STATE OF WASHINGTON

BEFORE THE MARINE EMPLOYEES COMMISSION

In Arbitration Before
Commissioner David E. Williams

DISTRICT NO. 1, MARINE ENGINEERS BENEFICIAL ASSOCIATION on behalf of GARY NESS, Grievant, v. WASHINGTON STATE FERRIES, Respondent.	MEC Case No. 42-00 DECISION NO. 273 - MEC DECISION AND AWARD

Mario Micomonaco, Union Representative and Davies, Roberts and Reid, attorneys, by *Todd Lyon* for and on behalf of District No. 1, Marine Engineers Beneficial Association and Gary Ness.

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

THIS MATTER, in arbitration under the parties' collective bargaining agreement, having come regularly on for hearing on March 21, 2001, at Colman Dock, before a duly designated and fully authorized arbitrator, and the parties having been represented, each by its advocate, and the evidence having been adduced of record, and argument having been advanced and good cause appearing, the arbitrator herewith returns the following decision and award:

NATURE OF THE CASE

This case presents an issue as to interpretation and application of the parties' collective bargaining agreement, with respect, in particular, to the underlying facts, which are summarized, in the following form, by the employer's brief:

> This case is the grievance of Gary A. Ness, an Assistant Engineer working for Washington State Ferries (WSF), and represented by the Marine Engineers Beneficial Association (MEBA). On the day giving rise to the grievance, July 3, 2000, Mr. Ness was assigned to the Ferry *Kittitas*. He was working the typical engine room schedule of twelve (12) hours on, twelve (12) hours off, for seven (7) days followed by seven (7) days off. July 3, 2000 was a normal day off for Mr. Ness, but he was called in to work part of a shift. The reason was that his Staff Chief Engineer was called away from his normal watch on the *Kittitas* to assist in repairs to another ferry of the same class. (Tr., p.9). The Staff Chief Engineer is an expert on electrical control systems of this class of vessel. (Tr., p.11). The decision to send the Staff Chief to the other vessel was made during his normal watch, and it was necessary to call in a relief Assistant Engineer to fill in for the balance of the shift, as the normal Assistant Engineer was bumped up to acting Chief Engineer.
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> By the time Mr. Ness assumed his duties as Assistant Engineer, only eight (8) hours remained on the watch. As the Ferry ran late, he actually worked eight (8) hours and four (4) minutes. (See Exhibit 1). Initially, he was paid eight (8) hours and one-quarter (1/4) at the overtime rate, but this was later corrected to nine (9) hours of overtime, since any fraction of an hour is properly payable as a whole hour of overtime when the individual has been called out on overtime. (See Exhibit 1). Mr. Ness believes, and the basis of this grievance is, that he was entitled to be paid twelve (12) hours of overtime, since the normal shift for this vessel is twelve (12) hours.

The quoted summary is consistent with the stenographic record and the corresponding statement in the union's brief.

The parties express the issue here at base similarly, with their written arguments. Thus, the union set forth that question, as follows:

> Whether Engineer Officers are entitled to twelve (12) hours of overtime when returning to work on a regularly scheduled day off in order to work on a vessel operating on a twelve (12) hour schedule?

The employer poses the same inquiry with somewhat different verbiage, *viz*:

> Must an Assistant Engineer called out on overtime to work a shift of eight (8) hours or less be paid twelve (12) hours overtime if the normal shift duration on the vessel in question is twelve (12) hours?

The parties specify additionally the precise provisions of their contract, which have been referred to, by one side or another, as controlling with regard to the dispute at hand. Namely:

> Section 6 (b) Overtime compensation shall be at the rate of two times the base rate in each classification. All overtime request must be approved and authorized by the Port Engineer, except that in emergency cases overtime pay may be approved by the Staff Chief Engineer or Chief Engineer on watch. The Staff Chief or Chief Engineer shall forward an accurate record of all authorized Engine department overtime to the Operations Department in a timely manner.
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> Section 6 (e) Management will endeavor to see that all Engineer Officers receive scheduled days off but Engineer Officers returning to work on a regularly scheduled day off shall receive one (1) day's pay at the overtime rate.
>
> Section 9 (a) The principle of eighty (80) hours per two-week period is hereby established. For all practical purposes eight (8) or twelve (12) hours shall constitute one (1) day's pay. No one who is a permanently employed Engineer Officer shall receive less than eighty (80) hours pay per two-week period. The Employer agrees that the eight (8) or twelve (12) hour day will be adhered to depending upon the vessel's schedule and that normal watch schedules will be arranged so that Engineer Officers do not work in excess of eighty (80) hours per two-week period.
>
> Section 13 All Engineer Officers when called to work shall receive a minimum of eight (8) hours pay. Work time shall begin as provided otherwise in this Agreement.

DISCUSSION

The union advances the view that there is a "clear and unambiguous" requirement posed by Section 6 (e) and Section 9, which, ordains allowance of the grievance before the arbitrator. In response to the employer's contentions that Section 13 controls, as evidenced by the practice, the union cites the long-standing "rule," whereby plain language in the governing agreement should not yield and give way to custom describing the historical actuality. The union urges additionally that Section 13 is "irrelevant," because it does not address, and is not related to, the particular problem raised by the actual situation, on which the grievance is grounded.

On the other hand, as noted, the employer places primary reliance on what it designates as the "perfectly clear" language of Section 13, *viz*: "All Engineer Officers when called to work shall receive a minimum of eight hours pay. Work time shall begin as provided in this agreement." However, the employer recognizes, in its brief, that the "mix" of Sections 6, 9, and 13 may pose a legitimate impression, on the part of an arbitrator, that there is a recognizable prospect for conflict, between parts of the applicable contractual base, as to the intended effect of the whole.

In this connection, sworn testimony, from Mr. Nitchman, regarding the pay practices, and the duration thereof, in circumstances such as those underlying the instant grievance, was plain, straightforward and unqualified. The essence of that testimony appears, at page 20 of the recorded proceedings. Thus:

> Q. . . . And can you tell us what the practice is, has been within the MEBA bargaining unit when a member is called in on their day off to work for a duration of eight hours or less?
>
> A. Eight hours is a minimum call out. Its referenced in Section 13 of the contract. It's always been interpreted that way since I've been employed here.
>
> Q. Okay. So have you seen pay orders when someone has worked less than eight hours and been paid 12 hours?
>
> A. No.

Q. None?

A. None that I can recall.

Although the foregoing sworn testimony was from a veteran of the employer's management, there is evidence of record that some members of the union, recognized the same practice, which is described by the quoted witness. Nothing in the record, as to allegedly related "bargaining history" is of a quality and content which requires that the standing of the historical practice, as a reliable reference, be disregarded here. Nor, in the arbitrator's assessment does the record embody persuasive denial that such practice has obtained, in accord with the Nitchman testimony, over an extended period, without protest from those concerned.

Frequently, grievance arbitrations, including this instance, involve interpretation of language as it appears in the controlling collective bargaining contract, which poses uncertainty rather than undeniable clarity. A familiar proposition, thought to warrant reliance, in such a proceeding, by many who serve regularly as arbitrators, is reported, in a "call-in" case, by Walter E. Baer, at pp. 25-26, of *Winning In Labor Arbitration*, Crain Books. Chicago, 1982:

> Arbitrator Whitley P. McCoy, serving as chairman of a tripartite board for Kaiser Aluminum and Chemical Corporation and the Aluminum Workers International Union, ruled in favor of a binding past practice in a call-in pay dispute. Employees who had completed their regular 8:00 A.M. to 4:00 P.M. shift on one day and were then called and told to report early on the following day, were not entitled to four hours pay for time worked prior to 8:00 A.M. on the second day, even though the contract provided (1) that the work day was from 8:00 A.M. to 8:00 A.M. and (2) that employees called in to work on the second shift within the same work day should be paid for not less than four hours' work.
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> Three features—(1) uniformity, (2) acquiescence by the parties, and (3) long continued practice—all influenced the decision.
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> > The company proved that a uniform practice has existed, where the man called out has continued to work on into his regular shift, to count the time on his regular shift in computing the minimum of four hours paid for. An employee of the company's payroll

> department testified that so far as he knew payment had always been made as it was made in this case, when a man called out continued working into his regular shift. He testified that he had made a random check and had been unable to find any instance of paying allowed time under the circumstances. Other supervisors testified as to instances that they recalled where payment had been made in the same manner as in this case. They testified as to these instances, giving names and circumstances. The union offered no evidence of an instance where payment had been made in accordance with its interpretation of this contract section.
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> Uniform and long-continued practice, known to and concurred in by both parties, is of course good evidence as to the intent placed upon contract language by the parties.

It seems apparent then, while according favor to a cited practice in derogation of plain contract verbiage is seldom regarded as appropriate by one serving as an arbitrator, utilization of what appears to be an established and non-controversial "law of the shop," in a context formed in part, by conflicting provisions in the subject collective bargaining agreement, is a favored means for composing a dispute arising thereunder.

In this matter, the parties advance reasonable contentions, with citations to varying contract sections, which do not operate together in smooth and perfect harmony. In the situation so described, the employer cites a practice, which the union does not challenge as to its existence, but maintains instead that the referenced usage, grounded on the contracts' Section 13, is not germane here, where the facts of record present an ordinary call-in situation. Against the background erected by the presentations from the parties in this matter, the arbitrator is inclined to accept and apply, and does accept and apply, the notion pronounced by the arbitrator in a case (29 LA 439) cited by Baer, above, at p. 28:

> It is a universally recognized rule that in interpreting a contract clause capable of more than one meaning, the intention of the parties as evidenced in long established past practice is an important and often controlling factor.

Accordingly, the grievance ought to be and is denied.

AWARD

On the grounds and for the reason outlined above, the grievance in the above-captioned matter should be and hereby is denied.

DATED this _____ day of June 2001.

MARINE EMPLOYEES' COMMISSION

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DAVID E. WILLIAMS, Arbitrator

Approved By:

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JOHN D. NELSON, Chairman

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JOHN P. SULLIVAN, Commissioner