

<p>In the Matter of a Controversy</p> <p>Between</p> <p>INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 63</p> <p>AND</p> <p>PACIFIC MARITIME ASSOCIATION</p> <p>RE: Appointment Systems at TTI, Pier T, Long Beach</p>	<p>SCAA-0012-2019 INTERIM Opinion and Decision</p> <p>Of</p> <p>Southern California Area Arbitration Panel</p> <p>Walter Daugherty, Chair Person Mark Mascola Ron Merical</p> <p>March 25, 2019</p> <p>San Pedro, California</p>
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The hearing was held at 9:00 a.m. on Monday, March 25, 2019, at 350 W. 5th Street, San Pedro, California. Each party was afforded full opportunity for examination and presentation of relevant arguments, documents, and testimonies of witnesses. A Certified Shorthand Reporter was in attendance and recorded a transcript of the hearing.

APPEARANCES:

FOR THE UNION: Joe Gasperov, ILWU Local 63

FOR THE EMPLOYER: Phillip Tabyanan, Pacific Maritime Association
Bill Candella, Pacific Maritime Association

ALSO PRESENT: Various Others

WITNESSES: Shelene Conen, ILWU Local 52
Dane Jones, ILWU
Judith Ardron, ILWU Local 63
Marla Felando, ILWU Local 63
Birgit Knappe, TTI

ISSUE:

Issue 1:

Should Marine Clerks be assigned the following work to conform to the principles of Section 1, PCCCD and of the Technology Framework in the Total Terminal International (“TTI”), Pier T, Long Beach, California Appointment System:

1. The assignment of date and gate hours for terminal appointments;
2. The selection of the appropriate shift template for terminal appointments;
3. The assignment of move types and time slots for terminal appointments;
4. The establishment of hourly and cumulative appointment time limits for the referenced terminal;
5. The definition of yard locations for terminal appointments.

Issue 2:

Are Marine Clerks entitled to restitution due to TTI Long Beach’s refusal to assign the above work to Marine Clerks?

BACKGROUND:

This dispute concerns the assignment of certain work performed on the Employer’s, TTI, Pier T in Long Beach, California, computer-based appointment system that provides a web-based appointment system for truckers entering the terminal. On October 13, 2016, the Union pursuant to the relevant provisions of the PCCCD Technology Framework submitted an information request to PMA regarding the Appointment System at TTI in the Port of Long Beach. PMA responded to the request, and by letter dated October 25, 2016, the Union claimed jurisdiction over some six functions performed in connection with the “delivery and direction of cargo at the referenced terminal” (Joint Exhibit 1). The Joint Coast Technology Committee (“Technology Committee”) met on November 15, 2016, disagreement was reached that was not acted upon by the CLRC, and a request for arbitration was afterwards made by the Union.

On August 30, 2018, the Union wrote to PMA advising that it had learned that the Employer had “altered work assignments” regarding the TTI Appointment System and requested additional information prior to the scheduled Technology Committee meeting. By letter dated September 11, 2018, PMA advised the Union that effective June 25, 2018, the disputed work had been assigned to the Office Clerical Unit (“OCU”) represented by ILWU Local 63 OCU (Joint Exhibit 1). This work was previously done by management. The Union’s initial request for arbitration subsequently coming before the Southern California Area Arbitration Panel (“Panel”) in the instant proceeding.

The Union presented four witnesses. Their testimonies may be summarized as follows:

Shelene Conen (“Conen”) testified that she is a Chief Clerk employed at TTI Seattle Pier 46. Conen testified, and the parties stipulated that she performs the five work functions described in the issue statement and that the same computer screens are displayed and used in the Seattle and

Long Beach Appointment Systems. She said that before the Washington Area Arbitration Panel issued its Decision on August 3, 2017 in PSAA-0003-2017 assigning this work to Marine Clerks (Union Exhibit 3), this appointment system work was done by management and that her work now involves management giving her instructions and her making the required entries into the system. Conen acknowledged that she is unfamiliar with the Employer's Long Beach terminal operations.

Dane Jones ("Jones"), the Chairman of the Clerks Technology Committee, testified that the screenshots generated in the TTI Appointment System were reviewed and discussed at numerous Technology Committee meetings and that the same appointments systems are used at the Seattle and the Long Beach terminals. He said that work equivalent to that at issue is assigned to Marine Clerks at numerous terminals including ETS at Tacoma, every SSA facility on the West Coast, YTI, Long Beach Container Terminal, and WBCT.

Jones stated that an agreement was reached at the CLRC level regarding the assignment of specific functions and work on the eModal Appointment System to the Marine Clerks (Union Exhibit 4) and that this work is functionally equivalent to the disputed work of the TTI Appointment System. He stated further that TraPac's Oakland appointment system is identical to TTI's Appointment System and that the equivalent work on TraPac's system was awarded to Marine Clerks by the Northern California Area Arbitration Panel in NCAA-0008-2017 (Union Exhibit 6).

Chief Supervisor Judith Ardron ("Ardron") testified that she has been steady at TTI Long Beach since 1999 and supervises the Marine Clerks in the tower and the yard dayside whose responsibilities include directing trucks to locations to receive or deliver cargo and containers. She said that the yard planners are responsible for ensuring that areas of the yard are properly utilized and available for cargo delivery and that about 80 percent of the cargo moved in and out of the terminal required appointments, with appointments being mandatory to receive cargo.

Ardron testified that she has never contacted a trucking company who is not on the terminal and that her involvement in the appointment system has been limited to when a trucker comes to the trouble window to process their ticket. If there is an issue with an appointment, the trucker is sent to an office clerical employee.

Marla Felando ("Felando") testified that she has been employed as a steady 30 percent yard planner at TTI Long Beach for ten years. She said that she is responsible for planning where cargo from incoming vessels will be placed in the yard based on where the vessel is berthed and who is picking up the cargo. She also determines where cargo is placed in the yard before it is loaded for shipment from the terminal. Felando is responsible for entering this information into a template in the Terminal Operating System ("TOS") (Union Exhibit 8). She stated that she does not directly contact the truckers or customers.

Birgit Knappe, the sole Employer witness, testified that she has been employed as a Customer Service Manager for TTI Long Beach since 2004 and is responsible for supervising the OCU employees working in the Customer Services Department. She said that the OCU employees are the "first contact point" for customer inquiries regarding cargo movements and are the "frontline staff clerks" that deal with customers and truckers on appointment issues.

Knappe testified that management determines the available number of appointments for truckers for a particular place and time in the yard, which is communicated to the OCU employees and that the sequence of entries into the software program is determined by a template the clerk follows. Any information regarding changes in the appointment system is provided to the clerks by management and not from communications with the shipper or a trucking company. She estimated that the work the Union is claiming involves some 10 to 15 minutes each week and stated that this work does not require contact with the trucker to enter the data into the appointment system. Knappe acknowledged that this 10 to 15 minutes involves the initial input and that if management opened more appointments, it would take a few minutes to enter this information. Knappe opined that because of the scope of work performed by the OCU employees it was more logical to assign the disputed work to these employees rather than to Marine Clerks. She acknowledged that if this work were assigned to the Marine Clerks it would not interfere with management's ability to communicate with and direct the work of the OCU employees.

RELEVANT CONTRACTUAL PROVISIONS:

1.13 Documentation work performed by clerks as of July 1, 1978 shall continue to be performed by clerks. In the event that new documents are developed which replace existing documents, then clerks shall be assigned to perform such work on such new documentation. If computer remote terminals, electronic or mechanical devices are introduced to replace existing or new documentation, then clerks shall be assigned to perform work on such new equipment for that portion of the work which is recognized as being covered by Section 1. In any event, such work shall not be assigned to non-clerks off dock. (See Addenda, Framework for Special Agreement on Application of Technologies and Preservation of Marine Clerk Jurisdiction, page 156).

1.131 When any work described in Section 1 is performed by computer remote terminals, electronic, or mechanical devices, the necessary operation of such devices shall be performed by clerks for only the portion of the work which is recognized as being covered in Section 1. The intent is to preserve the traditional work of clerks as provided by the Agreement. (See Addenda, Framework for Special Agreement on Application of Technologies and Preservation of Marine Clerk Jurisdiction, page 156).

1.251 Clerk. An employee responsible for performing any and all of the following clerical functions related to receiving, delivering, checking, tallying, yard and/or cargo area inventorying (including containers), sorting, spotting and inspecting cargo and/or containers for the purpose of taking and recording exceptions, including the recording of necessary notations and the keeping of such records as may be required by the individual employer.

**FRAMEWORK FOR SPECIAL AGREEMENT ON APPLICATION OF
TECHNOLOGIES AND PRESERVATION OF MARINE CLERK JURISDICTION
Item VI November 23, 2002
Memorandum of Understanding**

A. Controlling Principles

The Employers shall have the right to implement technologies that may affect marine clerks, subject to the following controlling principles.

1. The Employers shall guarantee all registered marine clerks covered under the PCCCD a full opportunity to work as marine clerks and such clerks shall not be subject to item 11, Supplement 1-A. . . .

2. All traditional marine clerk work modified by any technology shall be assigned to marine clerks in accordance with section 1 of the PCCCD as modified herein.

3. Work assignments may be discontinued to the extent they become unnecessary as a result of technology.

4. In consideration for the modification and elimination of certain marine clerks' work that may occur as a result of technology, any new marine clerks' work created by the introduction of technology shall be assigned to marine clerks at a terminal and, thereafter, such assignment shall be construed as having the same effect as if it were an addition to Section 1 of the PCCCD at that terminal. All work created by technology or modified by technology that is functionally equivalent to the work of the marine clerks within their traditional Union jurisdiction, shall be assigned to marine clerks and remain marine clerks' work. It is further agreed that:

a) New technologies shall be implemented in accordance with traditional Union jurisdiction set out in Section 1 of the PCCCD.

b) All traditional marine clerks' work, including work modified by any technology, shall be assigned to marine clerks in accordance with Section 1 of the PCCCD.

c) All work created by technology, including the operating of such technology, that is functionally equivalent to traditional marine clerks' work shall be assigned to marine clerks.

d) Technologies shall not be used to shift traditional Union jurisdiction to non-bargaining unit employees or facilities. Bargaining unit jobs may be eliminated only as a result of labor-saving devices and technologies and not as a means to achieve labor cost savings by using a cheaper work force or subcontractor.

e) In exchange for the Employer's right to introduce new technologies, the following work and functions shall be assigned to marine clerks at all facilities covered by the PCL&CA

i) Yard Planning Operations.

Marine clerks shall be assigned yard planner duties and functions generally identified as directing and executing the flow of cargo, planning and determining the

particular place or area on a terminal dock or container yard facility where cargo is to be placed or relocated and involving the preparation, confirmation, distribution and reconciliation of all documents required by the employer for such work, including the input of data or the utilization of computer programs. It is understood that the practice of direction of supervisors by management is recognized and shall not be disturbed.

5. For the free flow of information to and from a terminal, the Employer shall establish a terminal control center(s) at each marine container facility.

B. Procedure for Implementation of New Technologies

8. Within fourteen (14) days of discussion by the Joint Coast Labor Relations Committee and/or implementation of the new technology, the issues raised by either party may be presented to the Area Arbitration Panel who shall issue a prompt interim decision.

UNION POSITION:

The work described in the issue statement comprises bargaining unit work as it is functionally equivalent to traditional Marine Clerk work as described in the PCCCD and is work that has been voluntarily assigned to Marine Clerks by other employers at West Coast terminals. Similar, if not identical, work has been awarded to the Marine Clerks by the Washington Area Arbitration Panel, PSAA-0003-2017 (Union Exhibit 3) and by the Northern California Area Arbitration Panel, NCAA-0008-2017 (Union Exhibit 6). In March 2018, the Coast Labor Relations Committee (“CLRC”) agreed that equivalent work was Marine Clerk work at all SSAT West Coast terminals (Union Exhibit 4).

Coast Arbitrator John Kagel in Decision C-01-2008 (Employer Exhibit 9) strongly supports the Union’s position, for Kagel held that even though each Framework case must be based on its own facts, if the facts of a given case fit into those of a past decision, the principles of that case can be applicable to it. Regarding the application of Framework Section A.4.e.i, Arbitrator John Kagel in Decision C-10-04 (Union Exhibit 10) concluded that the terminal to terminal restrictions of the Framework do not apply to this provision, for it is not dependent on new technology for its application, which when applied here supports the finding that the disputed work is Marine Clerk work.

The work in question involves the input of data into the appointment system to implement management decisions regarding the receipt, delivery, and flow of cargo. This work and the associated recordkeeping has always been the responsibility of Marine Clerks and is further specified in PCCCD Section 1.251 as Marine clerk work. Sections 1.13 and 1.131 ensure that this work remains Marine Clerk work regardless of technological changes. Further, the functionality of the appointment system depends on yard planner duties and planning operations, as described in Framework Section A.4.e.i.

Sections 1 of the PCCCD and A.4.e.i of the Framework mandate that Marine Clerks receive, direct, and execute the flow of cargo. Inputting data into the appointment system is a requisite element of executing the flow of cargo at a facility. In such regard, work associated with and involving the execution of the flow of cargo was determined by Coast Arbitrator John Kagel in Decision C-03-2007 (Union Exhibit 13) to belong to the Marine Clerks.

The Union requested that the Panel order that the Employer assigns the work as described in the issue statement to the Marine Clerks and issue restitution to the Marine Clerks for lost earnings retroactive to March 16, 2018 due to the Employer's refusal to properly assign this work. Such restitution is appropriate and warranted because on March 16, 2018 the CLRC agreed that equivalent work in the SSA Terminal appointment system was Marine Clerk work and two Area Arbitration Panels have awarded this work to the Marine Clerks.

EMPLOYER POSITION:

TTI carefully examined and considered the unique aspects of its facility and determined that assignment of the appointment system data entry work to the OCU was the best operational fit. For OCU employees as set forth in the Availability Clerk job description are responsible for diagnosing and solving all problems concerning trucker appointments including appointment time discrepancies and missed or canceled appointments. The work relating to appointments and dealing with outside truckers was never performed by the Marine Clerks nor have these clerks performed any functionally equivalent work. The disputed work simply does not comprise traditional Marine Clerk work.

The arbitration decisions cited by the Union were either out-of-area awards that are not binding on the Panel and/or involved Framework disputes at other terminals. The relevant language of the Framework is clear in specifying that analysis must be done on a case-by-case basis as the West Coast terminals are not identical in their operations. Arbitrator John Kagel in Decision C-13-2007 (Employer Exhibit 1) made it clear that each Framework case is to be decided on a terminal-by-terminal basis with exceptions not applicable here. For the facts of the instant dispute are readily distinguishable from those of the two out-of-area awards submitted by the Union, most significantly in that neither of the terminals involved in those disputes employed OCU employees. Further, the CLRC agreement regarding the assignment of allegedly identical work to the Marine Clerks was limited solely to the specific terminals identified in the agreement.

The Employer requested that the Panel not award the work described in the issue statement to the Marine Clerks. Regarding the Union's request for back pay, the Union never requested back pay during any of the proceedings prior to the arbitration hearing. Further, under the Kagel principle of finality a final determination has not been made as to the assignment of the disputed work such as to warrant back pay should the Panel assign this work to Marine Clerks.

DISCUSSION:

The Panel has fully reviewed and considered the entire record developed in this matter as well as the respective arguments of the parties. However, only those matters that ultimately contributed to and informed the Panel's decision will be discussed below.

At the outset, the Panel emphasizes that it is not tasked with the determination as to what classification or group of employees comprise the best fit for the contested work as described in the issue statement. For the Panel's jurisdiction and authority flow exclusively from the PCCCD and, as such, the Panel is constrained from considering any other collective bargaining agreement that purportedly covers the work in question.

The OCU employees and the Marine Clerks are represented by ILWU Local 63 OCU and ILWU Local 63 Marine Clerks, respectively, each with their own offices and officers. However, these two groups of employees are in separate and distinct bargaining units each with their own collective bargaining agreement. The assignment of the disputed work to the OCU employees, therefore, constitutes the assignment of this work to non-bargaining unit employees within the meaning of the PCCCD.

Resolution of the dispute presented involves the examination of the provisions of the PCCCD setting forth the scope of Marine Clerks' work and any precedential arbitration decisions in such regard. PCCCD Section 1.251 sets forth in general terms the job duties and responsibilities of a Clerk, these include but are not limited to the clerical functions of receiving, delivering, checking, sorting, and spotting cargo. The Framework at Section 4.A.e.i specifies that "Marine Clerks shall be assigned yard planner duties and functions generally identified as directing and executing the flow of cargo, planning and determining the particular place or area on a terminal dock or container yard facility where cargo is to be placed or relocated." This Section further defines this work to include the "preparation, confirmation, distribution and reconciliation of all documents required by the employer for such work, including the input of data or the utilization of computer programs." Since this work is specifically referenced and described in the PCCCD, it is by definition Marine Clerks' work and therefore, bargaining unit work. In Decision C-03-2007, Coast Arbitrator John Kagel clarified that the entries into the computer system involved in the execution of the flow of work as contemplated by Section 4.A.e.i was work reserved to the Marine Clerks under that provision (Union Exhibit 13, pp. 4-5, 7).

The Panel's review of the testimony and documentary evidence pertaining to the five disputed work assignments listed in the issue statement persuades that this work is inextricably intertwined with the flow of cargo into, through, and out of the terminal. No evidence was found that the OCU employees now assigned this work are required to contact the truckers or customers in order to enter the data into the appointment system. Further, review of the evidence of record shows that it is management that determines the number of available appointments for truckers for a particular time and place in the yard and that this information is then communicated to the OCU employees, who enter the information into the appointment system. The sequence of entries into the software program is determined by a template that the clerk follows. Therefore, it cannot be concluded that the OCU employees now assigned the five disputed functions are performing management functions such that this work cannot properly be assigned to the Marine Clerks.

The Employer's contention that the work in question has not previously been performed by Marine Clerks and does not constitute traditional Marine Clerk work is noted. However, the Framework at Section A.4.c specifies that "all work created by technology, including the operation of such technology, that is functionally equivalent to traditional marine clerks' work shall be assigned to

marine clerks.” The record establishes that Marine Clerks have traditionally been responsible for the flow of cargo at a terminal and that the TTI Appointment System at issue represents a technological advancement with respect to the execution of the flow of work at the terminal.

As discussed above, the descriptions of Marine Clerks’ work found in Sections 1.251 and 4.A.e.i of the PCCCD include within their coverage the five disputed work functions of the TTI Long Beach Appointment System listed in the issue statement. Further, the Panel’s reading of the contractual Framework language, particularly Section A.4.c, demonstrates that this work was created by new technology, the implementation of the Appointment System, and comprises work that Marine Clerks have traditionally been assigned within the meaning of this contractual provision. The relevant provisions of the PCCCD when viewed and weighed collectively support the finding that the Marine Clerks should be assigned the five disputed functions and/or tasks as listed in the issue statement. The Panel notes that this decision is consistent with that reached by the Washington Area Arbitration Panel in PSAA-0003-2017 (Union Exhibit 3) concerning the TTI Appointment System at its Seattle terminal and that of the Northern California Area Arbitration Panel in NCAA-0008-2017 regarding ostensibly equivalent work at TraPac, Oakland (Union Exhibit 6). Both decisions, however, were out-of-area interim Framework Decisions and do not comprise persuasive authority as to the dispute before this Panel. Although noted, neither decision was given any weight in the Panel’s deliberations and conclusions, the latter reached for the reasons discussed herein.

For the foregoing reasons, it is the finding and conclusion of the Panel that the work performed on the TTI, Pier T, Long Beach, California Appointment System as described in the issue statement shall be assigned to Marine Clerks. Attention next turns to the second issue before the Panel – Are Marine Clerks entitled to restitution due to TTI Long Beach’s refusal to assign the disputed work to the Marine Clerks?

The parties disagree whether the Principle of Finality as first developed by Coast Arbitrator Sam Kagel is applicable such that a monetary remedy is appropriate. In his Decision regarding the SS *Coronia* issued in 1964, Arbitrator Kagel held that the vessel operations in question were not previously defined and were not defined until the Area Arbitrator’s decision was affirmed by the Coast Labor Relations Committee. He stated in such regard that “the finality of that definition was of course achieved at the Coast Labor Relations Committee level” and that “future violations of this definition shall be subject to ‘in lieu’ payments” (Employer Exhibit 7, p. 3).

Review of Coast Arbitrator Sam Kagel’s Decision and a subsequent Decision issued by Coast Arbitrator John Kagel in C-03-2006 (Union Exhibit 14) discloses that the linchpin in the application of the Principle of Finality to the facts of this case is a prior determination at the Coast level that the disputed work here belongs to the Marine Clerks. Both decisions submitted by the Union were out-of-area Interim Framework Decisions, neither which was affirmed by the Coast Labor Relations Committee. As to the March 16, 2018 agreement reached by the Coast Labor Relations Committee (Union Exhibit 4), this agreement is limited in its coverage to the specific terminals identified within the agreement; it cannot be expanded by the Panel to define the work at issue here as Marine Clerk work. This agreement, as well as the two out-of-area Decisions, do not serve to trigger the application of the Principle of Finality to the instant dispute such that an award of back pay or restitution is warranted and appropriate.

Pursuant to Framework 4.B.8 and for the reasons set forth above, the following decision is issued.

DECISION:

Issue 1:

Marine Clerks shall be assigned the following work to conform to the principles of Section 1, PCCCD and of the Technology Framework in the Total Terminal International (TTI), Pier T, Long Beach, California Appointment System:

1. The assignment of date and gate hours for terminal appointments;
2. The selection of the appropriate shift template for terminal appointments;
3. The assignment of move types and time slots for terminal appointments;
4. The establishment of hourly and cumulative appointment time limits for the referenced terminal;
5. The definition of yard locations for terminal appointments.

Issue 2:

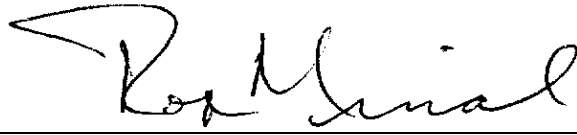
Marine Clerks are not entitled to restitution due to TTI Long Beach's refusal to assign the above work to Marine Clerks.



Walter Daugherty
Southern California Area Arbitrator



Mark Mascola
Southern California Area Arbitrator

A handwritten signature in black ink, appearing to read "Ron Merial". The signature is written in a cursive style with a large initial "R".

Ron Merial
Southern California Area Arbitrator

Dated: September 10, 2019