing security watches in the shipyard, the shoregang rate does not apply;

(b) the shoregang 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

(c) to regularly assigned crew members of extra service vessels.

It is unclear if a rate code has been established for the work performed in examples a, b and c. It is clear that these exceptions support Rule 4.02: ***"All work performed in shipyards or at Eagle Harbor shall be paid for at the rates set forth in this Agreement for shore side maintenance work."***

The record does not support any ambiguity in the language. The words "***in a shipyard"*** or ***"at Eagle Harbor"*** are, by any definition, explicit as to the locations where "***all work"*** is being performed. As a party of the contract provision, it is incumbent on the Employer to explain clearly what was contemplated or to use language that would not leave the matter in doubt. As learned WSF counsel knows, where the language is clear and unambiguous on its face, it is improper for the Arbitrator to vary its terms based on illusive arguments of past practice. Learned counsel is also aware that this present case does not contain factors necessary to establish a "past practice." The record does not support a practice of mutual acceptance and reciprocity over a period of years so that both parties accept the practice as part of the job routine. A past practice under a disputed contract provision is not a past practice for either party where the interpretation or misapplication of the clause has been the subject of dispute between the parties. It is clear in the record that this matter has been subject to some dispute – the practice – has therefore not attained the standing of a mutual interpretation as to the application of Rule 4.02. To accept WSF's argument would nullify any reason for the language in 4.02 to

exist and would render the language meaningless. As stated earlier, there would also be no reason to have the specific exceptions identifying under what conditions the shoregang rate would not be paid.

CONCLUSIONS OF LAW

1. The relevant provisions of the 2005-2007 contract are in effect. The parties have stipulated that those provisions govern the resolution of this dispute.

2. The Arbitrator has jurisdiction over the parties and the dispute (RCW 47.64.280). The case is properly before the Arbitrator for decision.

3. Accordingly, in light of clear language, no established past practice, exceptions as to when the shoregang rate is paid and testimony in the record as to the nature of the work involved, in spite of WSF's contrary contentions, I have no alternative but to rule that all work in question with exceptions noted must be paid at the shoregang rate of pay.

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DECISION AND AWARD

1. The Union grievance is sustained.

2. Employees covered by the Agreement by and between Washington State Ferries and Inlandboatmen's Union of the Pacific will be paid the shoregang rate of pay for all work performed in shipyards or at Eagle Harbor subject only to the exceptions noted in **Rule 4 – Vessel Personnel Assigned To Laid-up Vessels In Shipyards or Eagle Harbor.**

DATED this 18th day of April 2007.

MARINE EMPLOYEES' COMMISSION

/s/ JOHN SWANSON, Arbitrator

Approved by:

/s/ JOHN SULLIVAN, Commissioner

/s/ ELIZABETH FORD, Commissioner