

**IN THE MATTER OF**  
**WASHINGTON STATE DEPARTMENT**  
**OF TRANSPORTATION, FERRIES DIVISION**

**AND**

**FERRY AGENTS, SUPERVISORS AND**  
**PROJECT ADMINISTRATORS ASSOCIATION**

**OPINION OF THE ARBITRATOR**

**PROCEDURAL MATTERS**

In accordance with RCW 47.64.200, an interest arbitration hearing involving certain employees of Washington State Department of Transportation, Ferries Division was held on August 25 and 26, 2008 in Seattle, Washington. Washington State Department of Transportation, Ferries Division was represented by Don L. Anderson, Assistant Attorney General. Ferry Agents, Supervisors and Project Administrators Association was represented by Terminal Supervisor Dale R. Kramer. The parties agreed that the undersigned would decide this dispute as a single arbitrator, rather than utilize a three-person arbitration panel.

At the hearing, witnesses testified under oath and the parties presented documentary evidence. A court reporter was present. Rather than submit post-hearing briefs, the parties made oral arguments at the close of the hearing. The Arbitrator received the transcript from the court reporter on September 16, 2008 and the exhibits on September 17, 2008.

## **ISSUES**

RCW 47.64.300 provides that when Washington State Ferry System Management and an employee organization representing a bargaining unit of Ferry System employees are unable to reach agreement on a new collective bargaining agreement following negotiations and mediation, then the Marine Employees' Commission shall certify the issues in dispute for arbitration. The Union in this matter represents a bargaining unit of about 42 Terminal Supervisors employed by the Ferry System. The Ferry System and the Union reached an impasse in their negotiations for a 2009-2011 collective bargaining agreement, following negotiations and mediation. On August 22, 2008, the Marine Employees' Commission certified the disputed issues for interest arbitration. The certified issues for a two year agreement with a term from July 1, 2009 through June 30, 2011 are:

1. Wages
2. Drug and Alcohol Testing
3. Holidays
4. Vacations
5. "Me Too" Clause – (Wage increases tied to interest arbitration awards related to other maritime unions)

At the arbitration hearing, the parties agreed to remove the "me too" clause as an issue in dispute.

## **APPLICABLE STANDARDS**

Washington Statute, RCW 47.64.320, sets forth the following standards to be considered by the interest arbitrator:

\* \* \*

(3) In making its determination, the arbitrator or arbitration panel shall be mindful of the legislative purpose under RCW 47.64.005 and 47.64.006 and, as additional standards or guidelines to aid it in reaching a decision, shall take into consideration the following factors:

(a) Past collective bargaining contracts between the parties including the bargaining that led up to the contracts;

(b) The constitutional and statutory authority of the employer;

(c) Stipulations of the parties;

(d) The results of the salary survey as required in RCW 47.64.220;

(e) Comparison of wages, hours, employee benefits, and conditions of employment of the involved ferry employees with those of public and private sector employees in states along the west coast of the United States, including Alaska, and in British Columbia doing directly comparable but not necessarily identical work, giving consideration to factors peculiar to the area and the classifications involved;

(f) Changes in any of the foregoing circumstances during the pendency of the proceedings;

(g) The limitations on ferry toll increases and operating subsidies as may be imposed by the legislature; and

(h) Other factors that are normally or traditionally taken into consideration in the determination of matters that are subject to bargaining under this chapter.

Washington regulation, WAC 316-55-525, provides the following additional factors to be considered:

\* \* \*

(c) The interests and welfare of the public, the ability of the ferry system to finance economic adjustments, and the effect of the adjustments on the normal standard of services;

(d) The right of the legislature to appropriate and to limit funds for the conduct of the ferry system;

\* \* \*

The parties agree that for each issue in dispute, the Arbitrator must select the last best offer, in its entirety, of either the Employer or the Union.

**RELEVANT PROVISIONS OF THE 2007-2009 COLLECTIVE BARGAINING AGREEMENT**

\* \* \*

**RULE 17 - OVERTIME**

\* \* \*

**17.05** Employees called back to work after completing a scheduled shift and released prior to starting their next scheduled shift shall be paid at the overtime rate, with a minimum of eight (8) hours with the exception of Drug/Alcohol testing. In these cases, the employee will be reimbursed actual time worked with a minimum of four (4) hours call out at the overtime rate. Should the employee be scheduled to return to work the following day and they do not receive a minimum of eight (8) hours off (inclusive of travel time), they will be relieved the following day without loss of pay. If the Employer is unable to relieve the employee they will continue to be compensated hour for hour at the overtime rate until they are relieved or at the completion of their next shift.

**17.06** An employee may refuse call back assignments on scheduled days off or scheduled vacation, and shall not be disciplined for refusing said assignments. For Alcohol/Drug testing the Employer may require an employee to report if no other qualified employees are available to perform the necessary collection.

\* \* \*

**RULE 22 – HOLIDAYS**

**22.01** New Year’s Day (January 1), Martin Luther King’s Birthday (Third Monday in January), Lincoln’s Birthday (February 12), Washington’s Birthday (Third Monday in February), Memorial Day (Fourth Monday in May), Independence Day (July 4), Labor Day (first Monday in September), Columbus Day (Second Monday in October), Veteran’s Day (November 11), Thanksgiving Day (fourth Thursday in November), day after Thanksgiving and Christmas Day (December 25) shall be recognized holidays. All employees required to work on holidays shall be paid at the straight time rate of pay, with an additional one (1) hour’s pay for each hour worked during the period from midnight to midnight of the holiday.

\* \* \*

**RULE 24 – VACATIONS**

\* \* \*

**24.02** Vacation leave, in accordance with Section 24.01 will be credited on the following basis: a working day is based on an eight (8) hour day.

6 months

6 working days

7 months	7 working days
8 months	8 working days
9 months	9 working days
10 months	10 working days
11 months	11 working days
12 months	12 working days
2 years	13 working days
3 years	15 working days
4 years	17 working days
5 years	20 working days
15 years	21 working days
16 years	22 working days
20 years	23 working days
21 years	24 working days

\* \* \*

**RULE 28 – PENALTY PAY**

\* \* \*

**28.04** Employees who are Drug Alcohol sampling certified on each July 1, will receive a one-time payment of one thousand dollars (\$1000). This payment will be dispersed on the July 25 paycheck. This provision will remain in effect unless the certification program is discontinued.

\* \* \*

**DISCUSSION**

**Wages**

The Employer proposes the following wage increases for all employees within the bargaining unit:

Effective July 1, 2009 – 1.6%  
 Effective July 1, 2010 – 1.7%

The Union proposes:

Effective July 1, 2009 – 3%  
 Effective July 1, 2010 – 3%

The Employer contends that its wage proposal is justified for the following reasons.

First, it argues that the wage increases it has proposed is equal to the predicted implicit price

deflator for 2010 and 2011. It asserts even the projected increase in the CPI of 2 percent for each of those years is closer to its position than to the Union's. The Employer relies on the Marine Employees' Commission Wage Survey to argue that this employee group may be 40 percent ahead in wages when compared to the wages earned by comparable employees on the west coast. Finally, the Employer argues that consideration must be given to the \$2.7 billion deficit in the general budget that the State now has to correct.

The Union contends that while it recognizes the State's difficult financial situation, the wage increases which it proposes are necessary to soften the blow of the CPI cost of living increases over the past several years, and the increases it anticipates over the next two years. The Union argues that the Wage Survey relied upon by the Employer is flawed because it relies upon only one comparable employer and that employer did not provide any wage information for employees who are comparable to the Terminal Supervisors at issue here.

It is undisputed that the State is confronted with a difficult financial situation. The State, by law, must have a balanced budget. Robin Rettew, the Senior Transportation Advisor in the Budget Division of the State Office of Financial Management, testified that the State budget is in a very bleak state as a result of revenues which are declining by significant amounts from projections that were made only a few months ago. As a result the State budget has a large projected deficit which must be corrected by the legislature. Mr. Rettew testified that fuel, which represents about 21 percent of the budget for the Ferry System, has increased from 76 cents a gallon in 2002 to \$4.06 recently, which was significantly more than the June 2007 forecast of \$2.61 per gallon. He testified that this rise in fuel prices tends to reduce the general demand for fuel, which diminishes gas tax revenues that are tied directly to the number of gallons consumed. A portion of those diminishing gas tax revenues are dedicated to support the

Ferry System. Wolfgang Opitz is the Deputy Director of the Washington State Office of Financial Management. Mr. Opitz identified the Executive Summary prepared by the State's Economic and Revenue Forecast Council, which in June 2008, reported that the State revenue forecast for the combined 2007-09 and 2009-11 biennia had dropped \$167 million since its February 2008 forecast. Mr. Opitz testified that the February 2008 revenue forecast had dropped \$423 million when compared to its November 2007 forecast. Mr. Opitz testified that the projected ending balance for the 2009-11 biennium now has a \$2.7 billion deficit, which would wipe out the State's entire rainy day fund and still leave a deficit of almost \$2 billion. Mr. Opitz testified that since the gloomy June 2008 forecast, revenue collection reports issued during July and August reflect that collections for those two months were \$120 million below that which was projected in the June revenue forecast. As a result, on August 4, 2008, Governor Christine Gregoire ordered all agencies to reduce their gas consumption by 5 percent compared to last year and placed a freeze on hiring, discretionary equipment purchases, non-emergency out-of-state travel, and the signing of non-emergency personal services contracts.

The 2008 Salary Survey published by the Marine Employees' Commission indicates that for the "Benchmark Title" of "Terminal Agent," one comparable employer responded that their hourly base pay for that position was \$25.27. This compared with a base hourly wage of \$36.22 paid to the Terminal Supervisors at issue here. Larry Reynolds is a retired Reserve Terminal Supervisor, a Union board member, and was on the Union's negotiations team for the 2007-09 contract. Mr. Reynolds testified that during those negotiations it was agreed by the Union and Management that Terminal Agent and Terminal Supervisor were not comparable positions, and they further agreed to send out a nationwide survey separate from the Marine Employees' Commission Wage Survey. Based on that survey which, according to Mr. Reynolds, established

five good comparables, the parties agreed in their 2007-09 contract to provide to the bargaining unit a catch-up increase of 10 percent, which was in addition to the cost of living increase which was negotiated.

The Employer provided the following statistics regarding the annual average rise in the cost of living:

	<u>Price Deflator</u>	<u>U.S. CPI-U</u>	<u>Seattle-Tacoma-Bremerton CMSA CPI – U</u>
2006	2.8%	3.2%	3.7%
2007	2.5%	2.9%	3.9%

The Union presented evidence that the inflation rate for the Seattle Metropolitan area for the 12 month period preceding June 2008, reported by the U.S. Bureau of Labor Statistics, was 5.8 percent. Mr. Opitz testified that the State Economic Forecast Council used various sources to make predictions for cost of living increases for 2008 through 2011. Those predictions are listed below:

	<u>Price Deflator</u>	<u>U.S. CPI-U</u>	<u>Seattle-Tacoma-Bremerton CMSA CPI – U</u>
2008	3.8%	4.8%	4.7%
2009	2.4%	2.3%	2.9%
2010	1.6%	1.3%	2.0%
2011	1.7%	1,7%	2.0

I find the Marine Employees’ Commission Wage Survey to be not relevant to this bargaining unit, since it contains no wage survey for the position of Terminal Supervisor. The Employer’s reliance on the wage survey results for Terminal Agent is misplaced in view of the un rebutted testimony that Terminal Agent is a different job than Terminal Supervisor.

I view the Employer's forecast of increases in the cost of living between now and 2011 to be unworthy of any consideration. The basis for these predictions was not adequately explained. Moreover, it is unlikely that in these uncertain and fluid economic times, that such predictions would be any more accurate than predictions about where the stock market will be, one, two, or three years from now.

I find that the Union's proposal of a 3 percent increase for each year of the new contract is the more reasonable one based on the applicable standards. One of the factors traditionally considered by interest arbitrators in determining appropriate wage increases is the increase in the cost of living. Interest arbitrators generally determine the increase in the cost of living by utilizing the consumer price index (CPI) published by the U.S. Department of Labor, Bureau of Labor Statistics. Ruben, ed., Elkouri & Elkouri – How Arbitration Works, 6<sup>th</sup> ed. (2003), pp 1424-25; Anderson, Krause, and Denaco, "Public Sector Interest Arbitration and Fact Finding: Standards and Procedures," Labor and Employment Arbitration, 2<sup>nd</sup> ed. (1999), § 48.05 [5]. The CPI is based on consumer expenditure surveys for a fixed basket of goods and services. The Implicit Price Deflator (IPD) relied upon by the Employer, makes an adjustment for changes in consumer expenditures from period to period. I have chosen to rely on the CPI rather than the IPD, not only because CPI is the standard generally utilized in interest arbitrations, but also because the U.S. Department of Labor in its published CPI-U figures measures the change in the cost of living for the Seattle-Tacoma-Bremerton metropolitan area, while the IPD is available only for the entire United States. The Washington State Ferry System operates primarily in the Seattle-Tacoma-Bremerton metropolitan area, and therefore, the CPI-U for the Seattle-Tacoma-Bremerton metropolitan area is the most relevant for determining the cost of living increase for residents of that region. The most significant time periods for utilizing the CPI-U are the most

recent time period and the changes in the CPI-U since the previous contract was negotiated during 2007. The CPI-U for the Seattle-Tacoma-Bremerton CMSA increased an average of 3.9 percent during 2007. The June 2008 CPI-U for this metropolitan area increased by 5.8 percent over the previous 12 months. I recognize the State's difficult financial circumstances. However, I am not convinced that there is an inability to pay this small bargaining unit a 3 percent pay increase, which is below the increase in the cost of living for the past several years, and, in fact, much lower than the most recent CPI changes.

### **Drug and Alcohol Testing**

The Union proposes to remove from the Agreement the provisions within Rules 17 and 28 which relate to Terminal Supervisors performing drug and alcohol testing. The Union claims that these provisions were negotiated into the 2007-09 collective bargaining agreement with the understanding that either side has the ability to eliminate drug and alcohol testing conducted by Terminal Supervisors if it was not working for them. The Union asserts that Terminal Supervisors do not want to continue to perform drug and alcohol testing because there is a lot of pressure involved in doing those tests, it causes the Terminal Supervisors to be on call all the time, and the compensation provided for this responsibility is insufficient.

The Employer's position is that there should be no change in these provisions. The Employer suggests that the negotiated language regarding drug and alcohol testing by Terminal Supervisors which appears in the 2007-09 contract does not say that it could be discontinued at will by either party, but instead provides that the Employer has the prerogative to continue the program. The Employer denies that the \$1,000 paid each year to Terminal Supervisors who are certified to conduct drug and alcohol testing is inadequate, particularly since the number of tests

conducted amounts to only an average of about 1.5 tests per year per employee. The Employer argues that it makes little sense to make the change the Union requests because the current system allows the Employer to meet the Coast Guard requirement that drug and alcohol testing be conducted within two hours of an on-the-job injury. The Employer maintains that the Union's proposal would result in additional costs, including for outsourcing the testing and for transporting employees to a clinic to be tested. The Employer suggests that changing the method of conducting drug and alcohol testing would risk objections by other unions whose members would be affected by a change.

Doug Schief, the Senior Terminal Manager, testified that the requirement for Terminal Supervisors to be certified in, and conduct, drug and alcohol testing, resulted from a new Coast Guard requirement that a breath alcohol test be conducted within two hours of an incident which results in an injury that goes beyond just basic first aid. Prior to the change in the required time window for conducting the tests, the Employer had an eight hour window, and injured employees were sent to a private clinic for testing. Mr. Schief testified the Employer did not believe that it could continue to send employees to a clinic to be tested and still comply with the Coast Guard's new two hour deadline for conducting the tests. Mr. Schief testified that having Terminal Supervisors perform the testing has worked very well. James Schofield is the State's Human Resources Representative for the Terminal Department. Mr. Schofield testified that if an incident occurs while the vessel is away from the dock, the time it takes to return to the terminal reduces the time available to conduct the testing within the newly established two hour window.

Mr. Reynolds testified that he participated in the negotiations which led to the inclusion in the 2007-9 collective bargaining agreement of the language in Rules 17 and 28.04 which relates to drug and alcohol testing. Mr. Reynolds testified that it was agreed to try out the newly

negotiated method of having Terminal Supervisors conduct the drug and alcohol testing in order to meet the new Coast Guard timeline requirement. He testified that since it was a trial program, it was agreed to pay the Terminal Supervisors for being certified to conduct drug and alcohol testing \$1,000 as a lump sum on an annual basis, rather than incorporating this compensation as part of the hourly wage. Mr. Reynolds testified that during negotiations, they had agreed that either side had the right to discontinue the trial program.

The new drug and alcohol testing procedures were implemented during the second half of 2006, and for the remainder of that year, Terminal Supervisors administered a total of 56 drug and alcohol tests. During 2007, a total of 85 drug and alcohol tests were administered. During the first seven months of 2008, a total of 69 drug and alcohol tests were administered by Terminal Supervisors. The great majority of Terminal Supervisors conducted between 0 and 2 drug and alcohol tests during a particular year. Vern Rosbach was assigned to perform many more than any other employee. Mr. Rosbach testified that he performed such tests about 25 times during the past two years, though employer records indicate that the total was closer to 20 when one or both tests were conducted. Mr. Rosbach testified that he believes that he performs more tests than others because he lives close to the Bainbridge Terminal and to Eagle Harbor where the yard people work.

Mr. Rosbach testified that the testing and related paperwork generally takes about 1.5 hours for him to perform. He testified that a day long class is required to obtain certification. He further testified that recertification can be required if the Terminal Supervisor makes a significant error in procedure in the testing or paperwork. Mr. Rosbach testified that the Terminal Supervisor first conducts a breathalyzer test for alcohol. Then urine is collected in a terminal bathroom and sent for testing to a lab. Mr. Rosbach testified that before the urine

sample is collected the terminal bathroom must be secured by taping off the water, the flush handle, and the soap dispenser, removing the garbage can, and locking the door. The Terminal Supervisor must record the temperature of the urine from a thermometer on the cup, place the contents into two vials, and label and send them. Mr. Rosbach testified that the Terminal Supervisor Job Description does not mention drug and alcohol testing, though it does say that they may perform other duties, as assigned. Mr. Rosbach testified that if he is called in to perform a drug and alcohol test, he receives a minimum of four hours of overtime pay.

I find that the Union has not provided sufficient justification for ending the negotiated practice of having the Terminal Supervisors perform the drug and alcohol testing. The Employer has established that it is reasonable and practical to have the Terminal Supervisors administer the drug and alcohol tests, particularly in the context of the recent Coast Guard rule which requires that the test be administered within two hours of an incident, even if the incident occurs at sea. It has not been sufficiently established that this new duty for Terminal Supervisors constitutes an undue burden or that the \$1,000 lump sum payment for certification, or the call back overtime minimum is insufficient. Rather, I find that drug and alcohol testing is an appropriate duty for Terminal Supervisors for which they receive adequate compensation. The negotiated contract language does not give the Union the right to discontinue performing drug and alcohol tests. The Union exercised its right to request, in bargaining for a new contract, that the provisions requiring Terminal Supervisors to perform drug and alcohol tests be eliminated. The Employer was not obligated to agree to such a proposal. Under the circumstances, I find the Employer's position that the drug and alcohol testing language in the contract remain unchanged, to be the more persuasive.

## Holidays

The Union proposes to add one additional holiday for the bargaining unit. The holiday would be on April 10 to honor the Union's founder's day, which is the day that the Union was certified. This would give the Union 13 holidays each year. The Union argues that its proposal would bring it in line with the metal trades master contract, which recognizes 13 holidays, including a founder's day holiday.

The Employer responds that an additional holiday is not justified because the Union already has parity in holidays with all its other bargaining units, except for the metal trades group.

One of the factors traditionally considered by interest arbitrators is internal equity, that is, how the bargaining unit at issue is being treated in relation to the employer's other bargaining units. A significant disparity in benefits as compared with those received by the employer's other bargaining units is often raised by one side or the other during contract negotiations, as justification for their position. Of course, the settlements reached with other bargaining units are affected by the particular situation. However, there is still an understandable desire by the employer to achieve consistency. From the Union's standpoint, it wants to do at least as well for its membership as the other unions have already done. It is appropriate to consider internal equity as, in the words of RCW 47.64.320(3)(h), a factor which is "normally or traditionally taken into consideration in the determination of matters that are subject to bargaining. . . ."

According to exhibits provided by the Employer and the Union, the following of the Employer's bargaining units now have 12 holidays: IBU; MEBA-licensed; MEBA-unlicensed; MM&P; MM&P-Watch Supervisors; OPEIU, Local No. 8; and SEIU, Local 6. The Employer's general

government employees receive 11 holidays. Only the metal trades contract provides for 13 holidays.

I find there is no reasonable basis for providing the Union with an additional holiday. It is certainly not justified by the evidence of internal equity which was presented, and upon which the Union has based its argument, inasmuch as the Union's current 12 holidays is consistent with the overall norm of the Employer's bargaining units. Therefore, I find that the Employer's position on this issue should be adopted.

## **Vacations**

The Union proposes that it be granted one additional vacation day at 10 years, two additional vacation days at 20 years, and three additional vacation days at 30 years. The Union justifies its position by arguing that it always had parity with the IBU until the IBU received additional vacation days as a result of an arbitration award. The Union argues that since its members supervise the IBU members, it is only fair that they receive the same vacation package. The Union points out that its request for more vacation days, if accepted, would still not fully close the gap with the IBU.

The Employer contends that there should be no change in the vacation benefit. The Employer argues that among its numerous bargaining units, this bargaining unit's vacation accrual rate is second only to the IBU. The Employer argues that inasmuch as it is facing a large budget deficit, this is not the time to try to catch up with the IBU.

As previously observed, one of the factors traditionally considered by interest arbitrators is internal equity. According to a chart received in evidence the vacation accrual currently received by the bargaining unit here is comparable to or better than that which is received by

other bargaining units, with one exception. The IBU’s vacation accrual is significantly better than all other bargaining units since the IBU received a favorable interest arbitration award with regard to vacations a few years ago. A comparison of the vacation accrual received by IBU and the bargaining unit at issue here (FASPAA) at 10, 20, and 30 years is reflected below:

	<u>IBU</u>	<u>FASPAA</u>
10	22 days	20 days
20	29 days	23 days
30	34 days	24 days

The Union here is clearly behind the IBU in vacation accrual. It is significant that the Terminal Supervisors receive less vacation accrual than many of the IBU represented employees who they supervise. However, considering the situation with all of the Employer’s bargaining units, the evidence of internal equity is mixed. The applicable statute specifically calls for a benefit comparison not with other of the Employer’s bargaining units, but rather with the benefits received by comparable employees of other employers on the west coast of the United States, Alaska, and British Columbia. Neither party to this dispute relied on such evidence with regard to vacation benefits. Considering the evidence which was presented, including the difficult financial circumstances currently experienced by the State as well as the factor of internal equity, I find that there is insufficient support at this time for a change in this bargaining unit’s vacation accrual. Therefore, I find that the Employer’s position on this issue should be adopted.

**AWARD OF THE INTEREST ARBITRATOR**

It is the determination of your Interest Arbitrator that the Collective Bargaining Agreement between the State of Washington and the Ferry Agents, Supervisors, and Project Administrators Association, shall be modified as follows:

- I. Effective July 1, 2009, each classification represented by the Union will be increased by 3%.<sup>1</sup>
- II. Effective July 1, 2010, each classification represented by the Union will be increased by 3%.
- III. There shall be no change to Rules 17 and 28 with regard to drug/alcohol related testing.
- IV. There shall be no change to Rule 22.01 regarding holidays.
- V. There shall be no change to Rule 24.01 regarding vacations.

Sammamish, Washington

Dated: September 25, 2008

/s/ Alan R. Krebs  
Alan R. Krebs, Arbitrator

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<sup>1</sup> The parties are in agreement that the hourly wage rate for the Retired Reserve Supervisor shall be the same hourly rate as the Supervisor plus an additional five dollars and forty four cents (\$5.44) per hour.