

BEFORE THE ARBITRATOR

In the matter of the arbitration
of a dispute between

INLANDBOATMEN'S UNION OF THE
PACIFIC

and

WASHINGTON STATE FERRIES

CASE 24779-A-12-1509

ARBITRATION AWARD
(Donna Tegnell)

Schwerin Campbell Barnard Iglitzin & Lavitt, LLP, by *Robert H. Lavitt*, Attorney at Law,
for the union.

Attorney General Robert W. Ferguson, by *Don L. Anderson*, Assistant Attorney General,
for the employer.

On May 7, 2012, the Inlandboatmen's Union of the Pacific filed a joint request for grievance arbitration with the Public Employment Relations Commission. A hearing was held before Arbitrator Robin A. Romeo on December 4, 2012, in Seattle, Washington, pursuant to the binding arbitration provisions of the collective bargaining agreement between the parties. The parties presented evidence through witness testimony and exhibits. The parties filed post-hearing briefs.

ISSUE

At the hearing, the parties stipulated to the issue:

"Did the State violate the collective bargaining agreement by assigning terminal duties to a deckhand on certain Friday Harbor runs since March 20, 2012?"

Based upon the entire record, I find that the employer did not violate the collective bargaining agreement by assigning terminal duties to a deckhand on certain Friday Harbor runs. Accordingly, the grievance is denied.

BACKGROUND

The Washington State Ferries (employer), a division of the State Department of Transportation, provides a ferry transportation system in Washington State. The Inlandboatmen's Union of the Pacific (union) represents unlicensed employees of the employer, including deckhands who are classified as Able Bodied (AB) or Ordinary Seamen (OS). The employer and the union are parties to a collective bargaining agreement, effective July 1, 2011, through June 30, 2013.

Since at least 2002, the employer has contracted with private management companies to provide terminal agent services for the terminal in the San Juan Islands and Vancouver B.C. At the Friday Harbor terminal, the terminal agent attends to the arrival and departure of ferry sailings, including the loading and unloading of foot passengers and vehicles. Pursuant to the contract, the terminal agent does not provide these services for the last vessel arrival of the day if no passengers are loaded. In practice, the terminal agent does not attend to sailings after 8:00 P.M., with the exception of Friday nights during the summer sailing schedule.

On January 3, 2010, the employer reduced its service from the private management company, for the winter schedule. This removed terminal agent services to the last vessel arriving each night in Friday Harbor even if passengers were loaded onto the vessel. This reduction in service was expanded in September 2010, for the fall schedule. Beginning September 2010, terminal agent services were not provided for any vessels arriving after 8:00 P.M. regardless of whether passengers were loaded onto the vessel.

When the terminal agent is not present, the AB deckhand must leave the vessel to perform the loading and unloading functions. This includes raising and lowering the gate, directing traffic, and tying up the vessel when the vessel is docked for the night. Additionally, on Friday nights, the M/V Evergreen that arrives at 8:45 P.M. is tied to a different dock to allow the M/V Yakima to arrive. These functions take the AB deckhand approximately 15 minutes to perform. The remaining crew onboard the vessel assume the duties of the AB deckhand during that time.

Besides performing loading and unloading functions, there are other times between sailings when deckhands leave the vessel. They leave to perform personal business on their breaks, such as

Evergreen State Class (EVERGREEN STATE, KLAHOWYA, TILLKUM)

3 AB

1 OS

2 OS-Exempt

....
7.03

The Employer and the Union agree that every effort will be made to man the vessels of the Employer, while in service, with the standard complement of crew personnel in accordance with the above minimum manning schedules. All auto carrying vessels shall have a Boatswain (Bos'n).

7.04

Except in cases of emergency, and for movements within the vicinity of Eagle Harbor, when any vessel is not manned in accordance with the minimum manning scheduled of unlicensed personnel in the Deck Department, the wages of the position(s) shall be divided equally among the employees performing the work of the unfilled position(s). If a crew shortage occurs on a holiday, the holiday rate of pay shall apply.

PRINCIPLES OF CONTRACT INTERPRETATION

When parties cannot agree on the meaning of a contract provision, the function of the arbitrator is to interpret the language and determine whether a violation occurred. To interpret contract language, the arbitrator first examines the provision to see whether it is clear and unambiguous. ELKOURI AND ELKOURI, *How Arbitration Works* 9-2 (7th ed. 2012).

When contract language is clear and unambiguous, an arbitrator may simply look at the language of the agreement itself; *i.e.* the “four corners” of the agreement, to determine whether a violation occurred. This principle of contract interpretation is widely known and accepted as the “plain meaning rule.” ELKOURI AND ELKOURI, *How Arbitration Works* 9-8.

In cases where the contract is completely silent with respect to a given activity, the presence of a well established practice, accepted or condoned by both parties, may constitute, in effect, an unwritten principle on how a certain situation should be treated. ELKOURI AND ELKOURI, *How Arbitration Works* 12-2. Past practice in the context of contract interpretation has been defined as:

A past practice binding on the parties may be defined as one which is directly, repeatedly and consistently associated with a specific condition and must have been practiced with such regularity, consistency and constancy as to disclose a definite, distinct pattern mutually accepted in the past by the parties.

Campbell Plastics Corp., 51 LA 705, 706 (Cahn, 1968) as cited in *Inlandboatmen's Union of the Pacific*, Decision 401 (MEC, 2004).

Inlandboatmen's Union of the Pacific, Decision 401 (MEC, 2004) outlined the test for past practice:

1. Has the practice existed over an extended period of time, so that employees could reasonably expect the outcome?
2. Has the practice been clear and unequivocal?
3. Has the practice been accepted by both parties?

In typical contract interpretation grievances, arbitrators apply the rule that the union bears the burden of proving by a preponderance of the evidence that the employer violated the collective bargaining agreement. ELKOURI AND ELKOURI, *How Arbitration Works* 190 (Supp. 2010).

ANALYSIS

The union argues that when an AB deckhand at Friday Harbor leaves the vessel and performs the duties of a terminal agent on particular runs, the remaining crew on the vessel becomes short staffed. The union characterizes the deckhand as missing, leaving the crew short a person, in violation of the staffing requirements in Article 7 of the collective bargaining agreement. The union argues that as a remedy, the crew should receive short staffing wages under section 7.04 of the collective bargaining agreement. Additionally, it also believes the employer should fill the terminal agent position under its contract with the private company.

The allegations in this grievance specifically concern the M/V Evergreen arriving at 8:45 P.M., the M/V Yakima arriving at 9:45 P.M. and the M/V Evergreen arriving at 12:35 A.M., on Fridays at the Friday Harbor terminal. The contract language is broad and does not address these three specific arrivals at Friday Harbor. It only states how many deckhands are needed for a full crew. It does not state how or when the crew is short. It does not state whether leaving the vessel results in a deckhand being absent from the crew. The contract does not contain any specific or unique circumstances as to any particular terminal.

Because there is no clear and unambiguous language to address the issue before me, I must look at past practice to determine if there is a violation. The past practice shows that there is a history of a deckhand performing terminal agent duties on certain runs at Friday Harbor. It also shows a history of deckhands performing similar duties at other terminals and a history of deckhands leaving the vessel between sailings.

The 2002 contract between the employer and the private management company shows that terminal services were not provided for the last vessel arrival of the day when passengers weren't loaded. In that case, the AB deckhand unloaded passengers and tied up the last arriving vessel. This required the AB deckhand to leave the vessel to perform the terminal agent duties, leaving the vessel below minimum staffing since 2002. Thus, there is a past practice of the AB deckhand performing terminal agent duties on the last arriving vessel and vessels arriving after 8:00 P.M.

In 2010, the practice was expanded so that the AB deckhand provided terminal agent duties on the last arriving vessel even when passengers were loaded. Later in the year, the practice was expanded so that the deckhand had to perform terminal agent duties not only on the last arriving vessel, but on any vessel arriving after 8:00 P.M. Therefore, since 2010 an AB deckhand has been leaving the vessel more frequently to perform the terminal agent duties, leaving the remaining deckhands with one less person on board for approximately 15 minutes.

At other terminals throughout the State, there is a longstanding past practice of deckhands loading and unloading passengers and tying up vessels without the crew receiving short staffing pay. There is also a past practice of deckhands leaving the vessel for other reasons such as performing work duties or personal business without providing short staffing pay to the remaining deckhands.

Using the first prong of the past practice test, I find that 11 years is an extended period of time for the deckhand at Friday Harbor to perform terminal agent duties. The expansion of time during the day that the duties were performed since 2010 is also significant. Given the long period of time and subsequent authorizations, the parties can reasonably expect that the AB deckhand would perform the duties of the terminal agent at Friday Harbor on the 8:45 P.M., 9:45 P.M. and 12:35 A.M. sailings. The first prong of the test for past practice has been satisfied.

Looking at the second prong of the test, I find this practice has been clear and unequivocal. There is no question that the AB deckhands at Friday Harbor have consistently been performing terminal duties since 2002. There is no question that deckhands at other terminals perform terminal duties as well. There is no question that deckhands leave the vessel between sailings. The second prong of the test has been satisfied.

According to the third prong of the test, I find that the practice of deckhands performing terminal agent duties has been accepted by both parties. The union has never argued that deckhands could not unload the last arriving vessel at Friday Harbor. Since 2002 when this practice began, there has never been any argument by the union that the performance of these duties by deckhands at other terminals is improper or that it leaves the vessel short staffed. Additionally, the union has not argued that the changes in 2010 were a violation of the collective bargaining agreement. The union has never argued that the practice of deckhands leaving the vessel for reasons other than performing terminal duties leaves the crew short staffed or that the remaining deckhands should receive short staff pay. The third prong of the test has been satisfied. Using past practice to interpret the contract language, I cannot conclude that the employer violated the contract by assigning terminal duties to a deckhand on certain Friday Harbor runs since March 2012.

The union argued that the vessel was "in-service" when it was tied up to the dock and therefore, the staffing requirements of Article 7 apply. However, it did not show how this differed from the past practice when the vessel was also "in-service" and terminal duties were performed by a deckhand.

I cannot find that such broad language in Article 7 of the collective bargaining agreement allows for the union's interpretation that at one terminal on certain runs the deckhands should be compensated according to Article 7.04. The language does not state that when a deckhand leaves the vessel for any purpose that it leaves the crew short staffed. The union has not offered any precedent to supplement the deficient language in the collective bargaining agreement.

To accept the union's interpretation of the contract would mean that deckhands on all runs at every terminal could not leave the vessel to perform terminal duties, other business duties, or personal matters between sailings without the rest of the crew being compensated. There was no evidence

to show that this was the intent when Article 7 was negotiated nor is there any practice of this occurring.

The union also argued that leaving the terminal agent position unfilled violated the collective bargaining agreement provisions on staffing and filling vacancies. However, there were no vacancies in any bargaining unit position. The union cannot bargain or grieve over a position that is not in its bargaining unit.

The union also argued that the employer created a new classification when the deckhands at Friday Harbor were given additional duties to perform and that the work was outside of their job classification. However, there was no evidence to support this argument.

The union did not prove by a preponderance of the evidence that the employer violated the collective bargaining agreement.

AWARD

The grievance is denied. The employer did not violate the collective bargaining agreement by assigning terminal duties to a deckhand on certain Friday Harbor runs since March 20, 2012.

Issued at Olympia, Washington, this 7th day of May, 2013



ROBIN A. ROMEO, Arbitrator