IN ARBITRATION PROCEEDINGS
PURSUANT TO AGREEMENT BETWEEN THE PARTIES

In the Matter of a Controversy between MEBA DISTRICT 1-PCD AFL-CIO, and WASHINGTON STATE FERRIES. RE: Grievance #17-12, On-call employees overtime pay in one (1) hour increments; FMCS Case No. 191101-01108	OPINION AND AWARD of LUELLA E. NELSON, Arbitrator December 20, 2019

This Arbitration arises pursuant to Agreement between MEBA DISTRICT 1-PCD AFL-CIO ("Union" or "MEBA"), and WASHINGTON STATE FERRIES ("Employer" or "WSF"), under which LUELLA E. NELSON was selected to serve as Arbitrator and under which my Award shall be final and binding upon the parties.

Hearing was held on July 17, 2019, in Seattle, Washington. The parties had the opportunity to examine and cross-examine witnesses, introduce relevant exhibits, and argue the issues in dispute. A certified shorthand reporter attended the hearing and subsequently prepared a verbatim transcript. Both parties filed post-hearing briefs on or about September 10, 2019.

APPEARANCES

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STIPULATED ISSUE

Does the Employer violate the Labor Agreement when it pays on call employees for time worked in excess of 12 hours an overtime rate that is less than a one-hour increment? If so what is the remedy?

RELEVANT SECTIONS OF THE 2015-17 AGREEMENT[1]

RULE 1 – DEFINITIONS

...

1.14 On Call Employee
The term "on call employee" shall be an employee who may or may not be working on a year round basis, and who is not guaranteed forty (40) hours of straight time pay per week. The employee will be assigned work based on his/her date of hire and availability.

...

Other Definitions and Terms
Unless the context of a particular paragraph in question indicates otherwise, all other words and terms used in the Agreement shall be given their common and ordinary meaning.

...

RULE 11 – MINIMUM MONTHLY PAY AND OVERTIME

11.01 The overtime rate of pay for employees shall be at the rate of one and one-half (1½) times the straight time rate in each classification in accordance with all applicable terms of the collective bargaining agreement (CBA).

11.02 When work is extended forty-eight (48) minutes or less beyond the regular assigned twelve (12) hour work day, or eighteen (18) minutes or less beyond twelve and one-half (12½) hours of a regular assigned work day, such time shall be paid at the overtime rate in six (6), twelve (12), eighteen (18), twenty-four (24), thirty-six (36) and forty-eight (48) minute increments. Should work be extended by more than forty-eight (48) minutes, the time worked beyond the regular assigned twelve (12) hour work day or eighteen (18) minutes beyond twelve and one-half (12½) hours of a regular assigned work day, shall be paid at the overtime rate in increments of one (1) hour. Such extended work shifts shall not be scheduled on a daily or regular basis....

11.03 Employees called to work prior to their regular scheduled shift shall receive the overtime rate of pay in increments of one (1) hour for early call-out. ...

...

11.09 All employees in year-round positions and designated Vacation Relief Oiler positions ... shall be guaranteed forty (40) hours of pay per one (1) week work schedule or eighty (80) hours of pay per two (2) week work schedule, as set forth elsewhere in this Agreement. This provision shall not apply to on call employees.

...

11.11 Engine room employees shall submit a cycle-time pay order at the end of each eight (8) week engine room period. Cycle time pay order will be completed by the chief engineer whether or not there is any cycle time payable.

RULE 12 – ON CALL EMPLOYEES

12.01 An employee reporting to a shift shall be paid not less than eight (8) hours straight time pay for each shift worked.

12.02 On call employees may be employed subject to the following conditions:

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[1] The parties had negotiated a successor Agreement by the time this dispute arose. The only change to the language in dispute here resulting from those negotiations was to add the phrase, ""Minimum payment for any overtime work performed shall be in increments of one (1) hour, except as follows:" to the beginning of Rule 11.02. The MOU set forth at the end of this contractual recitation was added to the 2015-17 Agreement in a February 2016 reopener, as discussed below.

(a) All hours worked in excess of twelve (12) hours in any day or eighty (80) hours in any two (2) week work schedule shall be paid at the overtime rate, provided that employees who are working in positions which are affected by other overtime provisions in the Agreement or its Appendices shall be paid overtime as provided for in such provisions.

...

APPENDIX B

Oiler – Engine Department Personnel

The following Rules are in addition to Rule 1 through Rule 36 of the above:

RULE 1 – HOURS OF EMPLOYMENT, OVERTIME AND ASSIGNMENT

1.01 (a) The eighty (80) hours per two (2) week work schedule 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 year-round employee and available for work shall receive less than eighty (80) hours pay per two (2) week work schedule. 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 employees do not work in excess of eighty (80) hours per two (2) week period.

...

1.06 (a) The Employer shall continue the practice of having the Staff Chief Engineers make up schedules for the Engine Department employees subject to approval of the Senior Port Engineer.

(b) In scheduling of employees under this Rule, Employee Work Schedules for any vessel may be arranged so as to result in an average of eighty-four (84) hours per two (2) week period during a scheduling cycle of not more than four (4) two (2) week periods (eight [8] calendar weeks), PROVIDED, HOWEVER, such schedules shall not result in a normal expectancy of overtime for employees. If a schedule violates this principle, overtime shall be paid for the excess hours. Overtime shall not be payable for normal work time under such schedules, but shall be paid whenever employees perform work in excess of the scheduled hours in accordance with Rule 1.01, Appendix B. Paid leave time shall be computed as time worked. If a vessel schedules changes, all overtime incurred shall be paid.

(c) Employees shall be paid for eighty (80) hours per two (2) week work schedule; but shall report the actual number of hours and minutes worked. All straight time hours and minutes actually worked shall be cycled as part of the current cycling period. When vessels are moved into a maintenance or lay-up facility, normal cycling shall continue. Payment shall be subject to adjustment for overtime worked outside of the work schedule and for schedule changes.

....

MEMORANDUM OF UNDERSTANDING
BETWEEN
DISTRICT NO. 1 MARINE ENGINEERS' BENEFICIAL ASSOCIATION
AND
WASHINGTON STATE DEPARTMENT OF TRANSPORTATION, FERRIES DIVISION
AND
STATE OF WASHINGTON, OFFICE OF FINANCIAL MANAGEMENT,
STATE HUMAN RESOURCES, LABOR RELATIONS SECTION

This memorandum of Understanding by and between District No. 1 Marine Engineers' Beneficial Association (MEBA), the Washington State Department of Transportation, Ferries Division (WSF/DOT), and the State of Washington, Office of Financial Management, State Human Resources, Labor Relations Section (OFM/SHR/LRS) is mutually agreed to regarding Section 6, (b) and Section 9, (k) (2) of the Licensed Collective Bargaining Agreement, and Rule 11.02, Appendix B Rules 1.01 (a), 1.06 (b) of the Unlicensed Collective Bargaining Agreement.

The parties agree to the following:

1. For other than on call employees, overtime worked shall be rounded up to a one (1) hour increment of overtime in the event of a schedule change (i.e., a shift that differs from the day prior), as shown in the following example.

Wednesday	– Weekday	#1	0600 – 1815
Thursday	– Weekday	#1	0600 – 1815
Friday	– Weekday	#1	0600 – 1815
Saturday	– Weekend	#2	0615 – 1830 (¼ hour OT rounded up to 1 hour OT)
Sunday	– Weekend	#2	0615 – 1830
Monday	– Weekday	#1	0600 – 1815 (¼ hour OT rounded up to 1 hour OT)
Tuesday	– Weekday	#1	0600 – 1815

2. Relief employees shall be paid in the same manner as permanent crew members, except that the initial day of the relief assignment shall not be considered a schedule change.

...

FACTS

The Employer is a division of the Washington State Department of Transportation ("DOT"). It operates a fleet of twenty-two vessels providing vehicle and passenger ferry services throughout the state of Washington. Currently, each vessel's engine room is staffed by Staff Chief Engineers who oversee all operations, Assistant Engineers, and Oilers. The Union represents all engine room employees, in two bargaining units. Oilers and Wipers[2] comprise the unlicensed bargaining unit. The licensed bargaining unit consists of Staff Chief Engineers and Assistant Engineers. Since July 2019, MEBA has also represented Port Engineers in a separate bargaining unit.

This dispute involves overtime pay for on call Oilers. Vacation Relief Oilers are regular, full-time employees who are assigned to vessels and shifts in one-week tours to cover vacation leave for regular Oilers. On call Oilers also fill openings as needed but, unlike Vacation Relief Oilers, are not guaranteed any minimum number of working hours. Their assignments are based on seniority, and assignments are irregular. On call Oilers may work on one vessel one day and a different vessel with a different route the next day, or not at all, and their shifts are determined by the vessel and route to which they are assigned on a given day. While Oiler and Vacation-Relief Oiler are classifications specified in the Agreement, on call Oiler is not a separate classification, but a designation used to identify employees with no guarantee of minimum hours.

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[2] WSF currently employs no Wipers.

Staff Chief Engineers or Assistant Engineers prepare timesheets for the unlicensed unit employees on their vessels. In past years, those timesheets were reviewed by a Port Engineer, who might make changes before approving them. Administrative staff now audit those timesheets, make corrections, and approve them. Corrected timesheets are returned to the unlicensed unit employee, but not to the person who prepared them.

THE DISPUTE

Jeremy James ("Grievant") is an on call Oiler. On May 18, 2017, he worked 12 hours and 35 minutes, from 0500 to 1735. The Engineer on his watch prepared a timesheet for him which included 12 hours of straight time and 1 hour of overtime. The timesheet was returned to Grievant with the overtime entry corrected to 35 minutes and an explanatory stamp that read: "Overtime will be paid at 6 minute increments for the first 48 minutes, after that will be paid in 1 hour increments". The Union filed a grievance as a class action covering "all On-Call" Oilers on June 15, 2017, alleging a violation of Rule 11.02 and Appendix B Section 1.06(b) of the parties' collective bargaining agreement. The grievance explained that Rule 11.02

> comes into effect only for employees permanently assigned to vessels or vacation relief employees both of whom participate in cycle time. This rule comes into effect when their work day is extended beyond the scheduled watch such as when a vessel is running behind schedule and the employees are unable to relieve the watch at the scheduled time. It is the Union's argument that On-Call employees must be paid overtime in one hour increments for all watches longer than 12 hours because they do not cycle their time.

The grievance requested as a remedy that the Employer make all on call employees whole by paying overtime in one-hour increments for all overtime they have worked.

The Employer and the Union discussed the matter for several months before holding a Step 1 grievance meeting in March 2018. The Employer's Step 1 response denied the grievance and asserted that Grievant's 35 minutes of overtime was the result of a shift extension and fell within the 48-minute incremental timeframe provided for in Rule 11.02 of the Agreement. The grievance was not resolved in later steps.

Matthew von Ruden is WSF's Director of Vessel Engineering and Maintenance. He testified that, prior to the Step 1 grievance meeting, he spoke with union members and members of management who were responsible for overseeing the operations at the time the grievance was filed; one, Chief of Staff Elizabeth Kosa, had had continuous experience with the Agreement going back to 2010. From them, he testified, he learned that

WSF had been consistently paying overtime to on-call employees in 6-minute increments. He did not understand why the Union believed cycle provided a basis for paying overtime to On-Call Oilers in increments of one hour. He believed that Rule 11.02 applied to on call Oilers, and he therefore denied the Union's grievance.

THE IMPACT OF "CYCLING" ON THIS DISPUTE

Cycling refers to the recording of hours to account for variations in scheduled work days. Vessel schedules do not permit a 24-hour day to be divided evenly into 12-hour shifts. Instead, most employees alternate between 12.5- and 11.5-hour shifts. The extra half hour on the long shifts is "cycled" to the short shifts within an 8-week period. On-call employees cannot cycle their time because their days, shifts, and total hours vary from day to day. They therefore are paid for the shift worked each day, including overtime for long shifts. The pertinent part of the Employer's Engine Department Timekeeping Procedures describes cycling as follows:

> ... If a permanent engine room employee works an equal number of short and long shifts and the vessel schedule does not change (even though the vessel schedule shifts on a regular basis) the hours will cycle to an average twelve (12 hour shift over four work periods.
>
> All scheduled straight time hours up to 12.5 hours shall be cycled. Overtime shall be payable, pay period by pay period, for time continuously worked beyond scheduled shift. If the scheduled shift is up to 12.5 hours; minimum payment for any overtime work extended shall be in the following increments - 6 minutes, 12 minutes, 18 minutes, 24 minutes, 36 minutes and 48 minutes for the first hour; and one hour increments for the time worked in excess of 48 minutes. When the scheduled watch is 12.5 hours, overtime shall be paid in increments of 6 minutes, 12 minutes, or 18 minutes if work is extended for the first 18 minutes; 12.5 hours shall be cycle; and one hour increments for the time worked in excess of 18 minutes and 12 hours shall be cycled. If the scheduled shift is more than 12.5 hours; overtime shall be paid in the increments of 36 minutes and 48 minutes for the first hour, and one hour increments for the time in excess of 48 minutes; and only 12 hours shall be cycled.
> ...
> On-call Oiler/wiper and temporary employees do not cycle. If the shift is over twelve (12) hours they are to be paid the appropriate overtime for that shift. As per the Collective Bargaining Agreement, the first hour will be incremented.

DOT Payroll Manager Cindy Bellus testified that Port Engineers are among the personnel who receive drafts of Timekeeping Procedures revisions after each contract renewal for review and comment. Her recollection was that no suggestions or comments came in regarding the paragraph for on call Oilers, the current version of which is unchanged from the 2015 version. She testified that the Union does not receive a copy of the Timekeeping Procedures when they are updated.

EVIDENCE REGARDING REPORTING AND PAYING OVERTIME FOR ON CALL OILERS

Staff Chief Engineer Mark Nitchman has worked for WSF for 28 years, including management and Engineer positions. In 1998, as Port Engineer, he was responsible for auditing as many as 700 timesheets every two weeks. For the past 14 years, he has prepared and signed timesheets for on call employees under his watch. He testified that, throughout the period when he has been responsible for preparing or auditing timesheets, on call employees' timesheets have called for a minimum of 1 hour for any overtime worked. He continues to submit timesheets in this manner for on call employees, and testified he has never been informed he was completing those timesheets incorrectly. While some permanent employees have approached him with corrected timesheets, no on call, vacation relief, or temporary employees have done so. He testified that disagreements over timesheets are flagged and forwarded to Payroll for resolution, but that, due to the volume of timesheets, it is possible for incorrect timesheets to be paid if Payroll does not detect the error.

In 2009, Nitchman was party to an email exchange with then-Senior Port Engineer Mike LaCroix regarding pyramiding of overtime for on call Oilers. The Agreement in effect at that time provided for VOS ("Vessel Off Schedule") overtime at ¼ hour for the first 15 minutes and an hour for any time longer than 15 minutes due to a vessel arriving late. The on call Oilers in question were scheduled for a 12½-hour shift, and had worked up to 20 minutes past the scheduled end of that shift. The Relief Engineer had prepared timesheets paying those employees an hour of overtime for their scheduled half hour of overtime, plus VOS overtime for the time worked past the scheduled end of their shift. Nitchman's email explained to LaCroix that he understood that such employees were entitled to an hour of overtime pay for the scheduled half hour past 12 hours, but not to VOS overtime in addition. LaCroix emailed back that he agreed with Nitchman's interpretation of the Agreement and past practice.

Jeff Duncan worked as an on call Oiler from 2000 to 2002, before becoming MEBA's Seattle Branch Agent. He testified that he always received an hour of overtime when he worked beyond a 12-hour shift in that position. He acknowledged that Rule 11.02 does not specifically exclude on call employees, but "it's how it's always been interpreted how it's always been done". He testified that Rule 12 provides that on call employees

are paid overtime for time worked in excess of 12 hours in a day or 80 hours in a two-week period, and the rate is determined by Rule 11.01, but they are not covered under the VOS language. Duncan asserted that, as Rule 11.02 refers to a regularly assigned work day, it thereby excludes on call employees because they do not have a regular assigned work day, vessel or shift. To his knowledge, on call employees have never been paid under the language of Rule 11.02 and were always paid overtime in increments of one hour when their work was extended beyond 12 hours. He testified that Grievant was the first on-call employee the Union was aware of who did not receive overtime pay in this manner – a fact he attributed to the reluctance of on call employees, who are typically probationary employees, to raise issues due to their employment status.

Demry McCoy was a DOT Fiscal Analyst in 2015-16, responsible for reviewing timesheets for engine room employees. In May 2016, she sent an email to engine room staff reminding them of certain timekeeping procedures, including overtime pay for on call Oilers. She wrote:

> If an On Call Oiler is scheduled for more than a 12 hour shift the excess minutes will be rounded to one hour. Please note this is NOT for things such as VOS. Example: Scheduled Shift is 12 hours 25 minutes. Please enter 12 hours straight time and 1 hour of 02/88 (non-cyclable Overtime)."

McCoy testified she sent this email after receiving several incorrect timesheets for on call Oilers. Her recollection was that employees were paid overtime in 1-hour or 6-minute increments, depending on the coding on their timesheets, and that the 6-minute increments applied only to VOS. She recalled that there was an MOU which provided that any time worked over 12 hours was to be rounded up to the nearest hour and that, if the overtime was not due to VOS, it was paid in one-hour increments. The record does not reflect whether the MOU she recalled was the 2016 MOU (quoted above).

Bellus has worked in payroll for DOT for 17 years, and worked directly with WSF timesheets when she began working for DOT. She testified that neither McCoy nor McCoy's immediate supervisor consulted her about McCoy's email; that she was unaware of an MOU that would have guided McCoy on this email; and that she was unaware of the alleged practice described in this email. When McCoy's email was brought to her attention in preparation for this hearing, Bellus prepared an email stating, in pertinent part, that the guidance given regarding overtime for on call Oilers was "not supported by contract rules, is not a current practice, nor

was it a practice prior to the email being sent out." She testified she did not ask any Chief Engineers or Assistant Chief Engineers what the practice had been before writing her email. Her email stated, and she testified, that she had reviewed timesheets of on call Oilers from before McCoy's tenure, and found none for overtime in one-hour increments for the first hour of overtime.

The Union introduced timesheets from 2019 for on call Oilers on which overtime was entered for one hour when the employee worked a long watch, with a notation that the overtime was due to a long watch and the comment "on call oiler time does not cycle." The Chief Engineer who prepared those timesheets had been a Port Engineer in 2015-2016. The Employer introduced the same timesheets after auditing; the overtime on each had been changed to 30 minutes with a stamped explanation quoting Rule 11.02. The Employer also introduced timesheets for Grievant from April and May 2017. Some originally showed overtime of a full hour with comments regarding his on call Oiler status. All of those were edited to show incremental overtime, with a stamped explanation, "Overtime will be paid at 6 minute increments for the first 48 minutes, after that will be paid in 1 hour increments." On the timesheet for April 16-30, an overtime code for working more than 80 hours in a cycle was also changed to show an increment of .20 rather than an hour of overtime.

Payroll Auditor Jane Placek has audited WSF engine room timesheets at various times since 2012, and continuously since 2018. She testified that, if a timesheet is submitted for an hour of overtime pay when the employee worked 12 hours and 30 minutes, she changes the overtime to 30 minutes and adds the stamp referring to Rule 11.02 (described above). She testified that, during her training in July and August 2018, her predecessor told her to use that verbiage. She believes she also received an email from von Ruden to handle overtime in this manner. When she was first hired into the position in 2012, her supervisor, Kosa, told her that they always applied the Agreement's language that overtime was incremental up to 48 minutes. She did not recall receiving a direction to use anything other than Rule 11.02 for on call Oilers.

BARGAINING HISTORY

MEBA has represented the licensed bargaining unit since 1959, when WSF was established, and the unlicensed bargaining unit since the mid-1980s, after they decertified the Inland Boatmens Union ("IBU").

Duncan testified that Rule 12 was part of the unlicensed Agreement that MEBA "inherited" when it began representing the unlicensed bargaining unit. He testified that the proviso of Rule 12.02(a) addressed the frequent bids of IBU-represented deck employees in and out of positions. As applied to the unlicensed engine room employees, he understood that proviso would only apply if an on call employee was temporarily promoted into a Permanent position.

Prior to the 2011-2013 Agreement, Rule 11.02 read, in pertinent part:

> When work is extended fifteen (15) minutes or less beyond the regular assigned work day, or beyond twelve and one-half (12 ½) hours of a regular assigned work day, such time shall be paid at the overtime rate for one quarter (1/4) of an hour. Should work be extended by more that [sic[fifteen (15) minutes, the time worked beyond the regular assigned work day or beyond twelve and one-half (12 ½) hours of a regular assigned work day, shall be paid at the overtime rate in increments of one (1) hour. ...

According to Duncan, changes to Rule 11.02 followed an exposé of the WSF operations by local news media over a 3- or 4-year period. Those stories led to legislative proposals that would have limited the Union's bargaining rights and taken away employees' overtime pay. In response, WSF and MEBA reopened negotiations. Duncan was the bargaining representative for the engine room employees in these negotiations. As a result of the reopened negotiations in January 2011, overtime would be paid in 6-minute increments for the first 48 minutes of overtime worked, based on a proposal made by the State.

Duncan testified the 2016 MOU (quoted above) was negotiated to clarify schedule changes. Vessels periodically switch between two different schedules, resulting in changes in hours worked in that pay period for the entire vessel crew. Under the 2016 MOU, overtime caused by such schedule changes is rounded up to an hour "[f]or other than on call employees." Duncan testified this overtime provision excludes on call employees for two reasons. First, the quarter hour of overtime resulting from a vessel schedule change would already have been rounded up to an hour for those employees pursuant to Rules 11 and 12, so it was unnecessary to apply this MOU's overtime provision to them. Second, on call employees' schedules change frequently, so they would already be paid an hour of overtime for any day when they worked more than 12 hours.

In negotiations for the 2017-19 Agreement, the Union successfully proposed to add to the unlicensed Agreement a phrase at the beginning of Rule 11.02 reading, "Minimum payment for any overtime work

performed shall be in increments of one (1) hour, except as follows:" That phrase was already in the equivalent provision in the licensed agreement. Duncan testified that the phrase "except as follows" is a reference to VOS and that, for over 70 years, this was how the language was understood and applied by both the Union and the Employer. In his view, there was no need to clarify that it meant VOS, because this was the accepted meaning. He testified the language does not apply to on call employees because it "is strictly vessel-off-schedule language... And the way that the on call works, if they work in excess of 12 hours, they get an hour of overtime. So they're not subject to that vessel off schedule...."

Senior Negotiator Jerry Holder has represented the Employer in negotiations for the past 12 years, including in all but two cycles of this Agreement (2011-13 and 2015-17), and has also been involved in administering those contracts. He did not recall receiving questions related to the subject matter of this grievance. He testified he believes that Rule 11.02 applies to on call Oilers, as there is no language in the Rule to indicate that they are excluded. He testified that, in addition to VOS, overtime could arise if a crew failed to show up when a crew change was required. In that situation, the vessel would be held over until a replacement arrived, but it would not be VOS.

Holder testified that the phrase added to Rule 11.02 in the 2017-2019 Agreement did not change the meaning of the Rule. He believes the language is clear in that it does not exclude any employee and provides for overtime to be paid in 6-minute increments for the first 48 minutes and 1 hour thereafter. Von Ruden was involved in negotiations for the 2017-2019 collective bargaining agreement, but could not recall discussions related to changes to Rule 11.02.

THE CAVANAUGH DECISION

In 2012, Arbitrator Michael Cavanaugh heard a grievance involving overtime when licensed employees who worked on their day off were held over past the end of that shift. Briefly, the provision in question called for overtime in increments of one hour except where the employee was held over for less than an hour "beyond the regular assigned work day." Under that exception, employees were entitled to 15 minutes of overtime "when work is extended one (1) fifteen (15) minutes or less beyond the regular assigned work day" under the

2009-11 contract or up to 48 minutes of overtime in 6-minute increments under the 2011-13 contract. Arbitrator Cavanaugh concluded that this exception did not apply where the employee was working on their regular day off. He distinguished between a "regular work day" and a "regular assigned work day," and rejected the argument that an employee working on their regular day off was on a "regular assigned work day" for that day. He also noted that employees working on their regular day off were already being paid overtime for that work day, and had therefore exceeded the minimum overtime threshold. He therefore found that a full hour of overtime was payable for employees whose shifts were extended for less than an hour in such instances.

POSITION OF THE UNION

The parties' historical understanding and application of the rules, considered in light of the collective bargaining agreement as a whole, supports the Union's position that on call employees are to receive overtime pay in increments of 1 hour for all time worked in excess of 12 hours in a single day.

Rule 12 calls for payment at the overtime rate for "[a]ll hours worked in excess of twelve (12) hours..." It is ambiguous whether "hours" in Rule 12 refers to full-hour or partial-hour increments. For over two decades, on call employees have been paid for overtime in increments of 1 hour. This was confirmed by testimony from Management personnel, Union employees and WSF employees themselves, as well as by the email exchange between Nitchman and LaCroix and by McCoy's email. As recently as July 2019, Engineers continued to fill out timesheets consistent with the historical understanding that on call employees are to receive an hour of overtime for time worked in excess of 12 hours. Although WSF Payroll made changes to those timecards as it believed was appropriate, the timecards evidence the long-running interpretation of WSF employees who have worked both in management and in the fleet that on call employees receive an hour of overtime for hours worked in excess of 12 hours.

The Agreement as a whole supports the Union's position. Rule 11.02 does not apply to on call employees because they do not have a "regular assigned work day." All witnesses agree that they have no regular assignment or regular vessel schedule. The partial-hour overtime provision of Rule 11.02 is based on time worked beyond a "regular assigned" work day. It therefore applies only to unlicensed employees with a

regular assigned work schedule – i.e., Regular and Vacation Relief Oilers and Wipers. Arbitrator Cavanaugh's decision involving licensed personnel supports the Union's interpretation of "regular assigned." Although that case involved a different bargaining unit and contract, the language regarding partial-hour increments is much the same. The key phrase, "regular assigned work day," is exactly the same in both contracts.

In the Cavanaugh case, licensed employees working on their day off were not on a "regular assigned work day," so the overtime increments did not apply to them. The same logic applies here. On call employees never have a "regular assigned work day" – that is the primary characteristic of an on call employee. The 6-minute increment rule therefore does not apply to their overtime. Rather, the 1-hour increment applies, just as it does in all situations other than the first hour of overtime on a "regular assigned work day" – every hour of early call-out under Rule 11.03; every hour of overtime on a "regular assigned work day" following a schedule change under the 2016 MOU; and all other hours, even for those who are subject to 6-minute increments for the first hour after a regular assigned work day.

This issue has, for all practical purposes, been litigated and decided. The parties have negotiated three Agreements since Arbitrator Cavanaugh's decision. The only change has been the phrase added to the 2017-19 Agreement, which, if anything, more specifically indicates that the 6-minute increment in that Rule is a single exception to paying overtime in 1-hour increments. That change made the language identical to the language interpreted by Arbitrator Cavanaugh.

The Employer has not challenged Arbitrator Cavanaugh's ruling and interpretation; it has clearly accepted that the 6-minute increment rule is specifically limited to certain situations in both bargaining units, and is the exception to the standard practice of paying overtime in 1-hour increments. Because on call employees are not "regular assigned" employees, they are not subject to 6-minute increments under Rule 11.02.

Because on call employees are not subject to cycling, which is applied through Rule 11.02, payment of their overtime for hours worked in excess of 12 hours is not governed by Rule 11.02. Cycling ensures that employees are paid appropriately for their time despite the daily variances in the length of watches, given the imprecise timing of a ferry's operations ("VOS"). Cycling only works if the employee works on the same vessel

an equal number of long and short watches over the 8-week period when time is cycled. On call employees are not subject to cycling because they do not have a regular assignment, but instead receive single-day assignments throughout the fleet. Cycling is further evidence that on call employees are not subject to partial-hour overtime under Rule 11.02.

Rule 11.03 supports payment of overtime in 1-hour increments for on call employees. It guarantees an hour of overtime to employees who are called out before their "regular scheduled shift." The short-notice call-out that triggers this overtime is similar to the same-day dispatches that on call employees receive.

The 2016 MOU supports the Union's interpretation. Employees subject to a schedule change have their overtime rounded up to one hour. This MOU excludes on call employees from its application because they are already subject to a 1-hour increment of overtime for having worked past 12 hours.

WSF failed to establish that Rule 11.02 applies to on call employees. It is undisputed that this language is intended to apply to unlicensed employees who work a regular assignment as part of the cycling concept that is used to ensure fair compensation over an 8-week period. It is undisputed that cycling does not apply to on call employees. WSF offers no explanation why on call employees would be subject to the contractual provision used to balance out regular employees' hours over an 8-week period.

WSF failed to persuasively rebut the Union's testimonial and documentary evidence that on call employees have been paid overtime in 1-hour increments for over two decades. Before writing her email, Bellus did not interview any bargaining unit employees to determine if there was a practice of which she was unaware. She admitted it was possible that a practice existed of which she was unaware. Holder and Ruben also did not speak with bargaining unit personnel to confirm or deny that on call employees had been paid overtime in 1-hour increments. The practice would have been in effect before either began working for the WSF. Despite access to former management personnel, they failed to investigate and instead relied on their own interpretations of the Agreement. WSF's position relies on subjective, uninformed interpretations of the Agreement. This is not surprising in light of recent turnover at WSF.

WSF failed to persuasively rebut the Union's assertion of an established past practice in paying overtime to on call Oilers. It failed to prove that it made any effort to eliminate that past practice through negotiations. The Arbitrator should give little weight to WSF's interpretation of Rule 11.02 as it relates to on call employees.

The Arbitrator should sustain the grievance and return the matter to the parties to address the remedy.

POSITION OF THE EMPLOYER

The Union bears the burden of proof. The plain language of the Agreement and the parties' bargaining history do not support the Union's arguments.

Duncan's testimony, that on call employees were always paid overtime in 1-hour increments, is not supported by testimony from Bellus and Placek. There have been several iterations of the Agreement since Duncan worked as an Oiler. Von Ruden and Placek provided information that the former WSF Chief of Staff supported the interpretation that up to the first 48 minutes of overtime for on call employees is paid in 6-minute increments. Bellus' email credibly states that McCoy's email was "not supported by contract rules, is not a current practice, or was it a practice...." The Union provided no evidence to rebut Bellus' email.

Nitchman's testimony did not rebut Bellus' email. The original timesheets introduced in support of his testimony were audited and corrected to reflect incremental time. Placek audited and corrected those time-sheets, consistent with the knowledge she gained from Kosa when she began auditing timesheets at least four years ago.

Testimony from Nitchman and Duncan that overtime for on call employees has "always" been paid in 1-hour increments was not supported by WSF payroll representatives or by the Timekeeping Manual. Even if Nitchman continued to submit incorrect timesheets, there was no mechanism to inform persons completing timesheets that an error was corrected by an Auditor. Nitchman did not testify that, if an Auditor struck the time, that would violate the Agreement.

The perceived lack of communication about errors is not the subject of this grievance. The Employer has been consistently applying the provisions of the Agreement and has not been challenged by the Union.

Corrections have been made to previous timesheets for Grievant, as well as for other employees, to reflect compliance with Rule 11.02. Corrections have been consistently made, and no grievances have been filed.

The Arbitrator cannot add to the Agreement, but must give the words of the Agreement their plain meaning, because there is no ambiguity. Arbitrators must carry out the parties' intent. Evidence of bargaining history is always relevant to show the context in which parties reached agreement, but cannot be a basis for altering clear language. Arbitrators must give contract terms their ordinary and popular meaning absent indications that the parties intended a unique or specific meaning. Where parties disagree about the intent of contract language, the party whose understanding is in accord with the ordinary meaning of that language is entitled to prevail. The party advancing a construction of the language that is not based on the ordinary meaning of the words bears the burden of proving that construction.

Arbitrators seek to determine intent from several sources, including the express language, bargaining history, and past practice. Words should be given their ordinary and common meaning using the "reasonable person" or "fair and equitable" standard, provided that doing so does not create an absurd or unworkable result.

Arbitrators cannot rewrite the contract; their role is limited to ascertaining and giving effect to the parties' intent. When the language is clear, the contract must be given its plain meaning. Only when language is ambiguous is it proper for an arbitrator to consider extrinsic evidence such as bargaining history and past practice. Past practice provides evidence of what the parties believe the language means. Bargaining history can show what the parties intended or did not intend. An arbitrator must give effect to the agreement as a whole.

MEBA has not met its burden of demonstrating that any of the cited contract provisions were violated. The plain language governs, as the language is not ambiguous.

The language at issue is the phrase "when work is extended" in Rule 11.02. The plain language does not support the Union's attempt to limit this language, such as that it only applies to VOS. No language in Rule 12.02(a) or 11.02 "calls out" only VOS. Holder gave a perfect non-VOS example, of a relief not showing up, that would extend work beyond a 12-hour shift for an on call employee.

The 2011-13 changes in Rule 11.02 only changed the increments from 15 minutes to 6 minutes. A phrase was added to the beginning of Rule 11.02 in the 2017-19 Agreement. That does not change the meaning of Rule 11.02. It does not add an exclusion or qualification. Use of the word "any" in that phrase does not change the meaning. The rest of Rule 11.02 is clear about the increments. Although this grievance was pending during negotiations for the 2019-21 Agreement, the Union made no attempt to change the language or clarify that it applied only to VOS. It was not necessary for the Employer to attempt to change the language, because the language was clear.

There is no "past practice" in this case. Strong proof is required to show that a past practice constitutes an implied term of a contract. The party alleging a past practice bears the burden of proof. To be binding, a past practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and established practice accepted by both parties. Sporadic or singular occurrences do not constitute a past practice. Mutuality is also required, meaning that both parties must have unequivocally understood and accepted the implied term. It cannot arise out of a mistake. It must have become so well understood that its inclusion in the contract is deemed superfluous.

In this case, the parties have not "unequivocally" understood and accepted the implied terms the Union asserts. The Employer's position is supported by Nitchman as well as a Port Engineer, Kosa, and Holder. There was no meeting of the minds on this issue.

The grievance should be denied.

OPINION

PRELIMINARY MATTERS

The Union bears the burden of persuasion as the moving party in this contract interpretation case. The applicable standards for contract interpretation are well established. Where the language is clear and unambiguous, Arbitrators must give effect to the parties' intent as expressed in that language. In determining whether the language is clear, words are given their ordinary and popularly accepted meaning, absent evidence they were used in a different sense.

Arbitrators cannot interpret disputed contract provisions in a vacuum, but must read them in conjunction with the rest of the Agreement. A specific contract provision governs over a general provision and may operate as an exception to the general provision. Arbitrators must avoid interpreting ambiguous language to nullify or render meaningless any part of the negotiated agreement if another reasonable interpretation gives effect to all provisions. However, if no reasonable meaning can be given to a provision, either from its context or by examining the contract as a whole, it may be treated as surplusage and declared to be inoperative. If two plausible interpretations exist, Arbitrators must prefer that interpretation which avoids harsh, absurd, or nonsensical results.

Extrinsic evidence generally cannot override clear contract language. It can, inter alia, demonstrate a latent ambiguity in the language, or show that the parties intended a specialized meaning in using certain terms. The party asserting one of these exceptions bears the burden of demonstrating the existence of the exception.

Past practice is persuasive in interpreting ambiguous language where the practice is clear, consistent, and known to both parties. In this setting, past practice serves as an aid in illuminating the parties' intent. However, no illumination is required where the contract language is clear. Instead, a practice can override clear language only if it demonstrates an equally clear and unambiguous agreement by the parties to modify the written contract–i.e., if it is the functional equivalent of an amendment to the contract. The conduct necessary to modify clear language must be unequivocal, and the terms of the modification must be clear, mutual, intentional, and readily ascertainable through a fixed practice over a reasonable period of time. Although practice involving other contracts with the same language may be instructive in some circumstances, it is not binding on a non-party to that practice.

Unions have the jurisdiction to maintain the integrity of their contracts. While employees play a role by bringing possible contract violations to the attention of their union, it is of no significance whether individual employees have grieved past possible contract violations. Regardless of the sentiments of individual employees, an employer is not free to take action inconsistent with the Agreement, but is free to take action consistent with the Agreement.

THE MERITS

Rule 11.02 of the Agreement calls for overtime in 6-minute increments "[w]hen work is extended forty-eight (48) minutes or less beyond the regular assigned twelve (12) hour work day, or eighteen (18) minutes or less beyond twelve and one-half (12½) hours of a regular assigned work day, ..." The pivotal contract language is the term "regular assigned work day."

Rule 12.02(a) applies specifically to on call employees; it calls for payment at the overtime rate for "All hours worked in excess of twelve (12) hours in any day or eighty (80) hours in any two (2) week work schedule...." It provides an exception for on call employees "working in positions which are affected by other overtime provisions in the Agreement or its Appendices...." In that case, the employee is "paid overtime as provided for in such provisions." Thus, an on call employee assigned to work in a position with a "regular assigned work day" would be subject to the overtime provisions pertinent to that position under the exception in Rule 12.02(a). No evidence exists of such an assignment here.

A "regular work day" is not necessarily a "regular assigned work day." The word "assigned" has a separate meaning from the word "regular." A regular "assigned" work day has meaning only in the context of a regular assignment. On call Oilers work on an irregular basis. By no stretch of the term can their work days be considered "regular assigned work days." Their overtime compensation therefore is not covered by Rule 11.02. Instead, it is covered by Rule 12.02, as the Union argues, except if the exception in that Rule applies to the on call employee's particular assignment.

There is no pertinent past practice in contravention of the contract language. There is no evidence of the mutuality that is required to find a binding past practice. On this record, the Union was never put on notice that on call Oilers' timesheets were being changed prior to this case. It is undisputed that the Union did not receive copies of the Timekeeping Manual or its changes. The loop simply was not closed.

Bargaining history also does not argue for a different interpretation of the disputed language. The Union "inherited" language negotiated by the IBU. While the negotiations for the 2011-13 Agreement changed the length of the increments, it did not alter the predicate for overtime pay in increments, i.e., that work was

extended past the "regular assigned work day." The most recent negotiations added a phrase to Rule 11.02 calling for overtime in one-hour increments "except as follows." The "exception" to the rule of one-hour increments is 6-minute increments. That exception must be applied narrowly, to situations where an employee is held over on his/her "regular assigned work day."

For all the above reasons, I conclude that the 6-minute increments in Rule 11.02 do not apply to overtime worked by on call Oilers who are not on a "regular assigned work day." I therefore conclude that the Employer violates the Labor Agreement when it pays on call employees for time worked in excess of 12 hours an overtime rate that is less than a one-hour increment.

As requested by the Union, I will return this matter to the parties to address the remedy. As stipulated by the parties, I will retain jurisdiction over the Remedy and any disputes arising therefrom.

AWARD

1. The Employer violates the Labor Agreement when it pays on call employees for time worked in excess of 12 hours an overtime rate that is less than a one-hour increment.

2. The matter is returned to the parties to address the remedy. The Arbitrator retains jurisdiction over the Remedy and any disputes arising therefrom.

LUELLA E. NELSON - Arbitrator