CITY OF NEW YORK
OFFICE OF THE COMPTROLLER

In the Matter of THE COMPTROLLER OF THE CITY OF NEW YORK, *ex. rel.* DISTRICT NO. 1, PACIFIC COAST DISTRICT, MARINE ENGINEERS BENEFICIAL ASSOCIATION, AFL-CIO, Petitioner, -against- THE OFFICE OF LABOR RELATIONS OF THE CITY OF NEW YORK, Respondent, for a determination of the prevailing rate of wages and supplements pursuant to New York State Labor Law § 220	OATH Index No. 1667/21 **COMPTROLLER'S FINAL DETERMINATION AND ORDER**

This proceeding was brought by the Comptroller's Bureau of Labor Law ("BLL") pursuant to Labor Law § 220 (8)(d), upon a complaint filed by the Marine Engineers Beneficial Association ("MEBA"), to determine the prevailing rate of wages and supplemental benefits to be paid to marine engineers ("MEs") and chief marine engineers ("CMEs") employed by the City of New York aboard the Staten Island Ferry ("SIF") (collectively, "SIF Marine Engineers") during the relevant period. The City was represented by the Office of Labor Relations ("OLR").

Relevant Law

New York State Labor Law § 220, known as the prevailing wage law, requires the City of New York ("the City") to pay its "laborers, workmen or mechanics" the prevailing rate of wages and supplemental benefits paid in the private sector "for a day's work in the same trade or

occupation in the locality" where the work is performed. Labor Law §§ 220(3)(a) and 220(5)(a). The Labor Law defines "locality" as "such areas of the state described and defined" in a collective bargaining agreement for the relevant trade or occupation. Labor Law § 220 (5)(d). The rate provided in a collective bargaining agreement between private sector employers and unions is deemed "prevailing" if the agreement covers at least 30 percent of "workers, laborers, or mechanics, in the same trade or occupation" in the locality where the work is performed. Otherwise, the prevailing wage is the average wage paid to non-unionized workers, laborers, or mechanics in the same trade or occupation in the locality where the work is performed. Labor Law § 220(5)(a).

Under the Labor Law, the City must pay its "laborers, workmen or mechanics" a prevailing wage and must negotiate in good faith towards a collective bargaining agreement. If one cannot be reached, the union is authorized to file a verified complaint with the Comptroller on behalf of the employees it represents.[1] The Comptroller must then issue a determination on the prevailing rate of wages and supplemental benefits due to the employees ("prevailing wage employees") after an investigation by BLL. Labor Law §§ 220(8-d) and 220(8). If BLL believes a hearing is warranted, the Comptroller's rules authorize the Office of Administrative Trials and Hearings ("OATH") to conduct such a hearing. After the conclusion of the hearing OATH issues a Report and Recommendation, and the Comptroller issues a Final Determination. See 44 RCNY § 2-06(d)(1).

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[1] It should be noted that only those public sector workers that classified as being entitled to prevailing wage can avail themselves of this process. For this matter, the parties stipulated that for purposes of this prevailing wage rate-setting proceeding, the MEs and CMEs were "prevailing rate employees".

Procedural History

On January 22, 2018, the MEBA filed a complaint with BLL on behalf of SIF Marine Engineers. The complaint alleged the last collective bargaining agreement between the City and MEBA ended in 2010, that negotiations for a new agreement were unsuccessful, and that MEBA was requesting that the Comptroller determine the prevailing rate of wages for the SIF Marine Engineers. In their complaint, MEBA argued that the work of the SIF Marine Engineers was comparable to the work performed by the chief engineers and watch engineers at Penn South Mutual ("Penn South") covered by a collective bargaining agreement between the Local 94 and Mutual Redevelopment Houses, Inc. After an investigation, the Comptroller issued a preliminary determination rejecting MEBA's suggestion that Penn South engineers were comparable, and instead identified stationary engineers/building HVAC services operators in buildings subject to the RAB/Local 94 contract as comparable.

MEBA disagreed with the Preliminary Determination, and BLL agreed to bring the matter to OATH for a hearing on the issue. The Honorable Faye Lewis, Administrative Law Judge ("ALJ") conducted the proceedings at OATH. During these proceedings, MEBA argued, for the first time, that SIF Marine Engineers should be paid at the rate provided to chief engineers and first assistant engineers on U.S.-flagged Maersk cargo vessels ("Maersk Engineers") under the Dry Cargo Agreement with the Marine Engineers Beneficial Association ("Maersk/MEBA CBA").

ALJ Lewis conducted an eight-day trial in October 2021. Each party, including MEBA, was represented by counsel and had an opportunity to present testimony and documentary evidence. All parties submitted post-trial memoranda of law. ALJ Lewis issued a Report and Recommendation, dated August 23, 2022.

ALJ Lewis recommended that City-employed CIF Marine Engineers assigned to the Staten

Island Ferry be paid wages and supplemental benefits commensurate with those employed on U.S.-flagged Maersk Line Ltd. cargo ships under the Maersk/MEBA CBA.

The Comptroller issued an Interim Decision on October 27, 2022 ("Interim Decision") finding that the Comptroller's Bureau of Labor Law did not properly determine the classification and prevailing wage rates for the SIF Marine Engineer civil service titles and preliminarily accepting the following factual findings from ALJ Lewis: (1) Maersk Engineers working on cargo vessels that pass through New York City waters perform work in the same locality as SIF Marine Engineers and (2) Maersk Engineers on U.S.-flagged cargo vessels are in the same trade or occupation as the SIF Marine Engineers.

The Comptroller's Interim Decision further directed the parties to submit additional briefing on the questions of (1) whether the Maersk/MEBA CBA covered at least thirty percent of workers in the same trade or occupation in New York City, (2) whether foreign flagged ships were properly excluded from the determination of prevailing wage paid to SIF Marine Engineers, and (3) how the prevailing wage should be calculated if the Maersk/MEBA CBA did not cover at least thirty percent of the marine engineers in the NYC locality.

Based on the record, including the ALJ's Report and Recommendation, the transcript of the hearings, the exhibits thereto, and the post-hearing submissions, pursuant to the powers and duties vested in me as the Comptroller under Labor Law § 220 et seq., I make the following Order and Determination, adopting in part and rejecting in part the ALJ's Report and Recommendation, a copy of which is annexed hereto and incorporated by reference herein.

IT IS HEREBY DETERMINED THAT:

1. The ALJ's finding that SIF Marine Engineers are entitled to a prevailing rate of wage is adopted.

2. The ALJ's finding that BLL did not properly determine the classification and prevailing wage rates for the SIF Marine Engineer civil service titles, is adopted. Specifically, Petitioner's classification that Building HVAC Engineers perform comparable work to Marine Engineers for the purpose of setting the prevailing wage rate for Marine Engineers under § 220 of NY Labor Law is rejected.
3. The ALJ's finding that SIF Marine Engineers are performing the same work on comparable equipment as the Maersk Engineers on U.S.-flagged cargo ships is adopted.
4. The ALJ's finding that the SIF Marine Engineers have the same licensing requirements as the Maersk Engineers on U.S.-flagged cargo ships is adopted.
5. The ALJ's finding that Maersk Engineers perform work in the same "locality" as SIF Marine Engineers, New York City, is rejected. Upon further briefing and consideration, this finding modifies the Comptroller's Interim Decision.
6. The ALJ's finding that SIF Marine Engineers are entitled to the prevailing rate of wage and benefits paid to Maersk Engineers, during the relevant period, are those contained in the Maersk/MEBA CBA is adopted in part and rejected in part. Specifically, it is adopted for purposes of the base hourly pay rate and rejected for purposes of other employment benefits as defined in the Maersk/MEBA CBA. The vacation benefit due to SIF Marine Engineers should be adapted from one day of vacation per day of work, as set forth in the Maersk/MEBA CBA, to 21 days annually, consistent with benefits provided to employees of the City of New York.

Discussion:

Although ALJ Lewis' recommendation regarding wages is adopted, albeit with a different analysis, the Comptroller reaches a different conclusion regarding supplemental benefits,

including vacation pay. This conclusion derives from a rejection of ALJ Lewis' finding that Maersk employees perform work in the same locality as SIF Marine Engineers and as such the Maersk/MEBA CBA is controlling.

It is well-settled law that the prevailing rate of wage shall be the rate of wage paid, *in the locality*, provided in collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work, provided that said employers employ at least thirty percent of workers, laborers, or mechanics in the same trade or occupation in the locality where the work is being performed. Labor Law § 220(5)(a). Although U.S.-flagged and foreign-flagged cargo ships pass through New York City waters to and from ports in New Jersey, "locality" is clearly defined by § 220(5)(d) of the Labor Law as "such areas of the state described and defined for a trade or occupation *in the current collective bargaining agreements*…" (emphasis added). The Maersk/MEBA CBA does not designate the applicable locality and is not limited in application to New York City. The absence of a locality in the Maersk/MEBA CBA is both significant and intentional, as the work subject to the agreement is performed all over the world.

Absent an applicable CBA covering thirty percent of all Marine Engineers in the locality, the Comptroller is instructed to set the prevailing wage as the average wage paid to non-unionized workers, laborers, or mechanics in the same trade or occupation in the locality where the work is being performed. Here, a survey of the average wage is impractical and imprudent, as it would require BLL to survey U.S. and foreign-flagged ships over which it has no jurisdiction. Even if it were possible to conduct such surveys, U.S. employment laws and wage rates do not apply to foreign-flagged vessels and BLL has no authority to compel responses. Moreover, including the rates paid to workers on foreign vessels in the analysis would likely depress the rates of Marine

Engineers on US-flagged ships and raise questions of international law. As such, any survey responses would be meaningless for purposes of setting the prevailing wage rate. Historically, BLL has relied upon the Occupational Employment Statistics ("OES") survey for average wage rates in New York City, which is published annually by the New York State Department of Labor with the assistance of the United States Department of Labor. In this case, the OES survey is not an appropriate measure of average wages. The BLL investigation revealed that the only comparable rate included in the data was that of the SIF Marine Engineers. As a matter of law, it is impermissible to consider the workers for whom the prevailing rate of wage is to be determined when calculating the average wage to be paid to those workers. N.Y. Labor Law § 220(5)(a).

It cannot be understated that this is a case of first impression with a unique nature, evidenced by the dearth of precedent and the implication of foreign law and wages. Without a CBA covering thirty percent of all Marine Engineers in the locality, the impossibility of conducting a survey, and finding that the Maersk/MEBA CBA does not control, we reach the following conclusion: the work performed by SIF Marine Engineers during their shifts is comparable to that of the Maersk Engineers, accordingly, the wage schedule set forth in the Maersk/MEBA CBA should be applied. However, in consideration of the fact that SIF Marine Engineers' broader employment relations more closely reflect those of other employees of the City of New York, their supplemental benefits should also reflect those of other City employees. There are several factors that support this rational conclusion. First, it is unquestionable that certain working conditions of the two categories of Marine Engineers are different. SIF Marine Engineers cross from Staten Island to Manhattan, and back while the Maersk Engineers traverse international waters, months at a time. Indicatively, as the Maersk/MEBA CBA does not delineate categories of compensation, the totality of the circumstances warrant that some benefits are related to the work performed at

sea. In fact, in their submissions MEBA concedes this point,

> "The Maersk CBA contains other items of compensation that MEBA agrees need not be included as components of the prevailing rates to be adopted for Chief Marine Engineers and Marine Engineers. These wage payments and supplements include room and board, duty pay, penalty time, travel pay, vacation plan administrative factor payments, In Lieu of Rest (Section 11 (b) of the 1986-1990 Agreement), Night, Weekend & Holiday Relief engineers (Section 12 &13 of the 86-90 Agreement), Supper Relief and Penalty Meal Hours (Section 14 &15 of the 86-90 Agreement), Restriction to Ship & Delayed Sailing (Section 16 &17 of the 86-90 Agreement), Penalty and Premium Pay and Standby Duty (ACCU) (Section 19 & 47 (f) of the 86-90 Agreement), Subsistence and Room Allowance, Explosives & Penalty Cargo (Section 21-24 of the 86-90 Agreement), Shifting Ship and Transportation/Travel Pay (Section 25 & 29 of the 86-90 Agreement), Quarters and War Risk Bonus (Section 32 & 36 of the 86-90 Agreement), Severance (Section 43 of the 86-90 Agreement), Vacation Administrative Factor (Section 34 (h) of the 86-90 Agreement)." There is still some dispute regarding the "Non-Watch Allowance." MEBA's January 11, 2023, Letter to the Comptroller.

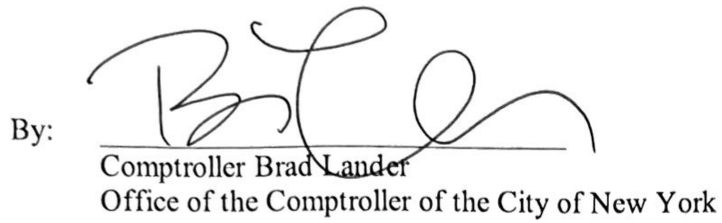
Lastly, the facts and circumstances dictate an adaptation of benefits. For example, it is appropriate for Maersk Engineers to receive one day of vacation for every day worked, as these workers are at sea for months at a time. However, unlike the Maersk Engineers working on U.S.-flagged ships at sea for months at a time, the SIF Marine Engineers who traverse the water between Staten Island and Manhattan each day return home at night like other City employees. As such, it would be unreasonable to hold that SIF Marine Engineers are entitled to the same benefit.

IT IS HEREBY ORDERED THAT:

For the foregoing reasons, BLL is hereby ordered to issue a Schedule of Prevailing Wages and Supplemental Benefits, by March 31, 2023, in accordance with this decision. Thereafter, the City shall pay to SIF Marine Engineers, for the relevant period, the rates of wages and supplemental benefits as determined in paragraph 6 hereinabove.

This constitutes the final decision and order of the Comptroller.

Dated: March 29, 2023

By: 

Comptroller Brad Lander
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