

Exh. J-1, Section 6(f) and Exh. J-3, Section 6(b),² but the parties differ on the compensation required when the employees are held over beyond the end of a shift. The dispute stems from the fact that while the Agreement provides that “minimum payment for any overtime work shall be in increments of one (1) hour,³ there is an agreed exception to this general rule when an employee is held over for less than one hour “beyond the regular assigned work day” (Exh. J-1).⁴ Consequently, employees extended 15 minutes or less under the 2009-11 CBA or 48 minutes or less under the new CBA are not entitled to a minimum of one hour of extra overtime pay in accordance with the general rule. Rather, they are entitled to just 15 minutes of overtime under the old Agreement, or up to 48 minutes of overtime in 6 minute increments under the new CBA.⁵

The crux of the dispute before me, however, is the contractual meaning of a “regular assigned work day” which, when extended for the designated portions of one additional hour, triggers limited overtime for the first hour. The Union contends that an employee working on a regularly scheduled day off is by definition not working his or her “regularly assigned work day,” and thus an employee working any *part* of an overtime hour should receive OT compensation for the *full* hour. The Employer counters that such employees should be treated for end of shift overtime purposes just like their fellow employees who are working regularly scheduled shifts. That is so, says WSF, either because the shift has essentially become the employee’s “regular assigned work day” *for that particular day*, or because the contractual

² The respective exhibits cited are the 2009-11 and 2011-13 CBA’s between the parties. The applicable language in each Agreement is very similar, but the numbering of the sections has changed because of modifications to the CBA that are not material to the present dispute.

³ See, Exh. J-1, Section 6(f) and Exh. J-3, Section 6(b).

⁴ The 2011-13 CBA contains slightly different language, i.e. “beyond the regular assigned twelve (12) hour workday” (Exh. J-3), but neither party has suggested that this difference in the language is significant on the issue before me.

⁵ Past these initial thresholds, there is no dispute that overtime must be paid in hourly increments.

language “regular assigned work day” should be read as referring to the regular work shift as designated *for the particular vessel on which the employee is filling in*.

At a hearing held at WSF headquarters in Seattle on October 10, 2012, the parties had full opportunity to present evidence and argument, including an opportunity to cross examine witnesses. The proceedings were transcribed by a certified court reporter, and I have carefully examined the transcript in the course of my analysis of the evidence and argument. Counsel filed simultaneous post-hearing briefs December 3, 2012, and with my receipt of the briefs, the record closed. Having carefully considered the evidence and argument in its entirety, I am now prepared to render the following Decision and Award.

II. STATEMENT OF THE ISSUE

The parties have stipulated that the issue before me should be stated as follows:

Whether the Washington State Ferries violated the collective bargaining agreement when it failed to pay overtime in increments of one hour for employees called into work on a scheduled day off? If so, what is the appropriate remedy?

Tr. at 5.

III. FACTS

The facts may be simply stated. When licensed engine room employees on scheduled days off are called in to work a shift in place of a fellow employee, they are paid a minimum of eight hours at the overtime rate. Until sometime in 2009, employees were generally paid overtime in hourly increments if they were held over beyond the end of such a shift—at least if they asked for it on their time sheets. In fact, three witnesses for the Union, each of whom had formerly served in a management function with WSF but has now returned to the bargaining unit, testified that they understood that the contract required payment of overtime in hourly increments in that situation and that they had applied such a policy, going so far on occasion as

to increase an employee's pay to the top of the following hour even if the employee had not asked for it. In 2009, a change occurred in WSF management at the Senior Port Engineer position, and apparently at about that same time, the Employer made some changes to the timekeeping forms to enable management to better evaluate the legitimacy of claims for overtime pay. These changes led to a policy of paying overtime in less than hourly increments for the first hour of holdover time even if the employee was working on his or her scheduled day off. The time records in evidence indicate however, that even after these changes in policy, some employees continued to claim entitlement to hourly increments and were paid by WSF on that basis, at least on some occasions. According to WSF witnesses, these instances were the result of "mistakes" because of the large number of timesheets to be audited and the compressed time frame in which managers were required to complete the task.

In any event, several grievances were filed by licensed engineers in 2010 claiming that the Employer had violated the Agreement by failing to pay overtime in hourly increments when employees were held past the end of a shift worked on their regularly scheduled days off. The parties were unable to resolve these grievances in the preliminary steps of the grievance and arbitration process, and these proceedings followed.

IV. DECISION

A. Contract Language

Section 6(f), the contractual provision most at issue, reads in pertinent part as follows:

Minimum payment for any overtime work performed shall be in increments of one (1) hour, except as follows: The employee will be paid one-quarter (1/4) hour at the overtime rate when work is extended one (1) fifteen (15) minutes or less beyond the regular assigned work day

Exh. J-1 at 11.⁶ The Union has argued, however, that in interpreting this language, the Arbitrator must also take account of the following companion provision of Section 6:

Management shall 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 a minimum of eight (8) hours pay at the overtime rate.

Exh. J-1, Section 6(f).

B. Burden of Proof

In the usual contract interpretation case, the party asserting a contractual violation (most often the Union) must bear the burden of establishing its contentions. *See, e.g., St. Antoine, ed., The Common Law of the Workplace* at 54, § 1.93 (2d Ed., BNA, 2005). When an Employer asserts that a situation falls within a stated exception to a general contractual rule, however, many arbitrators place the burden on the Employer to establish the existence of the “special circumstances” necessary to excuse the Employer’s compliance with the normal rule. That is particularly so when the issue presented is a claimed exemption from a duty to pay a certain form of compensation. *See, e.g. Schoonhoven, ed., Fairweather’s Practice and Procedure in Labor Arbitration* at 273 and footnote 20 (4th Ed., BNA, 1999) (reporting pay). I find that analysis convincing and will apply it here. That is, the parties have expressly agreed that “minimum pay for *any* overtime work shall be in increments of one (1) hour” (emphasis supplied). Therefore, the “normal rule” is that employees must be paid for overtime work in hourly increments. The parties have also agreed, on the other hand, that this normal rule does not apply in an explicitly specified situation—to employees “extended” for relatively brief periods “beyond the regular assigned work day.” It is appropriate, then, that the Employer bear the burden of establishing that

⁶ The quoted language appears in the 2009-11 CBA. This language changed slightly in the 2011-13 CBA, but neither party has argued that the meaning of operative language, i.e. “beyond the regular assigned work day,” changed. In fact, the parties have largely argued the case based on the old Agreement. Thus, just as the parties did in their briefs, I focus in this Decision primarily on the earlier language so as to avoid unnecessary complication in the analysis.

the employees involved here were held over beyond the “regular assigned work day” so as to fall within the agreed exception.

C. The Merits

Turning to the merits, each party argues, in effect, that the language clearly supports its position. In my view, however, the language is ambiguous and could be read by reasonable minds to support either party’s contentions. Under those circumstances, Arbitrators are accustomed to looking to other sources to determine the parties’ mutual intent. For example, evidence of bargaining history is often presented in arbitration because what the parties *said* to each other across the table during negotiations can be highly instructive as to what they mutually *intended*—or at least how they should have understood the contractual commitments they were making to each other. But no bargaining history was presented here, apparently because the language at issue has been around long enough that the party’s current representatives were not present at its birth.

In the absence of (or in addition to) bargaining history, the parties often present evidence about how the language has been *applied* in practice. That kind of evidence sometimes supports a conclusion that the parties have established a binding past practice, i.e. a mutually recognized practice that, through consistent application over a long period of time, has ripened into a contractual commitment. Here, however, both before and after 2009, many employees were paid in hourly increments, but some were not. The evidence, then, simply does not reflect the kind of consistency required to demonstrate that the parties had reached an implied agreement as to how to treat overtime for employees working an extended shift on a scheduled day off.

I recognize that both sides have attempted to explain away the inconsistencies reflected in the time records in evidence, at least to some extent, e.g. the Employer argues that the volume of

timesheets to be audited, and the complexity of the timekeeping at WSF, meant that some “mistakes” were bound to happen. Those “mistakes,” however, do not undermine the established “practice” according to the Employer. Similarly, the Union does not contest that some employees working on a regular day off did not request pay under the hourly increment rule, even prior to 2009, but rather filed for overtime under the same conditions and limitations as their colleagues working shoulder to shoulder with them on a regularly scheduled shift. But if an employee *did* request the hourly increment, says the Union, WSF paid it.⁷ Thus, in the Union’s view the record supports its contention of a binding “practice,” particularly in light of the testimony of former Senior Port Engineers that they understood the CBA to require overtime in hourly increments to employees working on a scheduled day off. Despite these arguments, however, I find that the established discrepancies in the application of the rule, taken together, prevent either side from persuasively arguing that the parties had developed a mutually binding contractual past practice on this issue.

Even when the evidence fails to establish a binding contractual practice, however, how the parties have acted historically is sometimes instructive to the Arbitrator in resolving ambiguities in disputed contract language. It might be reasonably argued, for example, that the fact that some former Senior Port Engineers, while serving in management roles in the past, had attempted to apply the overtime rules in the manner the Union now argues the contract requires, should be taken into account in resolving the ambiguity of the contractual provisions. *See, e.g. The Common Law of the Workplace* § 2.20 at 89-90; *see also, Mittenthal, Past Practice and the Administration of Collective Bargaining Agreements*, 14th Annual Proceedings of the National

⁷ In addition, some (but not all) employees had their overtime requests bumped up to one hour by the Senior Port Engineer.

Academy of Arbitrators at 36-38 (BNA, 1961).⁸ That is, for relatively extended periods of time, Senior Port Engineers, acting on behalf of WSF, understood the contract to require hourly increments for employees extended on shifts worked on their days off, even if they did not succeed in applying the provisions in that manner in every instance.

In the end, however, I do not find it necessary to rely on that sort of analysis because the language itself, considered without regard to how it might have been inconsistently applied from time to time, favors the Union's position sufficiently to justify a finding that WSF has failed to carry its burden of proof. Consider, for example, the critical phrase in the applicability of the exception as argued by WSF, i.e. "regular assigned work day." The employees at issue in these grievances may have been on an "assigned" work day in some sense, having been called in on a day off, but working on a scheduled day off would not ordinarily be considered a *regular* assigned work day by most in the labor-management community. Moreover, I have difficulty with the concept that an employee working on a "regularly scheduled day off," as Section 6(h) designates it for purposes of one aspect of overtime compensation (8 hours minimum pay at the overtime rate), could at the same time reasonably be considered to be on a "regularly assigned *work day*" for a different aspect of overtime compensation under Section 6(f), i.e. limited entitlement to overtime compensation for the first hour of an extended shift. Had the parties mutually intended employees to be in different statuses for the application of these two subsections of a single section in the contract (Section 6), I would have expected express language to that effect.

Moreover, it seems to me there is at least one other anomaly in the Employer's position. Everyone agrees that *any* employee extended past the end of a shift is entitled to overtime in

⁸ Searchable full-text copies of the NAA Proceedings, which reflect the considered views of highly experienced advocates and neutrals, are available free of charge online on the NAA website, <http://naarb.org/>.

hourly increments once the initial overtime threshold has been exceeded, i.e. 15 minutes under the old Agreement and 48 minutes under the current CBA. That is, when an employee has worked beyond these minimum amounts of overtime, the general rule of overtime in hourly increments applies. But by treating employees working on their regularly scheduled *days off* in the same manner as employees on their normal schedule, WSF's argument fails to take account of the fact that —unlike employees working a normal shift—an employee working an extended shift on a day off has *already been paid several hours of overtime* for that workday because of Section 6(h).

The purpose of the exception to the general rule at issue here appears to be to reduce the overtime cost to WSF of the frequent, but relatively minimal, off-schedule performance caused by special circumstances such as inclement weather, the need to wait for ambulances or aid cars, heavy holiday and/or weekend volume, and similar situations that cause ferries to run slightly late. When these delays cause employees to be extended on a regular shift, their *first hour* of overtime is impacted, to be sure, but once beyond 48 minutes of overtime (under the current CBA), everyone agrees they are entitled to hourly increments. In the absence of express contract language to the contrary, logic suggests that employees working on a scheduled day off—and who have *already* been paid (at the point the shift is extended) for at least 8 hours of overtime under Section 6—should also be viewed as having exceeded the minimum overtime threshold. Thus, they too should be entitled to hourly increments.

Finally, I cannot accept the Employer's alternative argument that “regular assigned work day” refers to the regular shifts established for the *vessel* involved and, therefore, that when an employee works one of those shifts on a day off, the limited overtime entitlement during the first hour of an extended shift applies. I might have been able to accept that argument if the

contractual language simply described what happens when a “regular work day” has been extended,⁹ but the actual contractual phrase, i.e. “regular *assigned* work day,” seems to me to be far more reasonably read as a reference to the *employee’s* regularly assigned work day, rather than to the established shift structure on a particular *vessel*. That is, while it would be natural to refer to employees as being “assigned” certain work days and shifts, it would be odd in this context to say that vessels have been “assigned” work days.

For the foregoing reasons, I find that the grievances must be granted. As a remedy, employees properly falling within the scope of the grievances must be made whole for any lost wages and benefits. I will remand to the parties for good faith efforts to agree on an appropriate remedy in light of the reasoning set forth above, but I will retain jurisdiction to resolve any remedy questions the parties are unable to resolve on their own. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

⁹ On the other hand, even that phrasing would be problematical because a held over employee is not working a “regular” work day, but rather has been called in to work on a scheduled day off.

AWARD

Having carefully considered the evidence and argument in its entirety, I hereby render the following AWARD:

1. The grievances must be granted; and
2. Employees properly falling within the scope of the grievances shall be made whole for lost wages and benefits;
3. The matter will be remanded to the parties in the first instance for an attempt to agree on an appropriate remedy in light of the reasoning set forth above;
4. The Arbitrator will reserve jurisdiction for the sole purpose of resolving any disputes in connection with remedy; either party may invoke this reserved jurisdiction by fax or email sent, or letter postmarked (original to the Arbitrator, copy to the other party), within ninety (90) days of the date of this Award or within such reasonable extensions as the parties may mutually agree (with prompt notice to the Arbitrator) or that the Arbitrator may order for good cause shown; and
5. Consistent with the terms of their Agreement, the parties shall bear the fees and expenses of the Arbitrator in equal proportion.

Dated this 3rd day of January, 2013



Michael E. Cavanaugh, J.D.
Arbitrator