In the Matter of a Controversy Between **INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 63** **AND** **PACIFIC MARITIME ASSOCIATION** RE: Fenix Marine Services Right to Hire a Steady Rail Planner	SCAA-0013-2019 Opinion and Decision Of Southern California Area Arbitration Panel Mark Mascola, Chair Person Walter Daugherty Ron Merical Wednesday, April 24, 2019 Long Beach, California and Wednesday, May 22, 2019 San Pedro, California

The hearings were held at 9:00 a.m. on Wednesday, April 24, 2019, at 1 World Trade Center, Suite 1700, Long Beach, California, and at 9:00 a.m. on Wednesday, May 22, 2019, at 350 West 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(s).

APPEARANCES:

FOR THE UNION:	Joe Gasperov, ILWU Local 63
FOR THE EMPLOYER:	Clay O'Neal, Pacific Maritime Association Bill Candella, Pacific Maritime Association Phillip Tabyanan, Pacific Maritime Association
ALSO PRESENT:	Various Others
WITNESSES:	Jessy Luna, FMS Paul Peng, FMS Phillip Tabyanan, Pacific Maritime Association Tom Warren, ILWU Local 63 Mike Zuliani, ILWU Local 63

PROCEDURAL ISSUE:

Shall the Union be granted a continuance in order to present its witnesses?

ISSUE:

Did Fenix Marine Services have the right to hire Mike Smith, #36046, as a steady rail planner?

PROCEDURAL ISSUE BACKGROUND:

On January 31, 2019, the parties reached disagreement on the substantive issue and referred the matter to the Area Arbitration Panel ("Panel") for resolution.

The Employer contacted the Panel via email initially on March 9, 2019, and requested a hearing date for March 18. The Union responded by notifying the Panel that the Employer had previously been informed that the Union was unavailable for that date and requested that the Employer refrain from attempting to unilaterally schedule a hearing date.

On April 2 and April 5, the Employer emailed the Panel requesting a hearing date for April 24. The Union was not included in the April 2 email but was included in the April 5 email to which it responded that due to scheduling conflicts and lack of availability of witnesses, it was unable to confirm the date requested by the Employer. The Union further noted its objection to the Employer's attempts to schedule a hearing date unilaterally.

The Employer sent additional emails to the Panel on April 12 and 16, again requesting an April 24 hearing date, claiming it was suffering ongoing harm by not being granted the requested hearing date. The Union responded that April 24 was unworkable, citing witness unavailability, but committed to scheduling a date that was mutually agreeable.

On April 17, the Panel notified the parties that the hearing would be scheduled for April 24. Included in the email, the Panel provided instructions that read in part as follows:

> *"…and that at the hearing as a threshold issue, and since it appears that witness availability is an issue, the Union may state on the record the identity of their needed witnesses, a brief statement regarding their intended testimony, and the reasons why the witnesses are unavailable. If the Panel determines that the witnesses are essential to the Union's case, an additional hearing day will be scheduled. However, since the Employer has the burden of proceeding first, the Employer should be prepared to present its case in chief on April 24, 2019."*

PROCEDURAL ISSUE DISCUSSION:

The Union requested a continuance on the grounds that two witnesses were unavailable for the April 24 hearing. The Union stated that the witnesses were crucial to the Union's case because they would be testifying to a historical practice that had been in place for 40 years. Both of these witnesses are retirees, one witness was unavailable due to being hospitalized, and the other witness is the primary caregiver for an immediate family member who was having surgery the day before the hearing.

The Employer claimed that it would suffer undue hardship by any further delay of a hearing because the substantive issue involves an individual employer, Fenix Marine Service (FMS), being prevented from engaging in its contractual right to hire a clerk for a steady position. The Employer dismissed the Union's claim of witness unavailability, stating that prior to the hearing, the Union failed to disclose the identity of its witnesses or reveal the probative value of their testimony.

The Employer requested that the hearing proceed as scheduled, or the Employer be permitted to put on its case in chief to establish a prima facie case that it has met the burden of proof in order to allow FMS to hire the steady clerk of its choosing. The Employer also requested that if the Panel were to grant the Union a continuance, an interim ruling should be issued allowing FMS to hire a steady clerk.

The Panel considered the respective positions of both parties as developed at the hearing. After hearing both parties' arguments regarding the procedural issue, the Panel concluded that the procedural issue and substantive issue were quite intertwined. Therefore, the Panel allowed the Employer to present its case in chief. At the conclusion of the Employer's case in chief, the Union was given an opportunity to determine if a continuance was still necessary, and the Union stated that it was. The Panel granted the Union's request for a continuance so that its witnesses might appear, and a second day of hearing was subsequently scheduled.

In accordance with the instructions provided to the parties on April 17, the following decision was rendered.

PROCEDURAL ISSUE DECISION:

1. The Union was granted a continuance so that its witnesses may appear.

2. The Employer's motions were denied.

BACKGROUND AND SUMMARY OF FACTS:

On January 31, 2019, the parties met and reached disagreement on the hiring of Mike Smith ("Smith") to a preferred clerk or "steady" rail planner position. The crux of the dispute involved FMS attempting to hire Smith who has not been jointly qualified in the 30% clerk skill rate category over other clerks that applied and have been jointly qualified in the 30% clerk skill rate category. At the center of the dispute was item 2, rule 7, of an agreement reached at clerk labor relations committee ("LRC") meeting 20-1983 which reads as follows:

"Clerks listed on the key list, who are jointly qualified, given first preference to opportunities when a company requests the hiring of a preferred clerk."

The issue was referred to arbitration for resolution.

During the course of the hearing, the parties made the following stipulations:

- The term "preferred clerk" is equivalent to "steady clerk."
- The new rail planner occupation code was introduced in May 2015 (pp. 99-101).
- There were two key lists, a 10% and 20% list, in 1985 (pp. 152-153).

Additionally, the Employer stated that the issue of the Union engaging in self-help by preventing Smith from accepting the steady position was not before the Panel for consideration.

Jessy Luna testified on behalf of the Employer and stated that he was a senior manager of the rail department at FMS. In his testimony, he explained that he conducted interviews for the applicants to the steady rail planner position and that when evaluating applicants, he assessed attitude, aptitude, and knowledge. He further testified that Smith was chosen for the position based on his extensive work history as a rail planner, his positive attitude and his ability to perform the work.

Phillip Tabyanan ("Tabyanan") testified on behalf of the Employer and stated that he was one of its representatives[1]. He testified that previously another employer hired a clerk to steady rail planner position that was not jointly qualified in the 30% clerk skill category. He further testified that although the Union initially complained, the clerk was hired and is currently still employed as a steady rail planner.

Under cross-examination, Tabyanan stated that he was unsure if there were any other applicants to the steady rail planner position he was referring to and did not know under what circumstances the individual was hired.

Tom Warren ("Warren") testified on behalf of the Union and stated that he had previously served as president, business agent, and dispatcher for ILWU Local 63. He testified that he is currently retired but was present at clerk LRC meeting 20-1983 and that the term "key" as used in that agreement was generic for clerk supervisors on the 10% or 20% clerk skill lists at the time. He further stated that in 1983, there were two key lists, 10% and 20%, and that in order to qualify for either list a clerk had to be considered qualified by the joint promotions committee. He further testified that clerks on the 20% list got first preference in dispatch of the 20% jobs over those who were on the 10% list and that same preference applied to clerks seeking steady employment.

Under cross-examination, Warren testified that if a clerk was qualified for the 20% list that clerk remained qualified in the subordinate clerk categories (10% and basic). He also testified that when the 10% and 20% lists were created, supercargo training did not yet exist and that clerks established qualification for the lists through job performance.

[1] A representative of Pacific Maritime Association.

Mike Zuliani ("Zuliani") testified on behalf of the Union and stated that he had previously served as president, secretary, business agent, and dispatcher for ILWU Local 63. He stated that prior to 1996, two clerk skill rates existed, 10% and 20%. In 1996, the parties amended the master contract to replace the 10% and 20% clerk skill rates with three new skill rates, 15%, 25%, and 30%. He also stated that the 10% clerk skill rate list became the 25% skill rate list, which applied to all 15% and 25% clerk skill rate jobs, and the 20% list became the 30% list.

Zuliani testified further that he was president of ILWU Local 63 in 2003 when rail and yard planning became the contractual jurisdiction of clerks. Zuliani stated that clerks had been performing that work since the 1990s, and by 2002, all but one employer were utilizing clerks for rail and yard planning. He recalled that as far back as 2003, in order to get the first preference of 30% clerk skill rate jobs at dispatch, a clerk had to be qualified for the 30% list by the joint promotions committee. Once qualified for the 30% list, clerks were obligated to accept 30% clerk skill rate jobs at dispatch or be penalized by not being allowed to accept any other clerk jobs. After all the individuals on the 30% list were exhausted, clerks on the 25% list could accept 30% clerk skill rate jobs. Zuliani stated that every company, except one, paid the 30% clerk skill rate for rail and yard planning jobs and that the 30% list got first preference of these jobs. He also stated that similarly, clerks on 30% list were given first preference when applying for steady rail and yard planning positions and that the Employer dispatch hall observers never questioned or disagreed with the hiring or dispatch protocols.

RELEVANT CONTRACTUAL PROVISIONS:

4.36 There shall be established two 30% Occupation Codes: "Planning – Rail" and "Planning – Yard". Marine clerks who perform the yard and rail planning functions shall be paid at the appropriate 30% rate. Nothing in this Section will limit an employer's rights under the PCCCD and its Addenda.

8.46 Employers shall be entitled to have made available to them adequate numbers of monthly and preferred clerks in all classifications. All such men must be hired, transferred or promoted in accordance with the applicable provisions of this Contract Document, the Port Supplements and Working Rules. For clerks' locals that utilize daily or weekly preferred hall clerks, such clerks shall not be offered nor shall they accept a preference hire on their scheduled day off.

9.2 There shall be established in each port a joint committee composed of an equal number of registered clerks' representatives and an equal number of employer representatives. It shall be the responsibility and obligation of such committee to establish qualifications and to pass on all promotions of the classifications contained in the respective Port Supplements.

9.21 Such qualifications shall include:

(a) Competency and ability to perform work as required in the respective classifications.

(b) Ability to direct work and supervise operations.

(c) Ability to maintain and promote harmonious relations on the job and between the parties to this Agreement.

(d) Ability to handle men.

(e) Ability to secure conformance to the Agreement.

(f) Any other qualification that the joint committee may consider necessary.

(g) Length of service in the industry and classification shall constitute the determining factor in promotions, provided above qualifications (a to f) are equal.

9.22 The joint committee shall examine and pass upon all applications for promotion and eligibility for promotion as follows:

9.221 Either individual registered clerks or the employers may file with the committee notice of desire for promotion or to upgrade, in which case the joint committee will consider such notice and classify the applicant according to qualifications as outlined herein, and once having been qualified are thereby eligible for promotion.

9.222 Preferred daily clerks and monthly clerks having already been qualified and employed as such, in accordance with the provisions of this Contract Document, may be promoted temporarily by the employers, in which case additional clerks to fill the vacancies if any are thereby created in the lower classifications, shall be obtained from the dispatching hall provided, further, that the limitations imposed by other provisions of this Contract Document, for the purpose of equalizing earnings by limiting the number of clerks that may be promoted in this manner, are observed.

9.23 All permanent promotions must be approved by the promotion committee, and having once been approved, no further recourse to the committee is necessary by registered clerks or employer. Application of this paragraph shall not prevent employers making temporary promotions as provided in Section 9.222.

9.231 The joint promotion committee shall post in the dispatching hall and furnish to each employer lists of the registered clerks that have been certified as qualified and eligible for promotion by the committee.

EMPLOYER POSITION:

FMS met every requirement for the hiring of a steady rail planner. They posted the job for 10 days and selected Smith for the position as he was the most qualified applicant. The Union refused to allow the hiring because of the belief that FMS was required to hire a different applicant instead. FMS is entitled to hire Smith as a rail planner, a job that he has successfully performed for years. Smith is key qualified and is eligible to accept the job. FMS has the right to hire steady clerks without interference from the Union in accordance with arbitration award SC-51-87 (Employer Ex. 4).

FMS has satisfied every obligation that is required to hire a steady and should be allowed to hire Smith. There is no contractual language or joint agreement that would prevent FMS from doing so and the only thing preventing the hiring of Smith, is the Union's continued reliance on self-help.

The Union's contention that the 30% list is a key list is not accurate. The list is actually a 30% supercargo list for clerks who have been qualified for the supercargo position by the joint promotions committee. The key list referenced in clerk LRC meeting 20-1983 is singular, referring to one list, the 10% list, and it was commonly understood during that time period that what the Union refers to as the 20% list was actually the supercargo list.

The dispatch rules do not apply to steady hires, and the Union is attempting to gain further specialization to limit who can be hired as a rail planner.

UNION POSITION:

The Employer is attempting to hire Smith, who is on the 25% list, over clerks that are on the 30% list to a 30% rail planner position. This is in violation of the agreement reached at clerk LRC meeting 20-1983 when the parties agreed that clerks that are jointly qualified for a key list, 10% or 20%, had first-preference. In 1996, those percentages were increased to 15% and 25% respectively, and the highest rate became 30%. There are two key lists at this time, the highest at 30% and the second with both 15% and 25% (25% list). The agreement has not been changed since 1983. Clerks on the 30% list have had first preference of rail planner jobs since 2002. The individuals on the 30% list always had preference to those jobs over individuals on the 25% list, and the practice has remained unchanged for over 16 years. The fact that the Employer has newer representatives that are not familiar with the longstanding agreement does not change the fact that it exists.

Section 8.46 explicitly allows the Employer to hire steady clerks, but they must follow all of the jointly agreed-upon rules in obtaining such clerks. The parties have a joint promotions committee which oversees the promotions process. That committee jointly qualifies clerks for the 30% list, and clerks on that list are obligated to accept 30% clerk skill work, including rail planning.

The hiring process has not been changed in over 30 years, with the exception of the skill rates. The Employer's assertion that there is both a supercargo list and key list is not correct. The 30% list is a key list, and clerks on the 30% list have first preference in choice of supercargo, chief supervisor, and planner jobs.

DISCUSSION:

The Panel carefully considered the arguments of both parties and all relevant evidence presented at the hearing.

The real core of the parties' dispute stems from a disagreement over the interpretation of the following sentence:

"Clerks listed on the key list, who are jointly qualified, given first preference to opportunities when a company requests the hiring of a preferred clerk."

This provision clearly states that clerks on the key list have first preference of employment when applying for steady clerk positions. The Employer asserted that the term "key list" refers to one list and that a separate list exists called the supercargo list, which refers to clerks qualified in the supercargo category only. The Employer further asserted that Smith is the most qualified applicant for the steady rail planner position and since rail planner positions do not fall into the key list or supercargo category, FMS is not precluded from hiring him over a clerk who has been jointly qualified for the 30% list[2].

The Union asserts that the term "key list" originally referred to the 10% and 20% clerk skill lists, but evolved through bargaining to encompass what is now known as the 25% and 30% clerk skill lists. The Union further asserted that since rail planner jobs are paid at the 30% clerk skill rate and dispatched first to clerks on the 30% list, clerks on the 30% list should have priority when applying for steady rail planner positions.

The Employer as the moving party had the burden proving the facts relative to its interpretation of the agreement contained in clerk LRC meeting 20-1983, specifically the term "key list." However, the Employer failed in this regard as no evidence was provided to support any of the relevant facts that the Employer asserted during the hearing. Employer witnesses testifying to Smith's ability as a rail planner or obstructive tactics employed by union business agents do not aid in the interpretation of any language at issue.

Employer witness Tabyanan's testimony initially appeared ostensibly relevant when he stated that a clerk had previously been hired to a steady rail planner position without being qualified for either the 25% or 30% list. Yet, upon cross-examination, he could not verify if any clerk on the 30% list had been passed over for the position, nor could he recall any pertinent details when pressed by the Union. As a result, the Panel found that Tabyanan's testimony did not provide enough information to make any of the relevant facts asserted by the Employer more likely.

The Panel did not consider any evidence of obstruction or coercion by the Union relating to Smith's application for the steady rail planner position as the Employer definitively stated that self-help was not an issue.

In evaluating the Employer's argument that the plain meaning of the term "key list" denotes that it is singular or referring to one list, the Panel finds this claim to be in direct conflict with the Employer stipulating to the fact that two key lists existed in 1985 (pp. 152-153). The Employer acknowledging that two key lists existed two years after clerk LRC meeting 20-1983 took place,

[2] The 30% list as asserted by the Union.

demonstrates, at the very least, that the term "key list" has a latent ambiguity and its ostensibly plain meaning cannot be applied.

The evidence provided by the Union was not particularly compelling, but it did support the facts that were asserted.

Two Union witnesses with experience as union officials and jointly employed dispatchers gave credible testimony that was not refuted by the Employer.

Both witnesses testified that in their experience, clerks on the 30% list received first preference in the dispatching of rail planner jobs and, of greater relevancy and weight here, in the hiring of steady rail planner positions. Zuliani testified that when the parties replaced the 10% and 20% clerk skill categories with the 15%, 25%, and 30% skill categories, their intent was to create two new key lists, the 25%, and 30% list. Zuliani also testified that as of 2003, rail planner jobs were almost exclusively paid at the 30% clerk skill rate.

The Union cited arbitration awards SCAA-0017-2016 and SCAA-0008-2018 as precedents. SCAA-0017-2016 involved a case in which an employer was attempting to hire a clerk that had not been key qualified to a steady key qualified position. The Panel ruled that first preference of employment to that position must be given to a key qualified clerk. This award has no relevance as the parties are not disputing whether a clerk on a key qualified list gets preference over a clerk not on a key qualified list, and there is no question to Smith being qualified on the 25% list. The question in the instant dispute pertains to the 30% clerk skill category and whether preference in that category applies to a steady rail planner position, which is not addressed in SCAA-0017-2016.

SCAA-0008-2018 established that rail and yard planner positions being included in the 30% clerk skill category during 2014 bargaining (PCCCD section 4.36) meant they were no longer considered comparable to 25% clerk skill categories for the purposes of shifting steady employees. In that decision, the Panel found it unnecessary to reach the issue of what qualified a clerk for a rail or yard planner position. Considering that the instant dispute deals directly with whether Smith is qualified for a steady rail planner position, the Panel can draw no meaningful factual parallels from SCAA-0008-2018.

The Union offered no direct evidence that rail planner positions were included in the definition of key list as it pertains to the hiring preference for steady employees. Nonetheless, enough was inferred by the evidence that was offered by the Union for the Panel to reasonably conclude that the preference that applies to rail planner jobs in dispatch would also apply to the hiring of steady employees. Further, the testimony proffered by the Union witnesses regarding the hiring of steady rail planners was unrefuted. Additionally, the inclusion of rail and yard planner positions to the 30% clerk skill category in section 4.36 of the PCCCD signifies the parties' intent to classify these positions as equivalent to other 30% positions.

Therefore, the following decision is hereby rendered.

DECISION:

1. Fenix Marine Services did not have the right to hire Mike Smith, #36046, as a steady rail planner.

Mark Mascola
Southern California Area Arbitrator

Walter Daugherty
Southern California Area Arbitrator

Ron Merical
Southern California Area Arbitrator

Dated: October 5, 2019