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Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 2228

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
International Brotherhood of Electrical Workers, Local 2228 v. Treasury Board (Department of National Defence)

In the matter of a group grievance referred to adjudication

REASONS FOR DECISION

Before: Dan Butler, adjudicator

For the Bargaining Agent: James L. Shields, counsel

For the Employer: Stéphan Bertrand, counsel

Heard at Victoria, British Columbia,
February 26 to 28 and November 4 and 5, 2008, and at Ottawa, Ontario, September 9 and 10, 2008.

I. Group grievance referred to adjudication

[1] On July, 8, 2005, the International Brotherhood of Electrical Workers, Local 2228 ("the bargaining agent" or IBEW), filed a group grievance on behalf of 16 employees of the Department of National Defence (DND) working at Fleet Maintenance Facility (FMF) Cape Breton, Canadian Forces Base (CFB) Esquimalt. The employees grieved ". . . [b]eing instructed to work evening and night shifts for sea trials in violation of article 32 (Sea Trials' Allowance) of the Electronics Group (EL) collective agreement." As corrective action, they asked that the instructions be withdrawn.

[2] After receiving the employer's final-level reply denying the grievance, the bargaining agent referred the matter to the Public Service Labour Relations Board ("the Board") for adjudication on May 11, 2006. It indicated in its filing that the group grievance also concerned article 23 (Hours of Work) of the collective agreement between the bargaining agent and the Treasury Board that expired on August 31, 2004 ("the collective agreement").

[3] On December 20, 2006, the bargaining agent asked the Board to hold 14 individual grievances in abeyance (PSLRB File Nos. 566-02-580 through 566-02-593) pending a decision regarding the group grievance. The employer responded on January 5, 2007, that it did not concur with the bargaining agent's request. After receiving submissions, the Chairperson granted the bargaining agent's request to hold the individual grievances in abeyance pending the outcome of the group grievance.

[4] The Chairperson subsequently appointed me as an adjudicator to hear and determine the group grievance.

[5] In *International Brotherhood of Electrical Workers - Local 2228 v. Treasury Board (Department of National Defence)*, 2008 PSLRB 36, I issued a preliminary decision regarding the employer's objection to my jurisdiction to consider the group grievance on two grounds — that it was premature and that not all of the employees consenting to the presentation of the group grievance shared the common element of having been aggrieved as required by subsection 215(1) of the *Public Service Labour Relations Act*, S.C. 2003, c. 22. I allowed the employer's first objection in part by finding that the grievance was premature in respect of the employees who consented to the presentation of the group grievance other than Messrs. Skrobotz, Buckley and Vinden. I dismissed the employer's second objection that the grievance was not within my

jurisdiction because one or more of the participating employees did not share the common grounds for feeling aggrieved.

[6] I ordered that the hearing proceed on the merits with respect to Messrs. Skrobotz, Buckley and Vinden (hereafter "the grievors").

II. Summary of the evidence

[7] The parties agreed that I may rely on evidence adduced for *International Brotherhood of Electrical Workers - Local 2228* in this decision.

[8] On a recurrent basis, the grievors are involved in sea trials for the purpose of testing and calibrating electronic equipment aboard naval vessels of the Canadian Armed Forces. The sea trials are most often conducted at the Naval Electronic Sensor Test Range Pacific (NESTRP), which was established in 1995. The NESTRP consists of two exercise areas spanning the marine traffic lanes in the Strait of Juan de Fuca south of CFB Esquimalt (Exhibit G-9). The NESTRP Range Control Building is located on shore at Albert Head southwest of the base.

[9] Richard Buckley is an Electronic Warfare/Radar/Nav Technologist at FMF Cape Breton. His position is classified at the EL-06 level. He testified that he has been involved in conducting sea trials since becoming a civilian employee at the base in 1991. According to Mr. Buckley, schedules for conducting sea trials changed several times between 1991 and the time that the group grievance was filed. Speaking about the period that began shortly after the NESTRP became operational in 1995 until 2000, he recounted that he typically boarded a vessel for a sea trial early Monday morning at approximately 08:30 for immediate sailing and returned to the dock at approximately 16:00. That pattern continued for four or five days, and occasionally carried over into the following week. Normally, "encroachment" was not an issue. That is, Mr. Buckley usually received at least the 10-hour minimum break between work periods required by the collective agreement. Often, he performed final preparatory work on shore during the weekend before the sea trial on overtime status.

[10] Beginning in 2000, fleet authorities shortened the timeframe for the completion of sea trials. Mr. Buckley's work pattern changed to resemble earlier practices that had prevailed between 1991 and 1995. Once on board on Monday morning, sea trials' work typically continued until it was finished, often into Thursday evening, with the vessel returning to the dock by Friday morning. During the week on board, Mr. Buckley

worked during the day and also during the night, when quieter conditions favoured testing activity. He slept for brief periods and took meal breaks when possible, but the emphasis was on getting the work done during the available time. He normally did not receive the required 10-hour break between periods of work.

[11] Mr. Buckley confirmed that the employer never altered his regular hours of work (07:00 to 15:00 or 08:00 to 16:00) when he performed sea trials between 1995 and 2005. For all time worked on board outside his normal hours of work, he submitted claims for overtime compensation in accordance with the collective agreement and was paid the required overtime by the employer.

[12] On two occasions before 2005, the employer did change Mr. Buckley's regular hours of work. Both instances, however, involved training courses taken at night during trips to Halifax rather than sea trials.

[13] Mr. Buckley provided examples of his sea trial schedules and overtime claims submitted between 1996 and 2004 using the "Irregular Pay Report (IPR)," also known as the "DND 907" form (Exhibits G-10 through G-20). Mr. Buckley also recounted how, towards the end of the period, he and other employees entered their overtime claims directly, or from approved DND 907 forms, into the Material Acquisition and Support Information System (MASIS).

[14] The situation changed in 2005. On July 5, 2005, Mr. Buckley and two co-workers, William Skrobotz and Jay Vinden, received an email that informed them that their regular hours of work would be shifted to commence at 15:00, effective July 11, 2005, for a sea trial that began on that date (Exhibit E-1). When Mr. Buckley subsequently submitted an overtime claim for his actual time worked on July 11 and 12, 2008, requesting premium overtime compensation beginning at 15:00, Edward Hix, head of the combat systems engineering section at FMF Cape Breton, denied overtime payment for Mr. Buckley's shifted regular hours (Exhibit G-7).

[15] Mr. Buckley testified that the same shift in regular hours of work has subsequently applied whenever he has performed sea trial duties at the NESTRP. When involved in non-NESTRP sea trials, however, his regular hours of work have not been shifted, as illustrated by the "DND 907" form that he submitted for a sea trial from August 7 to 13, 2005, sailing from Halifax (Exhibit G-22).

[16] In cross-examination, Mr. Buckley reported that he was involved in four or five shipboard sea trials each year, on average, at the NESTRP. He also worked on one or two sea trials each year from the Range Control Building on shore.

[17] Referring to the events of July 11, 2005, Mr. Buckley confirmed that, as instructed, he did not begin to work at his regular start time and, instead, reported for duty at 15:00. Nonetheless, he submitted an overtime claim for the hours that he worked beginning at 15:00 ". . . based on what we've always done" (Exhibit G-7). He agreed that he expected to receive regular pay beginning from 08:00.

[18] Asked whether he agreed that the employer could ask him to deviate from his regular hours of work, Mr. Buckley replied that the employer had never previously shifted his regular hours of work for sea trials, only for course work.

[19] Jay Vinden has worked as a civilian employee at FMF Cape Breton since 1974. Beginning in 1984 and through to the present, he has performed the duties of an EL-06 electronics technologist. Most of the sea trials in which he has participated since 1995 have involved work at the Range Control Building, although he has conducted sea trials aboard vessels.

[20] For the period from 1990 through 1996 or 1997, Mr. Vinden recalled that sea trials ran around the clock until their completion, requiring continuous work with only brief meal breaks and virtually no time off for sleep. Typically, each component test during a sea trial lasted 20 to 30 minutes following a 10-minute set-up period. Mr. Vinden's presence was constantly needed, particularly when a 20- to 30-minute instrument test plot was completed.

[21] Beginning in 1996 or 1997, sea trials no longer required continuous work. Mr. Vinden's hours of work on the first day of the sea trial began at 08:00 and extended to as late as midnight. On subsequent days, his starting times might shift several hours so as to avoid an encroachment situation. When working at the Range Control Building, Mr. Vinden normally was able to go home at night to sleep.

[22] According to Mr. Vinden, management became concerned that sea trials were taking three to four days to avoid encroachment situations rather than a much shorter period if conducted continuously, as in earlier years. The possibility of returning to a continuous work schedule on sea trials, according to Mr. Vinden, became a collective

bargaining issue. In the early 2000s, the work pattern for sea trials increasingly deviated from morning starts and involved periods of work of up to 16 hours.

[23] Mr. Vinden discussed several overtime claims that he submitted for sea trials (Exhibits G-6, G-23 and G-23A). He confirmed that the employer had never shifted his regular hours of work for a sea trial before the email that he received on July 5, 2005 (Exhibit E-1).

[24] On July 11, 2005, Mr. Vinden reported to work at his regular starting time of 07:00 having been authorized to do so by his supervisor because of his workload. He reported for sea trials at the appointed hour that afternoon. When he later submitted an overtime claim for his work after 15:00 on July 11, 2005, Mr. Hix initially denied the claim. Nine months later, Mr. Vinden did receive overtime compensation as claimed because his supervisor had approved his work hours before 15:00.

[25] Hilary Gill was hired in 2003 to an EL-06 position at FMF Cape Scott in Halifax. She testified that she works as a non-operating employee with a 7.5-hour workday beginning at 07:00. When performing a sea trial, Ms. Gill works continuous hours. The sea trials typically last approximately three days. She described her experience with a sea trial that began on August 8, 2005, with her hours of work during that seal trial depicted using data from the MASIS (Exhibit G-25). Ms. Gill testified that she performed work aboard the ship during her normal hours of work at her regular rate of pay and then received overtime compensation at the rate of time and one-half (1.5), double time (2.0) and then triple time (3.0) for a continuous period of overtime. On the sea trial in question, Ms. Gill worked with Mr. Buckley from FMF Cape Breton and performed the same duties.

[26] Ms. Gill indicated that management never changed her normal hours of work using clause 23.15 of the collective agreement.

[27] In cross-examination, Ms. Gill reported that she usually boarded the ship for sea trials at the dock or met the “rhib” (rigid-hulled inflatable boat) for transfer to the ship early in the morning. Occasionally, the boarding time could be as late as midday, but Ms. Gill could not recall ever being required to board a ship for trials after her normal hours of work.

[28] Mr. Hix joined FMF Cape Breton as a senior underwater weapons engineer in 2003. At the time of the grievance, he served as the combat systems engineering section head and was responsible for assigning and organizing engineering work, including sea trials. He reviewed and approved overtime claims submitted by his staff, exercising signing authority under section 34 of the *Financial Administration Act, R.S.C. 1985, c. F-11* (*FAA*).

[29] In 2005, towards the end of the fiscal year, an administration officer told Mr. Hix that the commanding officer of FMF Cape Breton was concerned about the large overtime expenditures for Mr. Hix's unit. According to data from the MASIS, those expenditures totalled in excess of 8000 paid hours in fiscal year 2004-05, representing 25% of all overtime payments at FMF Cape Breton despite the fact that the unit accounted for only 4.5% of its staff.

[30] Mr. Hix recounted that he knew of a situation where an employee in an EL position worked continuously for 24 hours. Mr. Hix stated that he was concerned about the safety implications of such a situation. He also reported that he had received many grievances about late overtime payments.

[31] Mr. Hix met with Ed Fletcher, the local EL steward, to discuss his concerns about safety and long periods of work on sea trials. Mr. Hix stated that Mr. Fletcher told him that employees did not always work long hours during sea trials and would often rest during the day while working at night. Mr. Hix was concerned that employees were on overtime status immediately on beginning sea trials and were paid overtime for some hours during the regular day when they did not work. He mentioned to Mr. Fletcher that he had read clause 23.15 of the collective agreement and proposed changing work hours and reducing the workday during sea trials to address the situation and to make it safer. Mr. Fletcher replied that the proposed change would reduce the pay of employees. Mr. Hix questioned Mr. Fletcher's objectivity on the issue because the latter was himself earning overtime.

[32] Mr. Hix recounted that he subsequently discussed his concerns with his manager. Mr. Hix indicated to him that he did not want to authorize overtime payments under section 34 of the *FAA* because he did not know whether those expenditures were appropriate for periods when employees on sea trials were not working. As agreed with his manager, Mr. Hix pursued the matter by consulting with the human resources chain of command. In May 2005, he received a response from a

human resources officer that confirmed that he could use clause 23.15 of the collective agreement to shift regular work hours during a sea trial.

[33] Mr. Hix testified that he had found that there were inconsistencies regarding the application of the hours of work and overtime provisions among the members of the four bargaining units that covered engineering-section employees. He drafted a new work instruction to achieve more "equitable administration" of work conditions and to address his concern about safety and long hours of work. He reported that he learned of an incident in 2002 when an employee in the EL Group was injured. Fatigue associated with long hours was found to be a contributing factor. He mentioned that he had also found 66 instances where triple-time overtime was paid during fiscal year 2004-05, demonstrating that there were many situations where employees worked very long hours. After consulting with a human resources officer about his draft work instruction, Mr. Hix participated in a meeting with local bargaining agent representatives where the draft was discussed. According to Mr. Hix, Mr. Fletcher attended the meeting but provided no feedback on the substance of the draft, stating only that he felt that the consultation process was inadequate. Mr. Hix incorporated suggestions received from another bargaining agent representative at the meeting into a revised version of the work instruction and then ultimately issued it on May 26, 2005 (Exhibit E-2).

[34] Mr. Hix testified that the new work instruction affected the organization of sea trials but that compensation during sea trials continued to be paid according to the terms of the collective agreement. Under the new instruction, regular work hours were shifted to begin at the start of the sea trial. Mr. Hix suggested that if he had not introduced that change, ELs would have been required to report for duty at their regular starting time and then later proceed on sea trials. That situation raised safety concerns in Mr. Hix's mind. He testified that it was his responsibility under the *Canada Labour Code, R.S.C. 1985, c. L-2,* to ensure that the workplace was safe.

[35] Asked whether he had ever used clause 23.15 of the collective agreement to shift regular work hours in a situation that did not involve sea trials, Mr. Hix responded that he had done so once for one employee as part of the operation to prepare H.M.C.S. Protector for rapid deployment to the Gulf of Mexico after Hurricane Katrina.

[36] Mr. Hix outlined that there were fewer instances where ELs received overtime compensation at triple time after he issued the new work instruction and that the overtime claims were typically for fewer hours. Overall, total overtime compensation for his unit dropped to a level equal to 43% of the previous year's total. With respect to safety, Mr. Hix testified that he heard fewer complaints about the dangers associated with exhaustion after working long hours.

[37] In cross-examination, Mr. Hix testified that he decided to change previous practices through his new work instruction for three reasons: his concern about the amount of overtime compensation, his concern about safety and his concern about "equitable administration" among different groups of employees. Of those three concerns, Mr. Hix stated that safety was the most important consideration. Asked where the concern about safety was expressed in his work instruction, Mr. Hix pointed to the sentence beginning with the words "For safety and economic reasons . . ." on the first page (Exhibit E-2). He confirmed that that sentence contained the only reference to safety in the work instruction.

[38] On the nature of his concern about "equitable administration," Mr. Hix explained that he had received several comments from employees in other groups that their collective agreement was not as good as the EL Group collective agreement. He felt that there was a perception of unequal treatment. Some employees in other groups were working shifts at the same time that ELs were paid overtime. Mr. Hix confirmed that his work instruction did not place ELs on shifts during sea trials and did not change their status to that of "operating employees." Employees on sea trials whose regular hours of work were shifted under clause 23.15 were paid premium compensation under clause 23.15 of the collective agreement rather than under article 32 (Sea Trials' Allowance).

[39] Returning to the safety issue, the bargaining agent asked Mr. Hix whether he had received a report from the safety committee about accidents during sea trials. Mr. Hix testified that he did not know whether the EL Group collective agreement provided for a safety committee and agreed that he did not speak with an EL Group safety representative. With respect to the safety incident in 2002, Mr. Hix agreed that he had not sought the accident report for that incident (Exhibit G-27) before issuing the work instruction. He did so only recently in preparation for the hearing. The bargaining agent referred to the corrective action recommended in the safety report

that a ". . . much more realistic trials schedule . . . be developed . . . instead of trying to cram a 5-day trial into 3 days." The bargaining agent asked Mr. Hix what he did in reaction to that recommendation. Mr. Hix answered that he "did not know about that part."

[40] The bargaining agent challenged Mr. Hix to accept that all that he really did through the work instruction was to cut overtime payments. Mr. Hix disagreed. He said that the work instruction shortened the length of time employees worked during sea trials. He also disagreed that the work instruction switched overtime payments to "captive time" payments. He insisted that he was trying to ensure that employees had sufficient rest time. He nonetheless conceded that the work had to be performed regardless of when it was done and that ELs could claim their encroachment rights only at the end of the sea trial.

[41] The bargaining agent referred Mr. Hix to sections 1 through 4 (Purpose and Scope, References, Definitions, Responsibilities) of the work instruction (Exhibit E-2). Mr. Hix accepted that he did not mention safety in any of those sections and that a reader would believe from their content that the work instruction is about managing overtime and premium pay. He also agreed that the remaining content of the work instruction (Section 5 - General Instructions) is about overtime and that the chart attached to the instruction contains no entries about "Quality/Safety/Environment" control points.

[42] In re-examination, Mr. Hix explained that he did not think that it was necessary to change the status of EL employees to "operating employees" because the collective agreement provides for very specific shift starting and finishing times for operating employees that were inappropriate, in his view, for managing sea trials.

[43] With respect to the 2002 safety incident, Mr. Hix clarified that employees had frequently reminded him that there had been an accident at the end of a shift during a sea trial because of fatigue.

[44] The blank column in the chart attached to the work instruction (Exhibit E-2) signified nothing, according to Mr. Hix. He did not see the necessity of requiring a control point that would have to be checked by quality staff under ISO9000 standards. Mr. Hix also testified that it was not normal practice to include in a work instruction the complete history behind it or the motivations that led the employer to issue it.

[45] The employer's second witness, Lieutenant-Commander Steve Watters, was posted at FMF Cape Scott from 2003 until he left the navy in September 2007. During that assignment, he managed sea trials and supervised employees who performed them. He testified that he was also familiar with the conduct of sea trials as a "customer" aboard ships during earlier postings. He outlined that the employer on the east coast did not shift regular work hours under clause 23.15 of the collective agreement because sea trials typically occurred during the day at that location.

[46] Lieutenant-Commander Watters testified about more recent changes in the conduct of sea trials and, in cross-examination, about advice that human resources staff provided in an email exchange in October 2008 about the use of clause 23.15 of the collective agreement to shift regular work hours for sea trials (Exhibit G-26). I have chosen not to summarize that testimony as I believe that it provides no assistance in determining whether the employer violated the collective agreement three years earlier, in July 2005.

[47] Both parties adduced evidence regarding the round of collective bargaining that replaced the collective agreement that expired August 31, 1999, through their respective spokespersons at the bargaining table — Paul Morse, Business Manager for the IBEW, Local 2228, and Al Bennett, Treasury Board negotiator.

[48] Mr. Morse detailed the internal organization of Local 2228 for collective bargaining purposes and the process it used to secure input from the membership and to develop collective bargaining proposals. He outlined that negotiation meetings began on September 22, 1999. Neither the initial package of proposals tabled by the employer nor the bargaining agent's package addressed article 32 of the collective agreement (Sea Trials' Allowance), which was quickly signed off by the parties as renewed (Exhibit G-24, tabs 3 to 5 and 9). The bargaining agent did submit a proposal to revise the encroachment clause of article 23 (Hours of Work) because its members at the DND were having difficulty accessing a 10-hour break during sea trials. On their behalf, it proposed that affected employees who so wished have the option of working during the break and receiving overtime compensation at the triple-time rate for those hours.

[49] Several months later during negotiations, with the bargaining agent's demand on encroachment still on the table, the employer advanced its own proposal addressing the issue, but within the context of article 32 of the collective agreement

(Sea Trials' Allowance)(Exhibit G-24, tab 12). Through a number of subsequent exchanges, the bargaining agent and the employer remained committed to resolving the issue in the context, respectively, of article 23 (Hours of Work) or article 32 (Sea Trials' Allowance) and could not reach agreement. When the bargaining agent applied for conciliation, the issue remained outstanding. New wording dealing with compensation for work performed during a 10-hour break was finally agreed during the conciliation process and signed off on February 25, 2000 (Exhibit G-24, tab 37). The agreed revision appeared as part of article 32.

[50] The record of negotiations discussed by Mr. Morse indicated that the concept of shifting regular hours of work to accommodate sea trials was never discussed. Clause 23.13 of the collective agreement was opened for discussion only in the context of the bargaining agent's attempt to resolve the encroachment issue, which was ultimately addressed through article 32 (Sea Trials' Allowance) instead. Article 23 (Hours of Work) was renewed without change in the new collective agreement. The bargain struck by the parties allowed for a delay in an employee enjoying the 10-hour break period during sea trials in exchange for enhanced compensation including the introduction of a triple-time rate for the first time.

[51] Mr. Morse testified that he only became aware that shifting regular work hours for sea trials was an issue in spring 2005. He confirmed that, until spring 2005, the employer had never used clause 23.15 of the collective agreement in scheduling sea trials.

[52] Mr. Bennett recounted that the employer bargaining team brought a concern to the bargaining table in December 1999 that some employees were invoking their right to have a 10-hour break during sea trials and, by doing so, caused delays that also affected the crew of a vessel and incurred additional expenses. The modification eventually agreed to by the parties to article 32 of the collective agreement (Sea Trials' Allowance) addressed the employer's concern by delaying access to the break until the completion of the sea trial but required that the employer accept the bargaining agent's proposal for triple-time compensation. Mr. Bennett explained that it was preferable to the employer to confine the new provision for triple-time compensation to the specific circumstances covered by article 32 rather than agreeing to include a triple-time feature in article 23 (Hours of Work) where it might apply to all bargaining unit employees whenever encroachment occurred.

[53] Mr. Bennett indicated that it was never an option during negotiations to exclude the operation of clause 23.15 of the collective agreement in the context of sea trials.

III. Summary of the arguments

[54] Both parties agreed that, should I find it appropriate to grant corrective action to the grievors in this decision, it should take the form of declaratory relief. The principal interest of the parties is to clarify the meaning of the provisions of the EL Group collective agreement that are at issue in this case.

A. For the bargaining agent

[55] The bargaining agent submitted that I need to answer the following two questions in my decision:

1) In scheduling EL employees for sea trials as provided in article 32 of the collective agreement, can the employer use clause 23.15 to alter employees' normal scheduled hours of work as provided in clause 23.04(a)?

2) Does the doctrine of estoppel apply in this case to prevent the employer from altering the normal scheduled hours of work when assigning EL employees to perform sea trial work?

[56] The bargaining agent argued that the language of the collective agreement is patently ambiguous in three respects. First, the collective agreement does not define what is meant by the phrase "when circumstances warrant" in clause 23.15. Second, article 32 (Sea Trials' Allowance) explicitly excludes the normal operation of the encroachment provision expressed in clause 23.15 during sea trials but neither clause 23.13 nor 23.15 mentions that exclusion. Third, there is no reference in article 32 to the operation of clause 23.15.

[57] In the face of patently ambiguous collective agreement language, an adjudicator may resort to extrinsic evidence as an aid to interpretation. The two most common forms of extrinsic evidence are negotiating history and past practice. Extrinsic evidence may also be used to establish an estoppel; see Brown and Beatty, *Canadian Labour Arbitration*, 4th ed., at para 3:4400 and 4401; and *Windsor Board of Education v. Windsor Women Teachers' Assns.*, (1991), 86 D.L.R. (4th) 345 (Ont. C.A.).

[58] The bargaining agent contends that the bargaining history evidence clearly shows that the parties negotiated the current language of article 32 of the collective agreement (Sea Trials' Allowance) in the 1999-2000 round of negotiations, revising the previous version because of concerns raised about encroachment. The resulting article 32 sets out clearly and unequivocally the intent of the parties concerning the scheduling of sea trials. Because of its specificity, article 32 prevails over clause 23.15, which is a general provision regarding hours of work: *Canada Post Corporation v. C.U.P.W.* (2002), 70 C.L.A.S. 381. With respect to sea trials, the parties clearly put their minds to the specific conditions that should operate and expressed them in article 32. To respect the intent of the parties, article 32, not clause 23.15, must govern the compensation to be paid to employees for the long continuous hours that they work during sea trials. Article 32 was negotiated with the specific intent of addressing the inconvenience, risk, long hours of work and continuous nature of sea trials. It was a bargain by which the employer agreed to pay premium overtime rates, including triple-time compensation, in exchange for securing the agreement of the bargaining agent to give up the right of employees to exercise their encroachment rights under clause 23.13 during the course of a sea trial.

[59] Through its work instruction in May 2005 (Exhibit E-2) and its email direction to the grievors dated July 5, 2005 (Exhibit E-1), the bargaining agent contends that the employer sought to obtain a benefit that it did not negotiate at the collective bargaining table and to do so in a manner not discussed during negotiations.

[60] Under clause 23.04(a) of the collective agreement, the employer must schedule normal hours of work for non-operating employees between 07:00 and 18:00. Although clause 23.15 allows the employer to require employees to work hours that deviate from their normal daily schedule, that shift may only occur "when circumstances warrant." The evidence of past practice clearly establishes that the parties never previously considered a sea trial to be an assignment or occasion that fell within the phrase "when circumstances warrant." The phrase "when circumstances warrant" instead suggests an irregular or exceptional occurrence. The parties never intended that clause 23.15, containing that phrase, could allow the employer to establish a new pattern of normal hours of work. The employer cannot use its discretion to such a degree that the abnormal becomes the normal, as was the case once the employer issued the new work instruction. The employer cannot use clause 23.15 to require planned, routine and regularly scheduled compulsory overtime for a group of

employees; see *Quebec & Ontario Paper Co. v. C.P.U., Local 101* (1992), 24 L.A.C. (4th) 163.

[61] Mr. Hix testified that the employer used clause 23.15 of the collective agreement to shift regular hours of work in the exceptional circumstances of FMF Cape Breton's response to Hurricane Katrina. That was an urgent situation. According to the bargaining agent, sea trials are not an urgent situation. There is no sudden change of circumstances to justify invoking clause 23.15 to change normal hours of work.

[62] The bargaining agent maintained that clauses 23.04 and 23.15 of the collective agreement are intended to operate together. In recognition that there may be a need to respond to circumstances as they arise, the parties agreed that the employer might be able to adjust normal hours of work using clause 23.15. That adjustment, however, offends the collective agreement when it becomes so regular or so common as to comprise a new normal or regular assignment: *Dufferin-Peel Catholic Separate School Board v. O.E.C.T.A.*, [2006] O.L.A.A. No. 180.

[63] Based on those arguments, the bargaining agent asked that I declare that sea trials cannot be considered to fall under the phrase "when circumstances warrant," because they are regular, routine and predictable. Should I not agree, the bargaining agent submitted that the employer is estopped from using clause 23.15 of the collective agreement to shift normal work hours for sea trials until the parties have an opportunity to negotiate the issue.

[64] The essential elements of an estoppel are as follows:

> 1) There is a clear and unequivocal representation, particularly where the representation occurs in the context of collective bargaining, which may be made by words or conduct.
>
> 2) It is intended that the representation be relied on by the party to whom it was directed.
>
> 3) The other party in fact relies on that representation in the form of some action or inaction.
>
> 4) There is detriment resulting from that reliance.

[65] The bargaining agent maintained that the elements of estoppel have been met in this case. Before 2005, management never used clause 23.15 of the collective agreement to change work hours for sea trials. Management never discussed during collective bargaining the possibility of changing normal work hours during sea trials using clause 23.15. The employer intended that the bargaining agent rely on the employer's past practice of scheduling sea trials without resort to clause 23.15. The bargaining agent relied on the employer's representation to the detriment of its members. It argued that there is no doubt that it would have required the employer to bargain collectively on the issue if the employer had put its position regarding the use of clause 23.15 to the bargaining agent during any round of negotiations. By not having the opportunity to do so, there was a substantial detriment to the bargaining agent in the form of it foregoing the opportunity to negotiate a change in the wording of clause 23.15.

[66] The evidence demonstrated that both parties interpreted article 32 (Sea Trials' Allowance) of the collective agreement as governing sea trials for at least 15 years. That practice continued through multiple rounds of collective bargaining. Sea trials, in the bargaining agent's submission, were simply not considered to be included in the exceptional "when circumstances warrant" requirement set down by clause 23.15. The employer never used clause 23.15 to schedule sea trials. It cannot now be permitted to unilaterally change its position, contrary to the mutual intentions of the parties when they negotiated the current and multiple past collective agreements.

B. <u>For the employer</u>

[67] With respect to the use of bargaining history as an aid for interpreting the collective agreement, the employer argued that its use is sometimes possible but only when certain conditions are met. In particular, the evidence of bargaining history must be relevant and unequivocal. It must disclose a consensus between the parties regarding the meaning of a provision of the collective agreement that a party urges. It cannot represent the unilateral hope of one party: *DHL Express (Canada) Limited v. Canadian Auto Workers, Locals 4215, 144 and 4278* (2004), 124 L.A.C. (4th) 271.

[68] The evidence of Messrs. Morse and Bennett about the 1999-2000 round of negotiations did not reveal a consensus on how the parties could invoke clause 23.15 of the collective agreement or that its application should be excluded in certain circumstances. The situation is not one where the employer negotiated away its right

to manage hours of work or to use clause 23.15. The employer did enter into a bargain in the 1999-2000 round of negotiations, but the bargain that it reached addressed compensation issues, not scheduling rights.

[69] With respect to past practice, because there was no evidence of a consensus concerning the use of clause 23.15 of the collective agreement, a pattern of inaction (that is, that the employer did not previously use clause 23.15 to shift hours of work for sea trials) cannot be utilized as meaning that that pattern constitutes the established practice. The employer was not forever forbidden by what had previously occurred from using clause 23.15 to address management of work or overtime issues or to take action to change a "flawed situation."

[70] The employer referred to guidelines about estoppel established by the Federal Court of Appeal, as summarized in *Pronovost v. Treasury Board (Department of Human Resources and Skills Development)*, 2007 PSLRB 93. Applying those guidelines, the employer argued that nothing in the evidence indicates that the employer promised to pay employees their regular wages to stay home, the effect that would ensue from a determination that the employer is estopped from invoking clause 23.15 of the collective agreement to shift regular hours of work during sea trials. The employer never renounced by word or action its right to schedule hours of work or to manage overtime expenditures in a responsible way. For the bargaining agent to succeed in setting up the conditions for an estoppel, it must show that the employer had full knowledge that it was giving up those rights. It must establish that the employer made a promise not to apply the clear wording of the collective agreement and then that the bargaining agent relied on that promise to its demonstrated detriment. The bargaining agent has not done so. As a result, the doctrine of estoppel should not apply. Management can introduce changes to make things better and more efficient. The doctrine of estoppel is not designed to foreclose the possibility of improving the situation in the workplace.

[71] The employer submitted that the issue to be decided in this case is whether the employer can invoke its right under clause 23.15 of the collective agreement to shift hours of work for sea trials as it did through the email of July 5, 2005 (Exhibit E-1), following the approach outlined in the work instruction issued on May 26, 2005 (Exhibit E-2).

[72] The work instruction was designed to address the management of overtime and associated premium payments. It applied to all overtime worked by combat systems personnel and not just to members of the EL Group. Mr. Hix issued the work instruction because of an obvious concern about significant overtime expenditures based on the MASIS data that he described in his testimony. Mr. Hix also outlined his concern about the exercise of his signing authority under section 34 of the *FAA* given that the bargaining agent, represented by Mr. Fletcher, had told him that employees were not always working long hours but were being paid. Mr. Hix focused as well on the safety implications of the evidence of long periods of continuous work that were performed by some employees during sea trials.

[73] Mr. Hix's discovery that employees were not necessarily working long hours but were being paid — including being paid for regular hours while at home before reporting for sea trials at the end of the normal workday — prompted his concern that the existing situation was flawed. He discussed the situation with his manager, consulted with the human resources chain of command, developed a draft work instruction, consulted with the bargaining agents about the draft and incorporated suggestions gained from that consultation. That sequence of events is completely different from a situation where a party promises to allow a known practice to go on for years and then changes the rules unilaterally just because it feels like it.

[74] The employer submitted that the words "when circumstances warrant" in clause 23.15 of the collective agreement, while undefined, are not necessarily ambiguous. Viewed in association with the provisions of article 7 (Managerial Rights) that recognize the employer's right to schedule work, clause 23.15 only requires that there be some justifiable situation before the employer undertakes a deviation in regular hours of work. Mr. Hix provided evidence that explained the circumstances that warranted the deviation in this case; that is, the three factors of safety, management of finances and equitable treatment. Of those factors, the first two were most germane.

[75] Management did have a legitimate concern about safety. The evidence indicates that employees frequently reminded Mr. Hix about the 2002 safety incident. The fact that he did not consult with a safety committee before proceeding to address his concern does not change the legitimacy of that concern. Equally, the absence of references to safety in the work instruction is not significant. As stated by Mr. Hix, it is

not standard practice to include a complete history or a statement of motives in a work instruction.

[76] The employer referred to evidence that established that some pieces of equipment must be tested at night during a sea trial. The employer contended that the plain wording of article 32 (Sea Trials' Allowance) of the collective agreement makes it clear that it was never intended that an employee engaged in a sea trial at night should be compensated at an overtime rate immediately when he or she reports for the sea trial if the employee was not actually doing work during regular work hours before that reporting time. The expression "no work, no pay" must be given meaning. In that respect, it is significant that clause 32.03 uses the words "in excess of the regular scheduled hours of work" to establish the trigger for overtime payment, not "outside of regular scheduled hours of work."

[77] According to the employer, no right was removed by invoking clause 23.15 of the collective agreement. The employer did not eliminate triple-time compensation. Employees whose hours of work are shifted under clause 23.15 receive the premium payments required by that clause and also receive overtime compensation for excess hours worked, in accordance with the collective agreement. The possibility of receiving triple-time compensation remains under clause 32.03.

[78] In the employer's submission, article 32 (Sea Trials' Allowance) of the collective agreement does not stand alone. It cannot be ignored that clause 23.15 permits the adjustment of regular work hours. The rest of the collective agreement, including clause 23.15, does not cease to apply because article 32 has specific provisions dealing with compensation during sea trials. Article 32 does not begin with the following words: "Notwithstanding clause 23.15 . . . ." The collective agreement must be treated as a whole, and all of its provisions have to be read together: *Canada (Attorney General) v. McKindsey*, 2008 FC 73.

[79] If employees in the EL Group are entitled to be paid from the start of their regular hours — from 07:00, for example — even though they are not required to work during the day and then must receive overtime compensation at the outset of reporting for sea trials, the negotiated right of the employer to modify scheduled hours under clause 23.15 of the collective agreement will have no meaning whatsoever. That interpretation would have the prohibited effect of amending the collective agreement.

[80] The employer maintained that the fact that the employer did not use clause 23.15 of the collective agreement to shift regular hours for sea trials on the east coast, as Ms. Gill testified, is not relevant. The evidence established that it did not make operational sense to invoke clause 23.15 on the east coast because sea trials at that location were normally conducted during the day rather than at night.

[81] In response to the bargaining agent's contention that the employer's use of clause 23.15 of the collective agreement seeks "to make the abnormal normal," the employer submitted that not every sea trial requires the use of clause 23.15. There is no convincing evidence that the type of sea trials at issue in this case are continuous, regular or routine events, nor that there is never any urgency attached to such trials. Clearly, clause 23.15 does not say "when exceptional circumstances warrant . . . . [emphasis added]"

[82] The employer concluded that there is no basis for finding that management violated the provisions of the collective agreement through its work instruction of May 26, 2005, or through its email direction to the grievors of July 5, 2005.

C. Bargaining agent's rebuttal

[83] The bargaining agent contended that there is no evidence before me that employees stayed home and received pay, as the employer alleges. The evidence given by Messrs. Buckley and Vinden did not say so, and the employer did not establish a factual basis for such an allegation in cross-examination.

[84] Despite what the employer contends, there was a covenant struck by the parties in article 32 (Sea Trials' Allowance) of the collective agreement. The parties refer to regular hours of work in that article. In clause 23.04(a), they stipulate that those regular hours of work must fall between certain hours of the day. Clause 23.04(a) is ironclad.

[85] With respect to the concept of "no work, no pay," all that an employee must do to be entitled to receive his or her regular pay is to be available to work during normal work hours. If he or she is not available, then no payment is due.

[86] The bargaining agent submitted that safety was never a key issue for Mr. Hix. Equitable treatment was also not an issue. The evidence shows that Mr. Hix developed

his work instruction (Exhibit E-2) in an attempt to save overtime compensation. The wording of the work instruction is clear. In paragraph 5, it states as follows:

> ***5. General Instructions***
>
> *. . . overtime is used to meet urgent requirements and will only be authorized when operationally essential. Whenever possible, changes to regular working hours or shift work will be used in lieu of overtime as appropriate to an employee's Collective Agreement.*
>
> . . .

[87] According to Mr. Hix's work instruction and to his use of clause 23.15 of the collective agreement to shift regular hours of work during sea trials, the phrase "when circumstances warrant" now means that, whenever possible, the employer will change normal hours of work to avoid paying overtime during sea trials. The employer wants to require employees in the EL Group to be available on a "24/7" basis for sea trials but to avoid, wherever possible, paying them at overtime rates while they are available. The collective agreement cannot possibly be read as having that meaning.

IV. Reasons

[88] The bargaining agent bears the onus in this case of proving, on a balance of probabilities, that the employer violated the collective agreement when it issued instructions to the grievors on July 5, 2005, to shift their normal hours of work for a sea trial scheduled to begin on July 11, 2005 (Exhibit E-1).

[89] The determination that I must make in this decision principally involves clause 23.15 of the collective agreement. Clause 23.15 reads as follows:

> ***23.15*** *It is recognized that when circumstances warrant certain non-operating employees may be required to work their normal daily hours within a schedule which deviates from their normal daily schedule as specified in clause 23.04. When a non-operating employee is required to work his/her normal seven decimal five (7.5) hours a day at times other than those specified in clause 23.04 the employee shall receive his/her normal daily rate of pay plus a premium payment as follows:*
>
> *In a calendar month for days worked in accordance with the above,*
>
> *(1) for the first and second day, in accordance with note 7 of Appendix "B" for each day,*

> *(2) for the third, fourth and fifth day, in accordance with note 8 of Appendix "B" for each day,*
>
> *(3) for the sixth and subsequent days, in accordance with note 9 of Appendix "B" for each day.*
>
> *If the employee works less than three point seven five (3.75) hours he/she shall receive the full premium for the day and revert to his/her normal schedule for that day which will be reduced by the equivalent number of hours that the employee worked. If the employee works three point seven five (3.75) hours or more he/she shall be paid the full premium for the day and his/her normal daily rate of pay.*
>
> *Hours worked in excess of seven decimal five (7.5) hours per day shall be subject to Article 25.*

[90] The parties submitted that clause 23.15 of the collective agreement should be interpreted and applied in the context of several other provisions of article 23 (Hours of Work) and of article 32 (Sea Trials' Allowance) of the collective agreement. The relevant provisions of article 23 read as follows:

> . . .
>
> ***23.03*** *Normal hours of work shall be arranged to provide for either:*
>
> *(a) a thirty-seven decimal five (37.5) hour work week as described in clause 23.04,*
>
> . . .
>
> ***23.04 Non-Operating Employees***
>
> *(a) Normal scheduled hours of work for non-operating employees shall be thirty-seven decimal five (37.5) hours per week consisting of five (5) consecutive days, Monday to Friday inclusive, each day to be seven decimal five (7.5) hours (exclusive of a meal break) between the hours of 07:00 and 18:00 local time.*
>
> *(b) These employees will be provided with a scheduled unpaid meal break of not less than thirty (30) consecutive minutes nor more than one (1) hour commencing between one-half (1/2) hour prior to and one (1) hour following the mid-point of the normal work period except that a meal break of less than thirty (30) minutes may be granted to compensate for summer hours. It is recognized that in extenuating*

> *circumstances the meal break may be advanced or delayed because of work requirements. However, if the employee is able to take a meal break of at least a half (1/2) hour's duration commencing within the time prescribed it shall be considered as satisfying the requirements of this clause. If an employee is not able to take a meal break within the prescribed time period the period of the meal break shall be counted as time worked.*
>
> . . .
>
> ***23.13 Encroachment***
>
> *An employee who has not had a break of eight (8) consecutive hours during a twenty-four (24) hour period in which he/she works more than fifteen (15) hours shall not be required to report for work on his/her regularly scheduled shift until a period of ten (10) hours has elapsed from the end of the period of work that exceeded fifteen (15) hours. If, in the application of this clause, an employee works less than his/her regularly scheduled shift he/she shall, nevertheless, receive his/her regular daily rate of pay.*
>
> *For the purpose of this clause, time necessarily spent in travel required by the Employer, shall be considered as time worked.*
>
> . . .
>
> ***23.16** In accordance with clause 23.03 and notwithstanding clauses 23.04 and 23.15 the following shall apply to employees aboard ship:*
>
> . . .
>
> *(d) Except for employees of the Department of National Defence eligible under Article 32, for Sea Trials Allowance, advance notice of a ship board assignment shall be given at the earliest possible date but, in any case, no less than seven (7) calendar days prior to such assignment. If advance notice of the assignment is less than seven (7) calendar days, the employee shall be paid a premium equal to the amount shown in note 6 of Appendix "B" for each day during the assignment for which he/she has not received seven (7) calendar days' notice.*
>
> . . .

[91] Clause 2.01(s) of the collective agreement defines a “non-operating employee” as follows:

> *(s)* ***"non-operating employee"*** *means an employee whose hours of work are not normally scheduled on a rotating shift basis and whose regular duties, at his/her normal work place, do not include the actual in situ maintenance of electronic equipment that must be continually available beyond the hours of 0600 to 1800 local time;*
>
> [Emphasis in the original}

[92] The parties also referred in argument to article 7 (Managerial Rights) of the collective agreement which reads as follows:

> ***7.01*** *The Local recognizes and acknowledges that the Employer has and shall retain the exclusive right and responsibility to manage its operation in all respects including, but not limited to, the following:*
>
> *(a) to plan, direct and control operations; to determine methods, processes, equipment and other operating matters; to determine the location of facilities and the extent to which these facilities or parts thereof shall operate;*
>
> *(b) to direct the working forces including the right to decide on the number of employees, to organize and assign work, to schedule shifts and maintain order and efficiency, to discipline employees including suspension and discharge for just cause;*
>
> *and it is expressly understood that all such rights and responsibilities not specifically covered or modified by this Agreement shall remain the exclusive rights and responsibilities of the Employer.*
>
> ***7.02*** *Such rights will not be exercised in a manner inconsistent with the express provisions of this Agreement.*

[93] The heart of the dispute between the parties concerns the interpretation to be given to the words "when circumstances warrant" in clause 23.15 of the collective agreement. Those words state the condition precedent for the employer's exercise of the right to require non-operating employees ". . . to work their normal daily hours within a schedule which deviates from their normal daily schedule as specified in clause 23.04." Specifically, the parties disagree whether circumstances warranted the employer shifting the regular hours of work for Messrs. Skrobotz, Buckley and Vinden for the purpose of a sea trial beginning July 11, 2005 (Exhibit E-1). Under clause 23.04(a), the daily hours of work for Messrs. Skrobotz, Buckley and Vinden, as non-

operating employees (essentially employees who do not work shifts), are scheduled between 07:00 and 18:00, Monday through Friday.

[94] It is important to emphasize at the outset that this decision is about scheduling hours of work during sea trials and that it is not directly about the compensation to which employees may be entitled for sea trials' work. The parties made frequent reference during the hearing to the implications of invoking clause 23.15 of the collective agreement for compensation entitlements, regarding regular pay but also particularly concerning overtime compensation at premium rates. It is not my task in this decision to rule on the operation of the various compensation provisions that may come into play during sea trials. That said, it is obvious that my ruling regarding the scheduling of hours of work under clause 23.15 will have implications for compensation. The nature of those implications is nevertheless not a factor in my decision.

[95] I turn first to what happened and to why it happened. In my view, the balance of the evidence establishes that the employer's principal motive for invoking clause 23.15 of the collective agreement in the circumstances of this case was to address a concern about the level of overtime expenditures in the section that Mr. Hix supervised. The evidence indicates that Mr. Hix learned that the commanding officer of FMF Cape Breton had identified as an issue the fact that overtime expenditures in Mr. Hix's section exceeded 8000 paid hours in fiscal year 2004-05 and represented 25% of all overtime payments at FMF Cape Breton despite the fact that Mr. Hix's work unit accounted for only 4.5% of its staff. Mr. Hix decided that he needed to do something. He investigated the situation and found, among other results, that there were 66 occasions where the employer compensated employees in his section at the triple-time rate during fiscal year 2004-05. Focussing on the occurrence of overtime for ELs during sea trials, he learned from a local bargaining agent representative, Mr. Fletcher, that there were circumstances where ELs spent very long periods on sea trials but were not always working — while still being paid. He also learned that ELs who were required to report for sea trials later in the normal work day, usually around 16:00, could receive pay for their regular hours of work before that reporting time even though they might not have been working and might, in fact, have been at home. For Mr. Hix, that was a "flawed situation," to use the characterization argued by the employer. Mr. Hix was aware as well that some employees in other bargaining units felt that their conditions of employment regarding overtime and shift work were not as favourable as those

available to ELs. For Mr. Hix, those circumstances suggested that there was an issue of "equitable administration" to be resolved.

[96] Mr. Hix fashioned a response to the general problem of overtime and, specifically, to the allegedly "flawed situation" particular to employees in the EL Group who were involved in sea trials. He issued a new work instruction on May 26, 2005, entitled "Combat Systems Overtime and Associated Premium Management" (Exhibit E-2). A reasonable reading of that work instruction cannot mistake that it addresses the management of overtime expenditures above all else. In it, Mr. Hix makes the employer's intentions clear. For the purpose of "managing the allocation of overtime and associated premiums," the work instruction states that "[w]henever possible, changes to regular working hours or shift work will be used in lieu of overtime . . . ."

[97] The employer contends that Mr. Hix was also motivated by a concern for the safety of employees and for the risks associated with long periods of continuous work during sea trials when he developed the new work instruction. While I do not question that Mr. Hix harboured a concern for safety, I am satisfied from the evidence that that concern played, at best, a secondary role in his decision making. I found it particularly telling that Mr. Hix referred to a safety incident in 2002 as illustrating the basis for his concern about the safety implications of long hours during sea trials but then admitted in cross-examination that he only consulted the accident prevention report for that incident (Exhibit G-27) very recently in preparation for the hearing — several years after he promulgated the work instruction that he maintains was, in major part, a response to safety concerns exemplified by the 2002 accident. Asked, for example, what he made of the investigator's recommendation regarding the development of a more realistic five-day schedule for sea trials that might reduce safety risks, Mr. Hix replied that he "did not know about that part." That answer suggests to me that the concept of reconfiguring the conduct of sea trials to avoid the safety problems associated with long hours of work was probably not a first-order priority for Mr. Hix. Certainly, there is no evidence to indicate that Mr. Hix did anything concrete to address his concern about safety during sea trials other than to issue his work instruction. The absence of anything other than the briefest single reference to safety in the content of that work instruction itself tends to belie the argument that safety was a leading factor behind its development.

[98] The work instruction took effect on May 26, 2005. On July 5, 2005, the grievors received email instructions (Exhibit E-1) that carried through on the employer's commitment in the work instruction that "[w]henever possible, changes to regular working hours or shift work will be used in lieu of overtime . . . ." The direction given in the email shifted the grievors' normal hours for a sea trial beginning July 11, 2005. They were instructed to report for duty at 15:00, at which time their regular hours of work were to commence. With the regular workday changed to start at 15:00, the majority of regular hours were shifted to fall outside the core working period for non-operating employees stipulated under clause 23.04(a) of the collective agreement. The evidence shows that the shift of work hours did have an impact on the payment of overtime, as illustrated by Mr. Buckley's overtime claim for the sea trial which was subsequently denied by Mr. Hix (Exhibit G-7).

[99] The testimony of Messrs. Buckley and Vinden established that the employer never previously shifted regular hours of work for sea trials in that fashion. Mr. Hix confirmed that he knew of only one prior occasion on the west coast where management had invoked clause 23.15 of the collective agreement to shift scheduled hours other than for training. The circumstance that warranted the shift on that occasion was the urgent requirement to prepare H.M.C.S. Protector for deployment immediately after Hurricane Katrina.

[100] Under clause 23.15 of the collective agreement, there must be circumstances that warrant the employer's exercise of its right to change regular hours of work. What I find most notable in the evidence in this case is, in fact, an absence of evidence. Nothing in Mr. Hix's testimony or elsewhere indicates that the employer turned its mind to the specific circumstances of the sea trial that was scheduled to begin on July 11, 2005, to evaluate whether those circumstances warranted the decision to shift the grievors' regular hours of work. Both Mr. Hix's examination-in-chief and his cross-examination by the bargaining agent convinced me that this is a case where management made a general policy decision in the form of Mr. Hix's work instruction of May 26, 2005, and then applied that work instruction to the July 11, 2005, sea trial as a matter of general policy. There is no proof that the employer looked at the nature of that sea trial, evaluated the options and come to an event-based conclusion that it was appropriate to invoke clause 23.15 with effect on July 11, 2005. The weight of the evidence thus leads me to conclude that the employer instead invoked clause 23.15 on

July 5, 2005, as a direct result of the general work instruction issued by Mr. Hix on May 26, 2005.

[101] The real question in this case, in my view, is whether compliance with a general work instruction is enough to satisfy the condition precedent for changing regular hours of work under clause 23.15 of the collective agreement. Was it sufficient for the purpose of clause 23.15 that the employer acted in accordance with a previously decided policy of general application, or did clause 23.15 obligate the employer to justify its decision to shift regular work hours for the sea trial of July 11, 2005, based on the circumstances of that sea trial?

[102] In the past, adjudicators have considered a somewhat similar issue in interpreting and applying phrases such as "where operational requirements permit" or "subject to operational requirements" that appear frequently in collective agreements. They have asked whether, and to what extent, an employer must meaningfully examine the particular circumstances of a situation to judge how a collective agreement provision contingent on operational requirements applies. From the very early years, adjudicators most often answered that question by confirming the employer's obligation to conduct an assessment of operational requirements on a specific case-by-case basis. In *Graham v. Treasury Board (Department of National Revenue – Customs and Excise)*, PSSRB File No. 166-02-1678 (19750326), at page 7, the adjudicator summarized a number of early decisions on the point and concluded that they supported the following principles:

> *a) "operational requirements" must be based on the work itself to be performed and not on administrative or mere economic criteria,*
>
> *b) minimum requirements are sufficient to meet the "operational requirements" unless contrary evidence is established and,*
>
> *c) "operational requirements" are a question of fact to be determined in each case.*

Although I have not conducted a comprehensive review of subsequent decisions interpreting similar collective agreement provisions, I believe that adjudicators have continued to support the foregoing principles — particularly principle (c).

[103] Adjudicators have found in some decisions that the obligation to examine the actual circumstances of each case to determine operational requirements can be relaxed where the specific language of the collective agreement so permits. An example of collective agreement language that may allow the employer to interpret operational requirements more generally or over the longer term is the phrase, "subject to operational requirements as determined from time to time by the employer": see, for example, *Tisdelle v. Treasury Board (Employment and Immigration)*, PSSRB File No. 166-02-14712 (19860224).

[104] As a point of interest, adjudicators have often been reluctant, at best, to accept that financial considerations play a role in determining "operational requirements." For example, in *Power v. Treasury Board (Transport Canada)*, PSSRB File No. 166-02-17064 (19880205), the adjudicator stated as follows:

. . .

> *It would be unwise to attempt to provide a universally valid definition of bona fide operational requirements. For present purposes it will suffice to say that policies established unilaterally by the employer solely for financial reasons cannot be accepted as valid operational requirements if they have the effect of denying employees their rights under a collective agreement . . .*
>
> . . .
>
> [Emphasis in the original]

In *Tremblay v. Treasury Board (Employment and Immigration Canada)*, PSSRB File No. 166-02-17538 (19890214), the adjudicator made the same point in the following passage:

. . .

> *A number of decisions have examined the expression "operational requirements" and the adjudicators concluded that this expression "refers to the nature of the work required to be done and not the nature of the book-keeping and expense analysis performed at headquarters"*
>
> . . .

[105] I do not take the position that the considerable case law interpreting the phrase "operational requirements" applies directly to this case. The parties did, after all, chose a different formulation when they used the phrase "when circumstances warrant" in

clause 23.15 of the collective agreement. Nonetheless, I believe that it is reasonable to ask whether the operation of clause 23.15, viewed within the framework of the other language of the collective agreement relevant to work schedules and sea trials, also suggests a requirement to evaluate "circumstances" on a case-by-case basis.

[106] The grievors are "non-operating employees" as defined by clause 2.01(s) of the collective agreement. That means that they are not shift workers and that their "regular duties . . . do not include the actual in situ maintenance of electronic equipment that must be continually available beyond the hours of 0600 to 1800 local time." Mr. Hix confirmed in his testimony that his work instruction did not place ELs on shifts during sea trials and did not change their status to that of "operating employees." As "non-operating employees," the grievors normally work seven and one-half hours per day, Monday to Friday, ". . . between the hours of 07:00 and 18:00 local time" as stipulated by clause 23.04(a). The bargaining agent argues that those delimiting hours are "iron clad." That term perhaps overstates what "normal" is meant to convey in clause 23.04(a), but it is certainly the case that the provision constitutes a robust injunction against scheduling normal hours of work outside the period of 07:00 through 18:00 other than as an exception. Furthermore, the only exception to the application of clause 23.04(a) for non-operating employees that is specifically authorized by the collective agreement is one that conforms to the condition precedent stated by clause 23.15.

[107] How does article 32 (Sea Trials' Allowance) of the collective agreement figure into the scheduling framework created by the interplay of clauses 2.01(s), 23.04(a) and 23.15? Article 32 reads as follows:

> ***32.01****(a) When an employee is required to be in a submarine during trials under the following conditions:*
>
> *(i) he/she is in a submarine when it is in a closed down condition either alongside a jetty or within a harbour, on the surface or submerged; i.e., when the pressure hull is sealed and undergoing trials such as vacuum tests, high pressure tests, short trials, battery ventilation trials or other recognized former trials, or the submarine is rigged for diving;*
>
> *or*

(ii) he/she is in a submarine when it is beyond the harbour limits on the surface or submerged;

or

(b) when an employee is required to proceed to sea beyond the harbour limits aboard a HMC Ship, Auxiliary Vessel or Yardcraft for the purpose of conducting trials, repairing defects or dumping ammunition;

or

(c) when an employee is required to work in a shore-based work site in direct support of an ongoing sea trial;

he/she shall be compensated in accordance with clause 32.03.

32.02 *Article 23.13 (Encroachment) shall be applied at the termination of the sea trial only.*

*3**2.03***

(a) He/she shall be paid at the employee's straight-time rate for all hours during his/her regularly scheduled hours of work and for all unworked hours aboard the vessel or at the shore-based work site.

(b) He/she shall be paid overtime at time and one-half (1 1/2) the employee's straight-time hourly rate for all hours worked in excess of the regularly scheduled hours of work up to twelve (12) hours.

(c) After this period of work, the employee shall be paid twice (2) his/her straight-time hourly rate for all hours worked in excess of twelve (12) hours.

(d) After this period of work, the employee shall be paid three (3) times his/her straight-time hourly rate for all hours worked in excess of sixteen (16) hours.

(e) Where an employee is entitled to triple (3) time in accordance with (d) above, the employee shall continue to be compensated for all hours worked at triple (3) time until he/she is given a period of rest of at least ten (10) consecutive hours.

(f) Upon return from the sea trial, an employee who qualified under 32.03(d) shall not be required to report for work on his/her regularly scheduled shift until a period of ten (10) hours has elapsed from the

> *end of the period of work that exceeded fifteen (15) hours.*
>
> ***32.04*** *In addition, an employee shall receive a submarine trials allowance equal to twenty-five per cent (25%) of his/her basic hourly rate for each completed one-half (1/2) hour he/she is required to be in a submarine during trials as per the conditions prescribed in sub-clause 32.01(a).*

[108] The bargaining agent contends that article 32 prevails over clause 23.15, which is a general provision about hours of work. Without disputing the proposition that specifically stated terms of a collective agreement normally provide a better guide for interpreting the intent of the parties than more generally stated clauses, I note that there is nothing specific in article 32 that can be relied on in preference to clause 23.15 about the scheduling of regular work hours. Article 32 contains provisions primarily about compensation rather than scheduling. It refers to "regularly scheduled hours of work" in clauses 32.03(a) and (b) but nowhere modifies those regular hours. Clauses 2.01(s), 23.04(a) and 23.15 continue to govern. The only modifying effect of article 32 on the scheduling of work hours concerns encroachment. Clause 32.02 suspends application of the normal encroachment provision found in clause 23.13 until the end of a sea trial.

[109] Given that article 32 (Sea Trials' Allowance) of the collective agreement affects scheduling only with respect to the specific issue of encroachment, I am not persuaded that the employer is precluded by the presence of article 32 from applying clause 23.15 to a sea trial. In my view, the scheduling framework of the collective agreement, taken as a whole, does not reveal an intent to remove sea trials from the list of possible situations where circumstances might warrant a decision to shift regular work hours under clause 23.15.

[110] That said, there is nothing in the framework of the collective agreement to suggest that the employer may treat the situation of a sea trial under clause 23.15 any differently than any other possible exceptional situation. By its very nature, a clause providing for the exercise of an employer right in exceptional circumstances such as clause 23.15 should be applied exceptionally rather than generally. Given the possible existence of unique factors in any particular situation, the employer, in my opinion, has an inherent obligation to inquire into the specific circumstances of a situation to establish the need to treat it as an exception. To invoke clause 23.15 without determining, for example, how the specific circumstances of a given sea trial warrant

an exceptional response by the employer risks the possibility of error in applying clause 23.15 or of transforming a collective agreement provision intended to be used exceptionally into one of more general application. Neither outcome, in my view, is consistent with the framework for scheduling regular work hours in this collective agreement or with the intent of clause 23.15, viewed within that framework.

[111] I am persuaded by the evidence that the employer did not treat clause 23.15 of the collective agreement as an exceptional provision when it applied it to the sea trial scheduled for July 11, 2005. As found previously, Mr. Hix's testimony established that the employer shifted the grievors' regular hours of work for that trial as a consequence of the work instruction he issued on May 26, 2005. The evidence also proved that the employer's treatment of the sea trial of July 11, 2005, was only the first example of what would become a standard approach to sea trials at the NESTRP in the months that followed — that is, that regular work hours were shifted in each instance. Even if it were proven that, in doing so, Mr. Hix was motivated primarily by a legitimate concern for the health and safety of his employees rather than for the administration of overtime — a proposition that I respectfully do not accept — it remains the case that there is no evidence that he or any other representative of the employer actively considered health and safety risks on any specific occasion before invoking clause 23.15. The evidence, instead, is that the employer acted based on a generalized concern for overtime costs, for the integrity of the overtime authorization process or for the associated use of the *FAA* signing authority. Those reasons, in my view, are not sufficient in and of themselves to establish that the specific circumstances of the sea trial scheduled for July 11, 2005 — or any other specific sea trial — warranted the use of clause 23.15.

[112] I note that Mr. Hix's testimony did reveal that the employer may well have acted differently — and more appropriately — when it applied clause 23.15 of the collective agreement to at least one situation in the past. While the evidence was admittedly very limited, Mr. Hix's example of using clause 23.15 to change the hours of work of an employee as part of FMF Cape Breton's response to the exceptional circumstances of Hurricane Katrina does seem to reveal an event-based analysis by the employer more in keeping with what I believe to be the intent underlying clause 23.15.

[113] Based on the foregoing analysis, I find that the employer breached clause 23.15 of the collective agreement when it informed the grievors that it was shifting their

regular hours of work for the sea trial beginning on July 11, 2005. The source of the violation was the employer's apparent application of a general policy as its reason for invoking clause 23.15 and its corresponding failure to turn its mind to whether the specific circumstances of that event warranted changing the grievors' regular hours of work.

[114] In reaching that conclusion, I have not found it necessary to rule specifically on the bargaining agent's contention that the language of the collective agreement exhibits patent ambiguity in several clauses relevant to this inquiry. While I accept, for example, that clause 23.15 does not make clear the types of circumstances to which the parties intended that it apply, I do not find clause 23.15 to be so patently ambiguous as to require reliance on evidence of past practice or of bargaining history for an interpretation of its intent. I believe that the intent of the parties that clause 23.15 should operate on a case-by-case basis is sufficiently apparent from an examination of its interplay with other provisions of the collective agreement that a confident finding on the merits of the employer's decision to invoke the clause in the circumstances of this case is possible.

[115] I also do not need to determine the second issue that the bargaining agent urged me to address which is the following: "Does the doctrine of estoppel apply in this case to prevent the employer from altering the normal scheduled hours of work when assigning EL employees to perform sea trial work?" Had the finding in this decision depended on answering that question, I am not confident that I would have been able to accept that the bargaining agent established all four of the essential elements of an estoppel that it argued should apply (see paragraph 64). In particular, I do not believe that the bargaining history evidence from 1999-2000 clearly revealed an undertaking by the employer that it would not subsequently use clause 23.15 of the collective agreement in the situation of a sea trial. In respect to the evidence of past practice, there was no dispute between the parties that the employer did not normally use clause 23.15 before 2005 in situations involving sea trials, although the Hurricane Katrina event may have been an exception. The testimony about past practice, therefore, did weigh in favour of the bargaining agent's position. However, without parallel evidence that the employer had indeed undertaken not to use clause 23.15 for sea trials in the future, I did not find the evidence of past practice strong enough on its own to establish a conclusive basis for an estoppel. In any event, I have ruled in favour of the bargaining agent for other reasons.

[116] For all of the above reasons, I make the following order:

The Order appears on the next page.

V. Order

[117] I declare that the employer violated the collective agreement when it invoked clause 23.15 to shift the normal hours of work of Messrs. Buckley, Skrobotz and Vinden for the purpose of a sea trial beginning July 11, 2005.

[118] The group grievance is allowed.

January 20, 2009

Dan Butler,
adjudicator