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Public Service
Staff Relations Act

Before an adjudicator

BETWEEN

VINCENT MAESSEN and MARK McKINDSEY

Grievors

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Maessen and McKindsey v. Treasury Board (Department of National Defence)

In the matter of a grievance referred to adjudication pursuant to section 92 of the *Public Service Staff Relations Act*

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Grievor: Paul Champ, counsel

For the Employer: Harvey Newman, counsel

Heard at Halifax, Nova Scotia,
May 30, 2006.

Grievances referred to adjudication

[1] Vincent Maessen and Mark McKindsey ("the grievors") allege that their employer breached the collective agreement when it failed to provide notice on changing the grievors' hours of work for a period in July 2003, and when it did not compensate the grievors at the applicable overtime rate for the time worked as a result of this change. The contract provisions at issue form part of the Operational Services Group collective agreement between the Public Service Alliance of Canada ("the bargaining agent") and the Treasury Board that expired August 4, 2003.

[2] At the times material to this case, the grievors were employed as oilers at the SC-DED-04 subgroup and level by the Department of National Defence ("DND" or "the employer") at Halifax, Nova Scotia, and performed their duties aboard the Canadian Forces Auxiliary Vessel (CFAV) *Quest*.

[3] The grievors presented the following grievances at the first level on August 12 and August 13, 2003:

> *Maessen (File No. 166-02-36200): I was designated to work nights from 1600-2400 on July 21/03 to July 30/03, 8 days. I believe Management has Violated the following: Collective Agreement Artical 28 Annex B (conventional) work system 1(d), QHM Standing Orders – Chapter 4 Section 416 #2 and Section 530 (working hrs.) #4, Master's Standing Orders Annex A-A1, First Mate Standing Orders Section 4.*
>
> [*Sic* throughout]
>
> *McKindsey (File No. 166-02-36201): On Wed, July 16/03 at 10:45 I was told to finish my 8 hrs and to return on Thurs. July 17/03 as well as July 18/03 from 16-2400. This has violated the following: Collective Agreement Article 28 Annex B (conventional work system 1D, QHM Standing Orders – Chapter 4 sec. 416 #2 and Section 530 (working hrs.) #4, Master Standing Orders Annex A-A1, 1st Mate Standing Orders Sec 4.*
>
> [*Sic* throughout]

[4] As corrective action, the grievors sought:

> *Maessen: An explanation of why Collective Agreement, QHM Standing Orders, Master's Standing Orders and First Mates Standing Orders do not Apply while in Home port, on slips and on conventional work system. To be compensated at applicable rate of pay 1.5xhr for hours worked.*

[*Sic* throughout]

> *McKindsey: I would like a clear description of the conventional work system as to how it applies to "Quest" i.e., for hrs worked 16-24 hrs at applicable rate. An explanation as to why Management disregarded QHM Standing Orders, Master Standing Orders and our collective agreement with regard to work hrs.*

[*Sic* throughout]

[5] The grievors, without opposition from the employer, specified at the hearing that the primary issues to be determined focused on the definition of the term '"non-watchkeeping vessels" used in paragraph 1(d) of Annex "B", the 48-hour notice requirement found therein, and the overtime entitlement outlined in paragraph 2.03(c) of Appendix "G".

[6] After the employer denied their grievances at the final level on March 4, 2005, the grievors submitted references to adjudication, which were received by the Public Service Labour Relations Board ("the Board") on May 10, 2005.

[7] On April 1, 2005, the *Public Service Labour Relations Act*, enacted by section 2 of the *Public Service Modernization Act*, S.C. 2003, c. 22, was proclaimed in force. Pursuant to section 61 of the *Public Service Modernization Act*, these references to adjudication must be dealt with in accordance with the provisions of the *Public Service Staff Relations Act*, R.S.C., 1985, c. P-35 (the "former *Act*").

Summary of the evidence

[8] The grievors and the employer each led evidence through a single witness. I admitted a total of five documents as exhibits, which are available at the Board for examination.

[9] During their opening statement, the grievors submitted on consent a memorandum (Exhibit G-2) dated July 16, 2003, which notified the crew of the *Quest* that the hours of work aboard the *Quest*, then in dry dock in Halifax, ". . . will be changed to accommodate the requirement to have a member of the ship's staff available to work from 16:00 to 24:00 hours daily Monday to Friday until further notice". For the grievors, the memorandum specified the following: "Mark McKindsey July 17 & 18th 1600-2400 hours; Vince Maessen July 21-25th 1600-2400 hours. The week of July 28-August 1st to be determined as required".

[10] Mr. Maessen has worked at the CFB Halifax dockyard on DND auxiliary vessels under the authority of the Queen's Harbour Master (QHM) for close to 20 years. The Halifax-based auxiliary fleet includes yardcraft vessels, harbour and coastal tugs and the CFAV *Quest*, a major ocean-going platform for conducting defence-related scientific research, primarily in the field of acoustics. Exhibit E-1 describes the *Quest* in greater detail.

[11] Mr. Maessen was one of three oilers staffing the engine room of the *Quest*. When the *Quest* was in port, he worked five days per week from 7:30 a.m. to 3:30 p.m. (7:00 a.m. to 3:00 p.m. in the summer), as was the case for the rest of the QHM fleet employees (Exhibit G-3).

[12] Unlike the other vessels in the fleet, the *Quest* spent substantial time at sea, ranging from 100 days per year to 170 days per year. Crew members were aware in advance of the general schedule for sea voyages each year. For any specific sailing, they received 48 hours notice indicating the sailing time and the time shore leave expired. While at sea, Mr. Maessen worked four hours on and eight hours off as part of a watchkeeping system (consisting of three watches from 8:00 to 12:00, 12:00 to 4:00 and 4:00 to 8:00 for each 12-hour period). When the *Quest* returned to port, the watchkeeping system ended and Mr. Maessen and others returned to regular day hours.

[13] While in port, the *Quest* oilers who were available sometimes worked overtime. Mr. Maessen could not recall any instance of regularly scheduled evening hours while in home port, nor had he ever known the *Quest* to maintain the watchkeeping system when moored in Halifax. Watchkeeping occurred only while the *Quest* was at sea or in foreign ports.

[14] Section 416 of the QHM's *Standing Orders* (Exhibit G-4) provides context:

. . .

> *1. Sea watches will be set and terminated at noon or midnight at sea or in port when CFAVs are deployed on taskings providing the nature of the exercise meets one of the following criteria:*
>
> *a. planned duration of tasking exceeds 16 hours;*
>
> *b. steam beyond local areas e.g. Lunenburg; and*

> *c. duration of tasking is uncertain e.g. SAR, emergency situations or adverse weather.*
>
> *2. Daywork hours will be maintained in CFAVs when tasked on daily operations in the Halifax Harbour, Bedford Basin, Harbour approaches and local areas (i.e. returning to Halifax on the same day). NOTE: Local areas include Exercise Areas A, B, C, D, and W.*
>
> . . .

[15] In cross-examination, Mr. Maessen confirmed that the *Quest* was the only auxiliary vessel that went to sea for extended periods on a regular basis. During the eight days in July 2003, when he was required to be aboard the *Quest* during the evening, Mr. Maessen worked a straight eight hour period and not four hours on and four hours off, although he testified to being told that ". . . the reason was for sea watches." While on board, Mr. Maessen was the crew member responsible for safety issues while contract personnel cleaned the fuel and ballast tanks. He indicated that he was not required to work day hours during this period, that the evening work requirement lasted several weeks and was shared with two other oilers, and that he received regular pay for his work.

[16] Captain Archie McAlister has been the National Superintendent of Auxiliary Vessels for the QHM since September 3, 2003. He has extensive marine experience in several departments of the federal government and holds the highest available level of certification as a master mariner, which qualifies him to command ". . . any size vessel, anyplace, anytime." Among his previous assignments, Captain McAlister served as First Executive Officer of the Canadian icebreaker *Louis St.-Laurent*, and also commanded the *Quest* for a period in 2004.

[17] Captain McAlister briefly described the QHM organization and the 10-vessel fleet at Halifax for which he has responsibility. Among the vessels of the fleet, only the *Quest* goes to sea on a regular basis. On average, the *Quest* spends 145 days at sea each year and is scheduled for 180 days this year. During these voyages, some crew on board perform day work in support of the scientific staff who are conducting experiments, while other members of the crew (bridge officers, engineers and oilers) are required to keep sea watches. Watches are also usually maintained when the *Quest* is docked in a foreign port. Once moored at home port, watchkeeping personnel break the sea watches and revert to a day work routine.

[18] The other vessels in the Halifax-based auxiliary fleet are not watchkeeping vessels, with the exception of the *Firebird*, the sole fire boat, which maintains its own watch system under a 42-hour averaging arrangement outlined in Annex "C" of the collective agreement. On infrequent occasions, when one of the tugs in the fleet certified for coastal duties goes to sea for other than a brief period, its commanding officer may order crew to keep sea watches.

[19] The grievors questioned Captain McAlister whether it is the organization of the work performed by individual crew members that distinguishes watchkeeping, or the vessel on which the work occurs. Captain McAlister specified that each vessel uses one of two or three authorized manning regimes. The *Quest* is a watchkeeping vessel. It uses a watchkeeping manning regime under the "conventional work system" described under Annex "B" of the collective agreement. Other vessels in the fleet, save for the *Firebird*, are non-watchkeeping vessels. When at sea for longer periods, the captains of the other vessels may maintain sea watches for specific purposes for limited periods, but this does not make them watchkeeping vessels. Captain McAlister confirmed that the collective agreement uses, but does not define, the term "non-watchkeeping vessel".

[20] Captain McAlister agreed that he had not seen a document that specifically designates the *Quest* as a watchkeeping vessel. The *International Convention for the Safety of Life at Sea*, to which Canada is a signatory, specifies that ocean-going vessels should have watchkeeping systems and outlines the standards for certifying watchkeeping manning regimes as safe. If a vessel is foreign-going, it will have a watchkeeping system in order to maintain safety of life at sea. The *Quest* is such a vessel.

[21] When in home port, regular day hours apply to members of the *Quest*'s crew, as for the other auxiliary vessels (other than the *Firebird*). This, however, does not change the *Quest*'s manning regime. It remains a watchkeeping vessel.

[22] Asked if the crew of tugs on coastal duties receive overtime if they work beyond their regular hours, Captain McAlister replied in the affirmative. Overtime is paid if crew members ". . . go beyond the regular day while on a watch system".

Summary of the arguments

On behalf of the grievors

[23] At issue is the correct interpretation of clause 1 (Hours of Work) of Annex "B" (Conventional Work System) of Appendix "G" of the collective agreement:

. . .

> ***1. Hours of Work***
>
> *Except as otherwise provided in Annex "C", "D", and "E", the hours of work shall be:*
>
> *(a)*
>
> *(i) eight (8) hours per day,*
>
> *(ii) an average of forty (40) hours and five (5) days per week,*
>
> *and*
>
> ****
>
> *(iii) the two (2) days of rest shall be consecutive.*
>
> *(b) Employees working sea watches shall normally work on the basis of either:*
>
> *(i) four (4) hours on and eight (8) hours off;*
>
> *or*
>
> *(ii) six (6) hours on six (6) hours off.*
>
> *(c) Employees whose hours of work are designated in accordance with paragraph (a) and who are not assigned to watches shall perform their daily hours of work within a twelve (12) hour period as determined from time to time by the Master/Commanding Officer. For employees other than those assigned to the Stewards Department these hours shall be consecutive except for meal periods.*
>
> *(d) For employees who regularly work five (5) consecutive days per week on "non-watchkeeping" vessels the hours of work shall be consecutive, except for meal periods,*
>
> *and*

> *the normal daily hours of work shall be between 06:00 hours and 18:00 hours.*
>
> *and*
>
> *employees shall be given forty-eight (48) hours notice of any change in scheduled starting time.*
>
> . . .

[24] In the grievors' submission, the case turns on the meaning of the term "non-watchkeeping" vessel used in paragraph 1(d). The grievors take the position that watchkeeping is a function of what the employer requires the crew members to do, not of the vessel *per se*. When the *Quest* was at port in dry dock at the time of their grievances, the grievors' regular hours of work were scheduled as consecutive eight-hour periods during the day on a five-day basis. They were not working watches pursuant to paragraph 1(b) or within the meaning of section 416 of the QHM's Standing Orders (Exhibit G-4). To determine how the collective agreement applied when the employer required evening work starting July 17, 2003 (Exhibit G-2), the *Quest* must therefore be considered a "non-watchkeeping" vessel at this time. The conditions of paragraph 1(d) apply, and the employer was obligated to provide 48 hours notice of any change to the grievors' work hours.

[25] Captain McAlister's testimony, in the grievors' view, did not resolve the confusion that has resulted from the employer's failure to provide a clear indication of the difference between a watchkeeping vessel and a non-watchkeeping vessel for purposes of the collective agreement. There is no document to support his contention that the *Quest* is designated a watchkeeping vessel, and at all times retains this designation even when at home port when crew members are not keeping sea watches. In the operative statement of working hours for the Halifax-based auxiliary fleet (Exhibit G-3), there is no reference to the concept of watchkeeping and non-watchkeeping vessels, only to a watchkeeping system. In the face of collective agreement ambiguity over the meaning of the former terms, the adjudicator is entitled to refer for assistance to the QHM's *Standing Orders* (Exhibit G-4), which define the circumstances in which ". . . sea watches will be set . . . ." rather than designate which vessels are "watchkeeping". This authority supports the grievors' contention that the *Quest* was not in watchkeeping mode at the times material to their grievances.

[26] As employees covered by paragraph 1(d), the grievors' normal daily hours of work must fall between 06:00 hours and 18:00 hours. The employer's instruction of July 16, 2003 (Exhibit G-2), did not change the 06:00-18:00 hours period in which normal daily hours of work occur at home port in non-watchkeeping mode. It instead scheduled the grievors to work for a temporary period outside their normal daily hours of work. In so doing, the employer went beyond what it could lawfully require under the collective agreement without triggering overtime compensation. The evening hours required of the grievors by the employer in July 2003 were, in this sense, in excess of their normal work hours. Overtime coverage under clause 2.03(c) of Appendix "G" thus comes into force:

. . .

2.03 Overtime Compensation

. . .

(c) Subject to paragraph (d), an employee shall be entitled to compensation at time and one-half (1 1/2) for overtime worked by the employee.

. . .

[27] The grievors cited the 1972 decision in *Re United Glass and Ceramic Workers, Local 248, v. Canadian Pittsburgh Industries Limited*, 24 L.A.C. 402, to support the proposition that work scheduled by an employer outside an employee's regular hours of work should be considered overtime and compensated accordingly.

On behalf of the employer

[28] A non-watchkeeping vessel does not become a watchkeeping vessel when, on an irregular basis, its crew members are required to keep watches while at sea. Similarly, a watchkeeping vessel does not lose its status while at port when crew members revert to daily hours. It is the nature of the vessel that makes the distinction. The evidence is clear that the *Quest* is a large sea-going vessel, and the only vessel in the auxiliary fleet that spends substantial time at sea. This makes the *Quest* a watchkeeping vessel, as the term is commonly understood in the trade, and it must be considered as such for purposes of the collective agreement. Captain McAlister describes watchkeeping as the *Quest*'s manning regime. Crew members of the *Quest* do not expect a pattern of eight-hour work periods, during the day, five days a week as the normal *modus operandi* for

their vessel. Watchkeeping is the norm, and the vessel does not lose its status as a watchkeeping vessel for those periods where the sea watches are discontinued.

[29] The employer does not accept that the collective agreement is ambiguous in its use in paragraph 1(d) of the term "non-watchkeeping" vessel. The reference may be subject to interpretation by the adjudicator, but this does not extend to the point of permitting the adjudicator to use an extrinsic document such as the QHM's *Standing Orders* (Exhibit G-4) to assist in interpreting the collective agreement.

[30] Annex "B" provides for two types of employees. The first type is an employee on a non-watchkeeping vessel who regularly works five days per week. This type of employee is covered by paragraph 1(d). The 48-hour notice provided under this paragraph applies only to changes in starting times within the period from 06:00 hours to 18:00 hours. If, contrary to the employer's position, the grievors are found to fall under paragraph 1(d), the record shows that grievor Maessen did receive more than 48 hours notice on July 16, 2003, of the requirement to work evening hours (Exhibit G-2).

[31] The second type of employee may or may not work sea watches. When working sea watches, employees in this class are covered by paragraph 1(b). When not assigned to sea watches, they work daily hours within a 12-hour period determined by the master or commanding officer under paragraph 1(c). The person so authorized may change the 12-hour period at any time and for any purpose, whether at port or at sea (where not all crew members work sea watches).

[32] If the union position prevails, there will be utter confusion, because a vessel could then change from "watchkeeping" to "non-watchkeeping" status depending on time and circumstances, shifting the applicable collective agreement provisions. The employer takes the position that the parties could not have intended so complicated a system. Instead, the employer argues that the parties intended to provide a relatively simple hours-of-work regime based on the nature of the employee's assigned vessel.

[33] Regarding *Re United Glass and Ceramic Workers*, had the parties intended overtime compensation to apply to any hours worked "outside" normally scheduled hours, they would have written the definition of "overtime" in article 2 accordingly. They did not, and no entitlement to overtime arises in the circumstances of this case.

Reply argument on behalf of the grievors

[34] There was no evidence adduced as to the understanding in the trade of the expression '"non-watchkeeping vessel". The union's position eliminates uncertainty by saying that, when watches are required at sea, a vessel becomes a watchkeeping vessel for purposes of the collective agreement.

[35] If the adjudicator does not agree with either party as to the interpretation of clause 1, it is open to him to order a different interpretation that he believes to be correct. To resolve the existing confusion, the adjudicator should indicate in his ruling the proper distinction between a watchkeeping and non-watchkeeping vessel.

[36] The instruction given on July 16, 2003, to the grievors to work evening hours (Exhibit G-2) did not establish a new 12-hour period within which daily hours were to be worked. The evening work was a temporary requirement outside normal work hours. Even if the adjudicator finds that this requirement was covered by paragraph 1(c) rather than 1(d), the grievors remain entitled to overtime compensation inasmuch as the hours worked were in excess of the grievors' normally scheduled hours.

Reasons

[37] It is not uncommon that an unusual situation reveals an issue in the interpretation of a collective agreement, as appears to be the case in these references to adjudication. The assignment of employees in their home port to work evenings on board the *Quest* was a new situation. It raised questions as to how the hours of work and overtime features of the collective agreement operate, and what the parties intended when they used the expression '"non-watchkeeping vessels" in their collective agreement.

[38] The employer and the bargaining agent will determine whether revisions to the collective agreement are needed in light of the issues uncovered in this case. My task is to take the existing language of the collective agreement as it is and decide how this language applies to the circumstances in evidence.

[39] Clause 1 of Annex "B" opens with a statement of daily and average weekly hours, and the requisite days of rest:

> ***1. Hours of Work***
>
> *Except as otherwise provided in Annex "C", "D", and "E", the hours of work shall be:*
>
> *(a)*
>
> *(i) eight (8) hours per day,*
>
> *(ii) an average of forty (40) hours and five (5) days per week,*
>
> *and*
>
> *(iii) the two (2) days of rest shall be consecutive.*
>
> . . .

Viewed in isolation, there is no indication that paragraph 1(a) applies only to some rather than all employees covered by the "conventional work system" outlined in Annex "B". Unless modified by what follows, paragraph 1(a) would appear to establish parameters for all hours of work arrangements under Annex "B", both at sea and in port, for all types of vessels, and for the operation of overtime provisions under either watchkeeping or non-watchkeeping conditions.

[40] I note that there is no evidence before me indicating how subparagraph 1(a)(iii) applies in practice to a vessel that keeps sea watches on a 24-hour basis. The administration of days of rest is not, however, an issue in this case.

[41] Paragraph 1(b) outlines the normal pattern of work hours for employees who keep sea watches:

> . . .
>
> *(b) Employees working sea watches shall normally work on the basis of either:*
>
> *(i) four (4) hours on and eight (8) hours off;*
>
> *or*
>
> *(ii) six (6) hours on six (6) hours off.*
>
> . . .

As with paragraph 1(a), nothing here explicitly limits the application of this provision to a certain type of vessel. Had the employer and bargaining agent intended that

paragraph 1(b) not apply to all situations where employees keep sea watches, regardless of the type of vessel, I would expect this provision to have been worded accordingly. It is not. The paragraph refers explicitly to employees "working sea watches", focussing on the nature of the activity or how the work is organized and not the type of vessel. While I do not rely on the QHM's *Standing Orders* (Exhibit G-3) for any finding in this decision, I note that they, too, appear to contemplate watchkeeping as a situation potentially applicable to any auxiliary vessel in the QHM fleet, rather than a fixed attribute of certain vessels.

[42] Paragraph 1(c) focuses on employees who do not keep sea watches:

. . .

> *(c) Employees whose hours of work are designated in accordance with paragraph (a) and who are not assigned to watches shall perform their daily hours of work within a twelve (12) hour period as determined from time to time by the Master/Commanding Officer. For employees other than those assigned to the Stewards Department these hours shall be consecutive except for meal periods.*

. . .

Once more, the employer and the bargaining agent have not stipulated that this provision applies differently to different types of vessels. The focus again is on the nature of the work; i.e., centring out those situations where employees "are not assigned to watches". We also find here, however, the qualifying phrase "whose hours of work are designated in accordance with paragraph (a)", a phrase that could be taken to infer the possibility of another class of employees under Annex "B" whose hours are *not* designated by paragraph 1(a), contrary to my initial reading above. Does this qualifying phrase have substantial meaning for our purposes, or is it only a reinforcing cross-reference to paragraph 1(a)?

[43] Paragraph 1(d) adds another layer. For the first and apparently only time in the collective agreement, the employer and the bargaining agent use the undefined expression "non-watchkeeping vessels", and draw special attention to the words "non-watchkeeping" modifying the noun "vessels" by surrounding the former with quotation marks:

. . .

> *(d) For employees who regularly work five (5) consecutive days per week on "non-watchkeeping" vessels the hours of work shall be consecutive, except for meal periods,*
>
> *and*
>
> *the normal daily hours of work shall be between 06:00 hours and 18:00 hours.*
>
> *and*
>
> *employees shall be given forty-eight (48) hours notice of any change in scheduled starting time.*
>
> . . .

[44] Both paragraphs 1(c) and 1(d) state that hours of work shall be consecutive, with the exception of the Stewards Department in the former. Paragraph 1(c) requires employees to perform their duties within an unspecified 12-hour period. Paragraph 1(d), by contrast, sets a precise 12-hour framework — from 06:00 hours to 18:00 hours — for scheduled hours of work. Paragraph 1(d) goes on to impose a notice requirement where the employer changes starting hours, a provision absent from paragraph 1(c).

[45] Paragraph 1(d) does not simply modify or add detail to paragraph 1(c). It must be that paragraph 1(d) is intended to apply to different circumstances than those covered by paragraph 1(c). The reference in paragraph 1(d) to "employees who regularly work five (5) consecutive days per week on "'non-watchkeeping vessels" defines a specific class of employees who, unlike other employees under Annex "B", have access to two conditions of employment — hours of work within the period from 06:00 hours to 18:00 hours, and 48 hours notice of a change in starting hours.

[46] Critically, employees covered by paragraph 1(d) are distinctive because they work on "'non-watchkeeping vessels". I have considered Captain McAlister's evidence on the significance of this term and have no reason to doubt that, in the common parlance of the trade, a vessel is either known as a watchkeeping vessel or a non-watchkeeping vessel, as he contends. I do not believe, however, that I am bound by this evidence to find that a vessel invariably retains its status as either "watchkeeping" or "non-watchkeeping" for purposes of interpreting the collective agreement. A vessel is a place of work, and the work performed on the vessel may be organized differently under different circumstances and at different times. Captain McAlister himself testified that some members of the *Quest* crew keep watches while the vessel is at sea,

while others work regular day hours. The fact that the *Quest* may be known as a watchkeeping vessel does not alter the reality that those *Quest* crew members who work regular day hours at sea cannot be covered by provisions of the collective agreement meant for watchkeepers. Similarly, it seems to me that watchkeeping employees of the *Quest* who no longer keep sea watches while in home port — who are, instead, working regular day hours — cannot be bound by collective agreement provisions intended to apply to work performed in watchkeeping mode.

[47] These observations lead me to the conclusion that the most appropriate interpretation of section 1 of Annex "B" is one based on understanding that a vessel is either in "watchkeeping" or "non-watchkeeping" mode. When a vessel is at sea and watches are kept, it is, in effect, a "watchkeeping vessel" for purposes of the collective agreement. For crew members of a vessel in "watchkeeping" mode who are actually required to keep sea watches, paragraph 1(b) applies. As outlined above, however, paragraph 1(b) cannot apply to other crew members on the vessel at the time who are not required to keep sea watches. This, I believe, is the reason why the employer and the bargaining agent crafted paragraph 1(c). In my view, it addresses non-watchkeeping hours of work for a vessel in "watchkeeping" mode. In respect of employees in this situation, the master or commanding officer retains the authority to determine the 12-hour period within which the daily and average hours of work required by paragraph 1(a) will be scheduled, consistent with the need for command flexibility in the unique circumstances of seafaring duty. (As to the significance of the qualifying phrase "whose hours of work are designated in accordance with paragraph (a)", I suspect that it is included to distinguish employees under paragraph 1(c) from watchkeepers, although this might suggest that watchkeepers are not covered by paragraph 1(a), a possibility for which I can find no other support.) Finally, when sea watches are discontinued aboard a vessel, it becomes a "non-watchkeeping" vessel for purposes of the collective agreement. In these circumstances, the conditions outlined in paragraph 1(d) apply.

[48] Should the employer and bargaining agent in the future prefer an interpretation of clause 1 different than the foregoing, I respectfully suggest that revisions to clause 1 may be appropriate, both to make precise the meaning and operational significance of the term "non-watchkeeping vessel" as agreed by the parties, and to clarify the interrelation of the provisions contained in paragraphs (a), (b), (c) and (d).

[49] On the basis of the foregoing analysis and the evidence before me, I find that the grievors were employees who regularly worked five consecutive days per week on a non-watchkeeping vessel within the meaning of paragraph 1(d) when the employer notified them on July 16, 2003, that they must work evening hours. Paragraph 1(d) requires 48 hours notice where the employer changes an employee's scheduled starting time. The evidence (Exhibit G-2) establishes that the employer was not in breach of this requirement in respect of grievor Maessen. The employer's argument on this point (paragraph 30) is, by omission, a concession that grievor McKindsey, for his part, did not receive 48 hours notice for his work requirement on July 17 and 18, 2003.

[50] The employer and bargaining agent have not specified in the collective agreement a consequence where the employer fails to provide the required 48 hours notice under paragraph 1(d). This is not, for example, a situation where the collective agreement explicitly imposes a penalty in the form of overtime compensation, as is the case under some collective agreements where the employer fails to provide the required advance notice of a change in an employee's shift schedule. Am I left, therefore, with no corrective action for grievor McKindsey other than to declare the breach of the collective agreement? I will return to this question after considering the issue of overtime as if no breach of the paragraph 1(d) notice period occurred.

[51] The grievors contend that all hours worked outside the period from 06:00 to 18:00 hours as a result of the employer's instructions of July 16, 2003, comprise overtime to be compensated at the appropriate overtime rate in accordance with clause 2.03 of Appendix "G".

[52] "Overtime" is defined in article 2 of the collective agreement as follows:

. . .

(q) ***"overtime"*** *means (heures supplémentaires):*

(i) *in the case of a full-time employee, authorised work in excess of the employee's scheduled hours of work;*

or

(ii) *in the case of a part-time employee, authorised work in excess of the normal daily or weekly hours of work of a full-time employee specified*

> *by the relevant Group Specific Appendix but does not include time worked on a holiday;*
>
> . . .

As previously noted, the daily and average weekly hours of work are eight and forty, respectively, under paragraph 1(a) of Annex "B".

[53] The evidence does not indicate that the grievors worked in excess of either eight hours on any given day or in excess of an average of 40 hours per week as a result of the employer scheduling them to work evenings in July 2003. The grievors' claim for overtime, therefore, depends on interpreting the words "authorised work in excess of the employee's scheduled hours of work" to include work performed "outside" the period from 06:00 to 18:00 hours provided in paragraph 1(d). The grievors offer *Re United Glass and Ceramic Workers* to support this proposition. The employer counterargues that the employer and the bargaining agent would have worded the overtime definition to include hours worked "outside" a core period had they intended this to be the case.

[54] The grievors assert that there is no evidence that the employer altered the "normal" 06:00 to 18:00 core period when it issued its instructions on July 16, 2003. Examining Exhibit G-2, I must agree with the grievors on this point. On their face, the instructions change only the specific hours the two grievors were required to work, and that only for a defined period. There is no mention of a new or alternate 12-hour period. From this perspective, I find that the employer's instructions comprise a requirement to work "outside" normal hours. Can the employer implement this requirement without consequence, i.e., without triggering an overtime entitlement for hours falling outside the 06:00 to 18:00 period?

[55] I note with interest that the grievors did not challenge the employer's authority to schedule hours of work outside the normal 06:00 to 18:00 period. Rather, they only claim that they should be compensated at the appropriate overtime rate.

[56] The plain wording of the collective agreement definition of overtime does not support the grievors' claim for overtime compensation. I must give meaning to the words ". . . *in excess of* . . . . [emphasis added]" in the definition of overtime, words which are not constructed in their normal or plain usage to include the additional

concept ". . . *outside of* . . . . [emphasis added]". I do note that the case made in *Re United Glass and Ceramic Workers* at page 3 offers a different perspective:

. . .

> *. . . While the company can schedule hours of work, it cannot schedule hours of work which do not fall within the normal hours of work, in order to make those other times normal for the purposes of overtime. . . . It is true that in the week in question* [the grievor] *did not work in excess of 40 hours in the work week but by changing the schedule of work for the grievor the company denied him the overtime pay which he would have received had the prescribed normal hours of work in art. 9.04 been followed.*

. . .

On balance, however, I am hesitant to embrace *Re United Glass and Ceramic Workers* as a persuasive precedent. The facts discussed in *Re United Glass and Ceramic Workers* are somewhat different, and include a history of overtime payments previously made in respect of the Saturday "overtime" work in dispute in the principal analysis. While the construction of the hours of work and overtime clauses is broadly similar, there are differences that may have affected the arbitrator's decision.

[57] Several decisions in this jurisdiction have touched on the issue of overtime payment for time worked outside core hours, but do not appear to offer clear and consistent direction. In *Piotrowski v. Canadian Food Inspection Agency*, 2001 PSSRB 94, for example, the adjudicator rejected a claim for overtime compensation when the employer altered an employee's daily hours of work to include time outside the 6:00 a.m. to 6:00 p.m. core period. The definition of overtime in this case was comparable to the definition before me here, but the analysis was complicated by other issues related to the operation of shift work provisions, and to the employer's authority to alter work hours. In *Hodgson et al. v. Treasury Board (Transport Canada)*, 2005 PSSRB 30, the adjudicator considered whether the employer breached the collective agreement when it changed hours of work without securing the consent of the bargaining agent. As a secondary part of its submissions in this case, the bargaining agent argued that hours worked outside of core hours are necessarily overtime. The adjudicator rejected the grievor's principal claim, but found it unnecessary to decide whether there had been consistency in the employer's treatment of overtime arising from the changed work hours, or whether the definition of overtime containing the

words ". . . *in excess of. . . .* [emphasis added]" included hours worked outside of a core period.

[58] At the end of the day, the grievors bear the onus of convincing me that I should prefer their interpretation of the overtime provisions of the collective agreement applied to the facts of this case. I find, however, that the arguments made by the grievors are not sufficient to overcome a plain reading of the language used in the collective agreement. The definition of "overtime" in the collective agreement clearly states that the hours worked must be "in excess of" the employee's scheduled hours of work. The definition does not reference a core period of work, nor does it explicitly include the concept of time worked *outside* such a core period. I note further that the phrase used is not, for example, "in excess of the employee's *normal* hours of work [emphasis added]", wording that might have supported a stronger linkage back to paragraph 1(d) and its "normal" core period of 06:00-18:00 hours. Overtime, instead, is constructed relative to the employee's "*scheduled* hours of work [emphasis added]", without any qualification that the referenced schedule is the normal or regular schedule as opposed to a temporary schedule. The grievors did not argue that the new hours established starting July 17, 2003, were not scheduled hours within the meaning of the collective agreement. They, in fact, accepted the right of the employer to "schedule" the hours in question, arguing at the same time that the employer's instructions did not change the paragraph 1(d) core period. I am left to conclude that the work performed by the grievors as a result of the instructions of July 16, 2003, were their scheduled hours of work, albeit for a temporary period. (Note once more that this analysis does not, for the moment, take into account the impact of the employer's failure to provide the required notice of a change in starting times in the case of grievor McKindsey.)

[59] Taken within the context of paragraph 1(a) of Annex "B" which establishes a daily work requirement of eight hours, it follows from the foregoing analysis that the grievors' scheduled hours of work must have exceeded eight hours in order to meet the definition of overtime. The facts are that they did not. Barring this condition precedent, the entitlement to premium pay pursuant to clause 2.03 of Appendix "G" is not triggered.

[60] The result of this interpretation of the collective agreement applied to the circumstances faced by the grievors is that the employer was able to schedule the

grievors to work in the evening for a temporary period in July 2003 without incurring an overtime liability. Whether it is fair or appropriate for the employer to be able to reschedule work in this fashion without a requirement to pay overtime or otherwise compensate the grievors' beyond their regular pay is a question that must be left to the employer and the bargaining agent.

[61] I return now to the question of corrective action for the breach of the 48 hours notice requirement under paragraph 1(d) in respect of grievor McKindsey. Is there corrective action available beyond declaring the breach of the collective agreement? If the answer to this question were in the negative, the employer could, in effect, enjoy free license to ignore the advance notice provision at will, leaving this aspect of paragraph 1(d) devoid of any practical significance. The parties presumably included the notice requirement in paragraph 1(d) for good reason. I feel bound, as a result, to determine whether I can give it substantial meaning beyond declaring a breach of the collective agreement.

[62] I am guided in this belief by the proposition that the grievance adjudication process exists for purposes of resolving alleged breaches of the collective agreement, wherever it is possible to do so without amending or compromising the framework established by the parties in their collective agreement. This proposition touches upon what some jurists and arbitrators have identified as a basic precept of the legal system. In *Re Waltec Components (Machining Plant) and United Steelworkers of America, Local 9143*, (1998), 69 L.A.C. (4th) 144, the arbitrator states the precept in these terms:

> *. . . It is a fundamental principle of our legal system that where a right has been created there must be a remedy that will allow for enforcement of that right in some form.* Ubi jus ibi remedium – *where there is a right, there is a remedy.*

Similarly, a former chairperson of the Public Service Staff Relations Board wrote in *Canadian Air Traffic Control Assn. and Treasury Board (Ministry of Transport)*, PSSRB File No. 169-02-398 (1984), that ". . . there cannot be a right without a remedy."

[63] In my view, the employer's failure on July 16, 2003, to give grievor McKindsey 48 hours notice of the requirement to work evening hours on July 17th and 18th (Exhibit G-2), means that the hours worked on these dates by this grievor after 18:00 hours — the end of the paragraph 1(d) core period — were not properly scheduled or "legal"

within the framework of the collective agreement. The hours worked after 18:00 hours on and after July 21st by grievor Maessen, by contrast, were properly scheduled hours of work because the employer respected the paragraph 1(d) 48 hours notice requirement in his case. While I obviously cannot turn back the improperly scheduled hours of work in grievor McKindsey's case to correct the breach of the collective agreement, I can determine whether they were appropriately compensated.

[64] Given that the hours worked by grievor McKindsey after 18:00 hours on July 17th and 18th cannot be considered to form part of a legal work schedule for lack of proper notice, the straight-time rate of pay provided by the collective agreement for properly scheduled work (which is not "in excess of the employee's scheduled hours of work") should not apply. The normal consequence under the collective agreement where work does not form part of scheduled hours is the payment of premium compensation, principally in the form of overtime. I, therefore, believe that it is reasonable in the circumstances of this case, and in the absence of explicit guidance in the collective agreement as to the consequences of the employer's failure to respect the 48 hours notice requirement, to consider the time worked by grievor McKindsey after 18:00 hours as equivalent to "work in excess of the employee's scheduled hours of work" within the meaning of the paragraph 2.01(d) definition of "overtime". As such, they should attract compensation at the premium rate of time and one-half (1-1/2) in accordance with paragraph 2.03(c) of Appendix "G" (see paragraph 26 above).

[65] In reaching this conclusion, I do not believe that I am amending or compromising the existing framework of the collective agreement. The consequence proposed for the employer's breach of the collective agreement gives substance to the notice requirement included by the parties in paragraph 1(d). It supports the concept that hours of work should be properly scheduled, a concept vital to the integrity of the collective agreement. It defines a remedy which is consistent with the collective agreement's approach to compensating hours which are not within an employee's proper schedule. In all of these senses, the corrective action is congruent with the overall system of the collective agreement put in place by the parties.

[66] There is no evidence before me establishing that grievor McKindsey worked evening hours on additional dates after July 17th and 18th, although this may have been the case. The limited objective of my order of corrective action is that grievor McKindsey receive payment at the time and one-half rate (1-1/2) for all hours worked

after 18:00 hours on July 17th and 18th as a result of the employer's July 16, 2003, instructions. If grievor McKindsey worked additional evening hours on later dates as a result of the employer's instructions, these hours would have fallen outside the 48 hours notice period in paragraph 1(d) and were thus properly scheduled, and properly paid at the straight time rate.

[67] For the reasons outlined above, I deny the grievance of grievor Maessen. I grant the grievance of grievor McKindsey to the extent of finding that the employer breached paragraph 1(d) of Annex "B" of the collective agreement when it failed on July 16, 2003, to provide grievor McKindsey 48-hours notice of the requirement to perform work after 18:00 hours on July 17th and 18th.

[68] I make the following order:

(The Order appears on the next page)

Order

[69] The grievance of grievor Maessen is denied.

[70] The grievance of grievor McKindsey is allowed to the extent that he is entitled to receive payment at the time and one-half (1-1/2) rate for all hours worked after 18:00 hours on July 17 and 18, 2003, as a result of the employer's instructions of July 16, 2003.

August 2, 2006.

Dan Butler,
Adjudicator