

United States of America

BEFORE THE FEDERAL SERVICE IMPASSES PANEL

In the Matter of

NATIONAL MARINE ENGINEERS
BENEFICIAL ASSOCIATION, AFL-CIO

And

OFFICE OF MARINE AND AVIATION
OPERATIONS, NATIONAL OCEANIC &
ATMOSPHERIC ADMINISTRATION,
DEPARTMENT OF COMMERCE

Case No. 22 FSIP 026

ARBITRATOR'S OPINION AND DECISION

This case, filed by the Marine Engineers Beneficial Association, District 1 (Union or MEBA) concerns Lodging and Meal Allowances. The National Oceanic and Atmospheric Administration, Office of Marine and Aviation Operations (Agency or Management) manages and operates NOAA's fleet of 15 research and survey ships and nine aircraft. The Union represents approximately 100 bargaining-unit employees who mostly encumber the position of Engineer or Wage Mariners (WG). The parties are under a collective bargaining agreement (CBA) that expired in 2020. But its current iteration was executed in 2015. The parties are negotiating a successor CBA and the last article in dispute is at the heart of this matter. The Union filed the request for Panel assistance in accordance with Section 7119 of the Federal Service Labor Management Relations Statute (the Statute).¹

Following investigation of the Union's request for assistance, the Panel determined that the dispute over the two issues in the sole remaining article of the parties' successor CBA, Article 10 – Commuted Subsistence Allowance, should be resolved through Mediation-Arbitration with the undersigned, Panel Member Jeanne Charles. The parties were informed that if a settlement was not reached during mediation, I would issue a binding decision to resolve the dispute. Consistent with the Panel's procedural determination, on March 24, 2022, I conducted a virtual mediation-arbitration proceeding with representatives of the

¹ 5 U.S.C. §7119.

parties. During the mediation phase, the parties agreed to explore settlement options to resolve the two remaining matters: Room Allowance and Meal Allowance.

During the mediation portion of the proceeding, the parties appeared to reach settlement on the matter of the Room Allowance, but given the late hour of the night, both parties requested time to think about the final language. I agreed to give the parties until April 8, 2022, to submit a signed agreement, or I would order the final language. While there were several emails exchanged between the parties, to date, there has been no final agreement on the Room Allowance provision submitted to the Panel. Therefore, I have no choice but to order final language on the Room Allowance matter. Because the mediation portion of the proceeding failed to result in the voluntary settlement of the Meal Allowance dispute, I am issuing a final decision resolving the parties' dispute over that matter in accordance with 5 U.S.C. §7119 and 5 C.F.R. §2471.11 of the Panel's regulations. In reaching this decision, I have considered the entire record.

BACKGROUND

By statute, the pay of Wage Mariners must be fixed and adjusted in accordance with prevailing rates and practices in the maritime industry, as nearly as is consistent with the public interest. (5 U.S.C. §5348 (a)). In keeping with this concept of reflecting the maritime practice, NOAA has adopted a policy which allows Wage Mariners who are employed by the NOAA and are attached to NOAA vessels to be paid Commuted Subsistence Allowances (COMSUBs) for rooms and for meals in accordance with rates and practices determined to be current with the industry. According to the NOAA Administrative Order 202-534B, COMSUBs are defined as:

Meals and lodging, or cash in lieu thereof, payable to ship employees in accordance with rates and conditions current in the maritime industry.

Some employees are authorized, if they choose, to remain and live aboard the vessel, even when it is not underway. Room Allowance for these individuals is addressed in the NAO 202-534B, as well. In the event that (a) the ship is declared uninhabitable, and (b) the Agency has not provided lodging, and (c) an employee does not maintain a local residence, the employee would be eligible to receive a room allowance.

COMSUB Meal Allowance is a cash payment made to make up for the Agency not supplying a meal during a time when an employee would otherwise expect to eat in the ship's galley or dining facilities onboard a ship. For example, on a day when the ship's galley is undergoing maintenance and the Agency would not be able to provide meals on the vessel, the Agency is authorized to provide the Wage Mariners with cash to permit the employee to leave the ship for a meal break and procure food. Employees who choose not to live aboard the vessel, but instead maintain a separate residence in the local area of the port, only qualify for a COMSUB for their mid-day meal. They must pay for the other two meals on their own. Employees that live aboard the ship, qualify to receive COMSUBs for any meal that may occur outside of their work hours.

The Agency policy provides that the amount for the subsistence should be consistent with the maritime industry standard. The Agency policy also provides that the amount should be paid at the rate specified in the agreement negotiated with the Union. (NAO 202-534B, Section 4 Policy). Under the current agreement, the COMSUB rates are as follows:

- Lodging: \$40 per night if the employee's ship is docked and lodging is not made available. Employees can receive applicable government rates above this figure if they provide receipts.
- Meals: \$38 per day if the ship is docked and the gallery is not open to employees. As with lodging, an employee can receive greater expenses if they provide receipts, but the figure also has to be greater than \$71 as set forth in GSA tables for meals and incidental expenses.

Both parties are seeking to make a change to the rates reflected in the current CBA. The Union seeks a higher rate because they believe the rates are lower than what is standard throughout the maritime industry. The Agency seeks a change in the rate to be consistent with rates adopted by two other NOAA bargaining units: Seafarer International Union, AFL-CIO (SIU) and the International Organization of Masters, Mates and Pilots, AFL, CIO (MMP).

ISSUES AT IMPASSE

The Panel asserted jurisdiction over two issues: COMSUB Room Allowances and COMSUB Meal Allowances. During the mediation, the parties reached tentative agreement on the following language regarding the Room Allowance:

If the Agency is unable to provide lodging, and the employee incurs a lodging expense, room allowances will be paid in the amount of the actual expense up

to the current GSA/FTR/DSSR rates for the locality. Receipts must be provided.

The Parties were directed to sign the proposed settlement language, or I would order the language to resolve the Room Allowance matter. To date, the parties have not notified the Panel that the settlement language has been signed by both parties. Additionally, in their statements of position (SOP), both parties identified only one remaining issue – Meal Allowances. I am, therefore, ordering the parties to adopt the following language regarding Room Allowances:

If the Agency is unable to provide lodging, and the employee incurs a lodging expense, room allowances will be paid in the amount of the actual expense up to the current GSA/FTR/DSSR rates for the locality. Receipts must be provided.

This language will be final and binding on the parties unless the parties agree otherwise.²

Regarding the Meal Allowance, the parties were unable to reach settlement on that provision. Under the current CBA, the employees receive a \$38 per day meal allowance - \$6 for breakfast, \$12 for lunch and \$20 for supper. The contract also provides that employees are entitled to the higher per diem meal rates in the General Service Administration's Federal Travel Regulations (GSA FTR) while in port in the continental United States; the higher meal rates in the DOD's Joint Travel Regulations (DOD JTR) in U.S. ports outside the continental U.S. (such as Alaska, Hawaii, Puerto Rico); and the higher meal rates in the Department of State Standardized Regulations when in foreign ports if: (a) those rates exceed \$71 and (b) receipts are provided.

The current CBA rates reflect the Agency policy dating back to at least 1992 (See Civilian Marine Personnel Instruction, CMPI 593, Section 4-2, RATES OF CASH IN LIEU OF SUBSISTENCE AND QUARTERS). Those same rates can be

² 5 U.S. Code § 7119 - Negotiation impasses; Federal Service Impasses Panel

(5)(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

§ 2471.11 Final action by the Panel.

(d) Notice of any final action of the Panel shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless they agree otherwise.

seen in the SIU³ 2001-CBA.⁴ But the standard rate has increased over the years. Even within the Agency, the rate has been increased. The SIU 2019-CBA reflects a change in rates. Their bargaining unit employees receive a \$50 a per day meal allowance - \$9 for breakfast; \$15 for lunch; and \$26 for supper, with no exceptions for high-rate locations. In 2021, the Agency made that same change in the MMP CBA. The Union presented several agreements, both in the federal government and within the private sector, reflecting a significantly higher rate than what is reflected in the current MEBA 2015 CBA. It is clear that the standard rate for COMSUBS throughout the maritime industry has increased since the parties negotiated their last CBA and with the reopening of that the CBA, now is the time, consistent with 5 U.S.C. §5348(a), for the rate to be “adjusted in accordance with the prevailing rates and practices in the maritime industry.” The parties have been unable to reach agreement on the current maritime standard for Meal Allowance, leaving the matter for the Panel to resolve.

Agency Position

During negotiations and the FSIP hearing, the Agency expressed two primary interests in negotiating a change to the current CBA: 1) a rate consistency with two other NOAA bargaining units who are also benefitting from the Agency-wide COMSUB program and 2) alleviating the administrative burden of the receipt, which is only required when an employee is seeking an amount higher than the standard rate (an option that is not available to the other two NOAA bargaining units and a process that the Agency argues has been abused). The Agency’s offer was to pay \$50/day, with no opportunity for a higher amount.

In its statement of position (SOP), submitted April 27, 2022, the Agency for the first time raised a negotiability concern regarding its right to determine its budget. During negotiations, the Union proposed a rate slightly higher than the Agency’s (\$54/day) but included the opportunity for higher rates in exceptionally higher cost locations (ports where the GSA per diem rate is more than \$71, e.g., Alaska: same condition agreed upon in the current 2015 CBA). During the

³ The Seafarers International Union (SIU), Atlantic, Gulf, Lakes and Inland Waters, AFL-CIO is a federal union that represents bargaining unit employees within NOAA:

Unit I: Employees of vessels under the jurisdiction of the Director, Marine Operations, except those identified as excluded. (This includes Engineering Electronic Technicians which are different from the excluded Electronic Technicians.)

Unit II: All Chief Stewards, Chief Boatswains, Chief BM/Fisherman, Chief Survey Technicians employed by the National Oceanic and Atmospheric Administration, NOAA Marine and Aviation Operations.

⁴ (See <https://www.dol.gov/sites/dolgov/files/olms/regs/compliance/cba/pdf/k5419.pdf>, Article 2, Section 43).

mediation discussions, the Union 's settlement proposal provided per diem for all impacted employees.

In its SOP, the Agency is now arguing that the Union's proposal (i.e., per diem rate for all impacted employees) violates the Agency's right to determine its own budget. In considering the parties' proposals, I have considered the Union's last proposal offered before the parties came before me in the Mediation-Arbitration. Specifically, the Union offered a meal allowance of \$54/day, with employees receiving higher rates in accordance with the framework set forth in the current CBA, but receipts would be provided solely at management's discretion. The Agency's negotiability claim was not raised against that proposal, but instead was levied over the later proposal – per diem for everyone. As the concern raised by the Agency is levied against a Union proposal that I have not considered, I have no need to address the Agency's claim here.

In its SOP, the Agency offers to remain with the status quo rate (\$38/day) that has been in the contract for a number of years. The Agency argued that there is no compelling need to change the rate in the current contract. During the hearing, the Union discussed a number of examples where the maritime industry has increased the \$38/day base rate. Even if we only focus on the two bargaining units (SIU and MBB) offered by the Agency, those units were offered a \$50/day rate, significantly higher than the \$38/day rate in the current CBA. It is clear that the \$38/day rate needs to be adjusted as it no longer reflects the current maritime practice. Accordingly, I find that there is a compelling need to change the status quo.

During the hearing and in its SOP, the Agency expressed an interest in eliminating fraud. Under the current CBA, there is a limited or capped reimbursement gap between a \$38/day reimbursement and a reimbursement over \$71/day. In other words, the current contract creates a "donut hole" where actual expenses incurred by employees for meals over \$38/day, but under \$71/day would only be reimbursed at \$38/day; leaving the employee out of pocket for the difference. The Agency offered examples of fraud committed when some employees submitted receipts inflating costs to get over the \$71 threshold for actual reimbursements. The Agency's solution offered to address the fraud problem is to eliminate all receipts and increase the cap of reimbursement to \$50/day. Any actual abuse of the program should certainly be addressed by the Agency. The Agency has been clear that they do not want the responsibility of managing receipts to support the oversight of the program. As the Agency sees no need for receipts, I will not order a requirement to submit receipts at the standard applicable rate, unless the Agency wants a receipt, and the employee is on notice in advance.

It should be noted that the Agency's offer to increase the cap of reimbursement to \$50/day still leaves some employees out of pocket for a meal

expense over \$50, particularly employees in areas the Agency agrees are exceptionally high cost areas (e.g. Alaska). The Agency asserted an interest in improving morale. But the Agency offered no recourse for the numerous employees who will have to pay out of pocket for meal expenses over the Agency proposed \$50 threshold. Increasing out of pocket expenses for the employees certainly won't promote higher morale.

As provided by 5 U.S.C. §5348(a), the parties are compelled to reflect the current practice in the maritime industry. There was no argument offered and no other information in the record to support the creation or ordering of a "donut hole" between a flat rate and a cap rate. Therefore, I will not be ordering this type of payment structure going forward.

The Agency argued that they rejected the Union's proposal because it promotes a "windfall" for the employees. The Agency cited as authority, the NOAA policy where the Agency explains that the COMSUB program is supposed to *defray* expenses for employees, not necessarily make them whole or to pay so much to amount to a windfall. The Agency interprets defray as meaning something less than full reimbursement to an employee despite the definition provided in its position statement prior to the Mediation-Arbitration that defray means to "*pay all or part of the money for costs or expenses*" citing the Cambridge Dictionary. (Emphasis added). The Agency's choice of interpretation is simply not reflected in the governing statute (5 U.S.C. §5348(a)). The Congressional interest in authorizing the Agency to fund a COMSUB program was to create parity between the federal sector maritime employees and the private sector⁵, limited only by the public interest. It does not offend the public interest to promote fairness.

Despite the Agency's attempt to compare these employees to other GS employees, it is clear that Congress did not intend to treat these employees the way we would treat GS employees with regard to wages and benefits. Congress directed that their wages and benefits be composed differently, and that the Agency reflect the maritime practices in consideration of the maritime employees' wages and benefits. Maritime companies are reimbursing their maritime employees for their reasonable actual expenses; not simply *defraying* the expenses. Congress intended the Agency to provide the Wage Mariners reimbursement for reasonable actual expenses, not for the Agency to simply defray their actual expenses. As for the Agency's argument that COMSUBs are not wages, I don't believe either party is confusing the expenses addressed by this negotiation as wages. To be clear, we are addressing allowances for meal expenses, not wages, when dining facilities are not available aboard the ship.

Finally, the Agency argued that by offering the GSA or JTR as the standard for "reasonableness" of expense reimbursement, the Union seeks to declare the

⁵ *Blaha v. United States*, 511 F.2d 1165 (Ct CL. 1975).

employees are in travel status. That was not my impression nor am I compelled to order a change in status that isn't supported by the travel regulations. I intent to treat the travel regulations, and the per diem rates reflected within those regulations, as an offering for a standard to support "reasonable" meal costs.

Union Position

During the negotiations and the FSIP hearing, the Union expressed one interest: the rate would be consistent with the current maritime industry. During bargaining, the Union proposed that the rate would increase from \$38/day to \$54/day, with employees receiving higher rates in accordance with the framework set forth in the current CBA, but receipts would be provided solely "at Management's discretion." The \$54 rate mirrors the GSA base per diem rate and the elimination of a receipt mirrors the GSA procedures, which do not require receipts for reimbursement within the GSA rate.

The Union offered a compelling argument that the prevailing rate and practices in the maritime industry that the Agency is obligated to follow by statute (5 U.S.C. §5348) and its policy (NAO 202-534B) include consideration of both the maritime practices throughout the federal sector (e.g., DOD) and the maritime practices throughout the private sector. The Union offered varying examples of historic practices that support the current CBA rates, as well as more updated "cash in lieu of" practices for meals in the maritime industry. As Congress requires consideration of the maritime practices throughout the industry, I have determined that I must consider the maritime practices throughout federal agencies (including NOAA) and in the private sector.

The Union argued that consideration solely of NOAA's other two bargaining units discussed by the Agency is not appropriate because one of those units (MMB) is comprised of unlicensed seafarers who are supervised by licensed engineers. In other words, they are not comparable to the MEBA unit because they do not have the same licensing and training requirements to perform their duties as the MEBA bargaining unit. There is not enough in the record to support a determination regarding the comparability of the MMB unit. However, the Union offered for consideration at least one other NOAA unit-- International Brotherhood of Electrical Workers (IBEW), Local 932. The Agency agreed in the 2011 CBA to provide mariners Meal Allowance at the full GSA FTR rates when meals are not provided on the ship. As discussed above, Congress requires consideration of the maritime practices throughout the industry. Thus, even the Agency has accepted the GSA FTR rates as a reasonable standard used when determining appropriate industry meal allowances. As such, there is a sufficient basis for me to consider the maritime practices offered by the parties throughout federal agencies (including NOAA) and in the private sector, not solely one or two units within NOAA.

OPINION

As reflected in NAO 202-534B which references 5 U.S.C. § 5348 (a), the parties are required to reflect a Meal Allowance rate that is consistent with the current maritime industry standard. While there is a rate in the current CBA that may have reflected the maritime practice upon its execution, some time has passed and there is significant evidence that the industry has increased that rate over time. The negotiations of the successor CBA provide the opportunity to reflect the current maritime standard, therefore, there is a compelling need to change the status quo. The parties have been unable to reach agreement on the current maritime standard for Meal Allowance, leaving the matter for the Panel to resolve.

The overwhelming record evidence in the private industry and federal agencies (including at least one example at NOAA) favors a practice of providing a flat rate reimbursement for actual expenses (\$46-\$55), with the opportunity to receive higher reimbursement for “reasonable” actual expenses above the flat rate. Within federal agencies, “reasonable” has been defined by the applicable per diem rate (e.g., DOD JTR per diem rate, GSA FTR per diem rate or State Department per diem rates⁶). There is also a practice of requiring that no receipt be provided for actual expenses within the per diem rate, unless the requested reimbursement exceeds the reasonable rate (i.e., exceeds GSA per diem rate). And finally, there is a practice of requiring advanced notice for the excessive expenses above the per diem. Where employees are reimbursed for reasonable actual expenses, there is no windfall.

DECISION

Having carefully considered the arguments and evidence presented in this case, as the Statute requires, I hereby order the parties to adopt the following language into their successor CBA:

Lodging -

If the Agency is unable to provide lodging, and the employee incurs a lodging expense, room allowances will be paid in the amount of the actual expense up to the current GSA/FTR/DSSR rates for the locality. Receipts must be provided.

⁶ The General Services Administration (GSA) establishes per diem rates for destinations within the lower 48 continental United States (CONUS). The State Department establishes the foreign rates (for example, Canada, Spain, Japan). The Department of Defense (DOD) establishes non-foreign rates which includes Alaska, Hawaii, and all U.S. Territories.

Meals -

Employees eligible for COMSUBs for meals will receive a flat rate \$54/day meal allowance - \$13 for breakfast, \$15 for lunch and \$26 for supper. However, the employee may seek a reimbursement for actual meal expenses higher than \$54/day, based upon localities in higher per diem rate areas reflected in the GSA FTR or DOD JTR or Department of State Standardized Regulation. If the employee is seeking reimbursement for actual expenses over the GSA/JTR/DOS rate, the employee must receive approval in advance and the employee will be required to submit receipts to justify the actual expenses.

/Jeanne Charles/
Jeanne Charles
Panel Member

May 13, 2022
Washington, D.C.