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Citation: 2012 PSLRB 108

Public Service
Labour Relations Act

Before an adjudicator

BETWEEN

FEDERAL GOVERNMENT DOCKYARD TRADES AND LABOUR COUNCIL EAST

Bargaining Agent

and

TREASURY BOARD
(Department of National Defence)

Employer

Indexed as
Federal Government Dockyard Trades and Labour Council East v. Treasury Board (Department of National Defence)

In the matter of group grievances referred to adjudication

REASONS FOR DECISION

Before: Augustus Richardson, adjudicator

For the Bargaining Agent: Ronald A. Pink and Jillian Houlihon, counsel

For the Employer: Martin Desmeules, counsel

Heard at Halifax, Nova Scotia,
March 27 to 29, 2012.

I. Group grievances referred to adjudication

[1] This matter involves two group grievances filed under section 215 of the *Public Service Labour Relations Act*. Both relate to clause 23.01 (Dirty Work) of the collective agreements signed on June 2, 2006 and June 16, 2008 ("the 2006 and 2008 collective agreements"; Exhibit U-1) by the Treasury Board ("the employer") and the Federal Government Dockyard Trades and Labour Council East ("the bargaining agent") for the Ship Repair-East Group bargaining unit.

[2] I have set out clause 23.01, which is identical in both the 2006 and 2008 collective agreements, in its entirety as follows:

> ***Article 23***
> ***Allowances***
>
> ***23.01 Dirty Work***
>
> *(a) The employer agrees to continue the present practice of paying a dirty work allowance to an employee for work requiring exposure to particularly dirty or obnoxious conditions.*
>
> *(b) An employee, who while working is exposed to such conditions, shall be paid a dirty work allowance equal to twenty-five per cent (25%) of the employee's basic hourly rate of pay on a prorata basis for actual time exposed to these conditions.*
>
> *(c) Present practice shall not be limited to work delineated in the Civilian Personnel Administrative Order 6.18 (Dirty Work Allowance), but shall include situations agreed to by the parties as being particularly dirty or obnoxious, or which an adjudicator determines as being particularly dirty or obnoxious.*
>
> *(d) Consultation between the supervisor and Shop Steward will take place with a view to immediate resolution of disagreements on dirty work.*
>
> *(e) Recognizing that changes in methods will introduce new situations which may qualify for compensation as outlined above, and delete old situations, local management will consult with the Council with a view to reviewing jobs for which compensation will be paid.*
>
> *(f) The utilization of either clause 23.01(d) or (e) will not serve to deny an employee the right to present a grievance arising out of the application of clause 23.01(a).*

[3] Both grievances focus on clause 23.01(a) of the 2006 and 2008 collective agreements. The dirty work allowance that it specifies was and is typically referred to as "dirt pay."

[4] One grievance (PSLRB File No. 567-02-27) was filed on behalf of a group of metalworkers (the "grinders") in the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, Local No. 580 (the "Boilermakers' Union"), which is one of bargaining agent's constituent employee organizations. The grinders performed grinding work. The grinders worked on a project that involved grinding armoured steel plates for the Bison armoured personnel carrier that began in May 2007 and that continued into the summer of that year. They stated that the work was "particularly dirty or obnoxious" and so warranted the dirty work allowance.

[5] The other grievance (PSLRB File No. 567-02-40) was filed on behalf of a group of riggers who worked on the removal and installation of batteries in *HMCS Corner Brook*, a Victoria-class submarine, in the fall of 2008. The basic thrust of their argument was that the employer had paid the dirty work allowance for the same work in the past on both Victoria- and Oberon-class submarines and that that past practice should be considered a continuation of the "present practice" of paying dirt pay for such work under clause 23.01(a) of the 2006 and 2008 collective agreements.

[6] On the morning of March 27, 2012, I, along with counsel and representatives of the bargaining agent and the employer, took a tour of the grinder's workspace in Building D200 at Cape North (the Canadian Forces dockyard facilities in Halifax, Nova Scotia). We watched a demonstration of the type of work performed by the grinders during the period that is the subject of their grievance. We also took a tour of parts of *HMCS Toronto*. That part of the tour was designed to demonstrate areas on-board vessels in which grinders sometimes have to perform grinding work. We then took a tour of the battery shop and *HMCS Windsor*, another Victoria-class submarine that for all intents and purposes is the same as *HMCS Corner Brook*. We followed the path that the batteries would have taken from the battery shop to the top of the submarine and then down through two levels to the battery storage compartment, in the lowest level of the submarine.

[7] The hearing commenced after the site visit. On behalf of the employer, I heard evidence from the following witnesses:

- Normand Chouinard, Group Manager 1, Hull Systems, who managed a number of shops, including the grinders';
- Gerard MacLelland, Technical Service Supervisor, who was the immediate supervisor of the grinding work;
- Lieutenant-Commander J.F. Beaulieu, who at the material time was Technical Service Manager for Mechanical 1, which included the electricians and riggers working on the submarines; and
- Charles Frederick Hawker, formerly Technical Service Supervisor, who took over LCdr Beaulieu's position.

[8] On behalf of the bargaining agent, I heard evidence from the following witnesses:

- Lew Francis, a boilerplate technician and a journeyman in the Boilermakers' Union, who testified about the grinders' grievance;
- Jamie Davidson, a journeyman rigger who testified about the process of installing batteries in a submarine; and
- Adrian Lohnes, a rigger who at the material time was Technical Service Supervisor of a team of riggers working on the battery installation on *HMCS Windsor*.

[9] All the witnesses testified in a straightforward fashion. No dispute arose as to the facts. The real issue was whether those facts triggered the dirt work allowance under clause 23.01(a) of the 2006 and 2008 collective agreements. That being the case, I do not propose to summarize the evidence of the witnesses, other than when necessary to make sense of the facts. I will simply set out the facts as I found them, based on the site visit and the testimonies of the witnesses.

II. Summary of the evidence

A. Grinders' grievance

[10] The evidence on the grinders' work came primarily from Mr. Francis on behalf of the bargaining agent and from Messrs. Chouinard and MacLelland on behalf of the

employer. Mr. Francis was the lead hand of the crew of five grinders working on the Bison shields. Mr. MacLelland was technical service supervisor on the job. A technical service supervisor functions as the shop floor supervisor. Mr. MacLelland had worked for many years as a journeyman grinder before moving into the safety office and then becoming, roughly nine years ago, a technical service supervisor. He reported to Mr. Chouinard, Group Manager 1, Hull Systems.

[11] Sometime in 2006 or 2007, the Canadian Forces decided that the Bison, used in Afghanistan, needed to be retrofitted with an armoured shield. Fifty-five shields were required. Each shield was composed of 15 separate pieces of armoured steel plate designed to be welded together. The steel plates were manufactured in Trenton, Ontario, and shipped to Cape North. The plates were covered with a coating that was designed to reduce rust and that was not supposed to interfere with the welding process.

[12] The edges of the plates had to be ground and bevelled so that they could be fitted snugly together before being welded into one large assembly (the shield). The grinders carried out that task. Once the edges were ground down, the individual pieces were tacked together by one or two of the grinders. Welders then took over, welding the seams closed. The grinders then ground the seams smooth.

[13] There was no dispute that grinding metal is part of the normal duties of a grinder. The issue was whether the grinding work done on the Bison shields was so far beyond the type of grinding normally performed that it qualified for the dirty work allowance.

[14] The work started on May 1, 2007. Five men were assigned to do the grinding work. Four worked at a large metal table, one to each corner. The fifth worked at a separate table.

[15] At that time, the four men at the large steel table worked in the open. There were no barriers or shields separating one workstation at the table from another. Sparks and bits of metal thrown off by the grinding tools could and did invade the working spaces of the other grinders. The grinding process generated a large amount of metal dust and fumes. The fact that the plates were made of armoured steel as opposed to softer “normal” steel meant that there was more dust and fumes and that it took longer to grind to a particular tolerance. Some of the dust and fumes were

supposed to be handled by the ventilation system. However, Mr. Francis testified that the old ventilation system had been deemed inadequate to deal with that work. A new system had been requisitioned and was in the process of being installed. In fact, that system was in place by the tour of the grinder's workspace on the morning of March 27, 2012, but it was not in place on May 1, 2007. Cleaners went through the building from time to time and were supposed to remove the accumulated dust from the workstations and the floors.

[16] Mr. Francis testified that the grinding work was onerous. The men wore coveralls, dust masks, face shields and earplugs. The men would grind "like crazy" for several hours at a stretch, four to six to eight hours a day, to assemble enough finished pieces that three or four shields could then be pieced together. The men had to stand all that time while using their hand grinders on the steel plates. When they started on May 1, 2007, they were subject to sparks and bits of metal flying off the grinding tool of the grinder next to or opposite them. The grinding tool and the primer that coated the steel plates emitted constant metallic fumes. The vibration from the grinding tool was constant and gave Mr. Francis, at least, pain in his arms, shoulders and neck. He testified that the grinders were offered vibration-dampening gloves at one point. The sparks and hot metal shards would sometimes burn holes in his coveralls. He taped the wrists of his coveralls to keep the metal dust out and put a scarf around his neck to protect his skin.

[17] It was not disputed that the dirt pay allowance payable under clause 23.01(a) of the 2006 and 2008 collective agreements was paid to the grinders from May 1 to May 13, 2007. Mr. Francis testified that, shortly after the work started, a request was made to Mr. MacLelland to grant the allowance. Mr. MacLelland did, for that period. However, on May 14, Mr. MacLelland advised the grinders that the dirt pay allowance would no longer be paid because the conditions had changed.

[18] I will pause to explain how the dirt pay allowance was typically granted. If a worker thought that the dirt pay allowance should be granted, he or she would raise the issue with the shop steward. The shop steward would then discuss the issue with the technical service supervisor, explaining why he or she thought dirt pay was appropriate. If the technical service supervisor agreed that dirt pay should be paid, it would be paid. Mr. MacLelland testified that, normally, the decision as to whether to grant dirt pay rested with him as the technical service supervisor. He would ordinarily

report his decision to his manager. The manager, who was responsible for more than one division, would read the reports from all the technical service supervisors and ask questions when necessary "to make sure [all the technical service supervisors] were consistent." That practice of a decision being made at the shop-floor level by a shop steward and a technical service supervisor applied to riggers as well as to grinders.

[19] Returning to the grinders, Mr. MacLelland was satisfied that their working conditions until May 14, 2007, warranted dirt pay. However, as of May 14, he felt that conditions had changed and that dirt pay was no longer warranted. After consulting with two other shop supervisors, he decided to end dirt pay at that point. Three factors led him to his conclusion. First, by that time, a temporary ventilation system had been installed. Each work site had a separate hose and adjustable vent that operated with a strong vacuum. It could suck fumes and metal dust and particles away from the grinding operation. Second, a cleaner was dedicated to the work area. The cleaner cleaned the workstations every lunch period and was available on request if more cleaning were required. Third, a type of fabric, three-sided cubicle had been put in place around each workstation. The cubicles contained the sparks and metal particulate thrown off by the grinding tools, preventing them from entrenching upon the workspaces of the other grinders. To Mr. MacLelland, those changes had enough of an impact on the working environment that the dirt pay allowance was no longer properly payable. The other difference, although he did not offer it as a reason, was that the grinders were told that they could take extended breaks or showers whenever they wanted.

[20] The bargaining agent did not agree with Mr. MacLelland. It called Mr. Chouinard, the manager. Mr. Chouinard testified that, around May 16, 2007, he met with the Boilermakers' Union president and visited the shop site for about 15 to 20 minutes. He testified that, he did not see "a whole lot of smoke . . . I saw grinding going on, there was nothing particularly dirty or obnoxious as far as I could see . . . it was pretty much what you would see in any metal fabrication shop." He also saw a grinder (James Joudrey) grinding in a T-shirt. That evidence was consistent with that of Mr. MacLelland, who testified in re-direct that he saw Mr. Joudrey (who was one of the grinders asking for dirt pay) wearing a T-shirt and nylon "flash pants" on numerous occasions during the period in question.

[21] Both Mr. Chouinard and Mr. MacLelland acknowledged that it was not usual to grind for long periods, as was the case on the Bison shields job. As Mr. Chouinard said at one point, "It's not often that we grind for long periods of time." However, neither thought that grinding for long hours meant that the job was "particularly dirty or obnoxious". Thus, the matter was not resolved. The parties agreed that, given the urgency of the Canadian Forces' need for the shields, the grinders would track the hours they spent grinding and that they would file a grievance.

[22] One more relevant area of evidence concerns what was termed a "contrast" between work on-board ships and in the metal fabrication shop. Mr. Francis testified that, from time to time, he had to do grinding work on-board ships. For example, the helicopter hangar in *HMCS Toronto* had what is known as a "soft-patch" hatch on the hangar floor. The hatch allows access to the machinery below. Normally, the hatch is welded shut to ensure that aviation fuel, if spilled accidentally, does not escape through the hatch into the engine room below and cause a catastrophic explosion. After the hatch is welded shut, a grinder grinds it smooth. That work, even though it could take place in a hangar where ventilation is good, is paid a dirt allowance.

[23] Mr. Francis testified that dirt pay was generally paid when workers did grinding work in areas inside a vessel. In contrast to the hangar area, the working environment inside was generally poorly ventilated. It was difficult to get ventilation fans and hoses to operate effectively because they had to travel through hatches and holds. Work was often done overhead, or in cramped spaces, where there would be a lot of physical strain as well as sparks and fumes in close quarters. According to Mr. Francis, although he would normally not ask for the dirt pay allowance if the work took only 10 to 15 minutes; if it took longer, he would ask for the allowance, and he was never denied it.

[24] In his testimony, Mr. Chouinard was not prepared to agree that shipboard grinding always meant receiving dirt pay. He testified that it depended on the trade and the work required. For example, dismantling a washroom on a ship or working with pipes that carried "black water" (sewage) warranted the allowance. So too did work in the cramped and confined quarters often found on board. It was difficult to properly ventilate the work areas. It was often quite hot. Work overhead was particularly hard on necks, shoulders and arms, and the confined spaces made it difficult to avoid being in close contact with sparks and fumes. Mr. MacLelland agreed. He pointed out that, on-board a ship, it was "much harder to control the conditions . . .

proper ventilation . . . physical access . . . temperature of the work place . . . all are more difficult to control."

[25] Mr. Chouinard also testified that in his experience dirt pay had never been paid simply because grinding had been carried on for an excessive amount of time. His recollection was that it had been raised as a reason to pay dirt pay by the Boilermakers' Union but that, when he asked the Boilermakers' Union president, "how much is excessive for grinding, we never got an answer, so all we could do was encourage them to take as many breaks as they wanted."

B. Riggers' grievance

[26] The evidence for the riggers' grievance came from Mr. Davidson and Mr. Lohnes, on behalf of the bargaining agent, and from LCdr Beaulieu and Mr. Hawker, on behalf of the employer. No disagreement arose on the facts.

[27] As already noted, the riggers' grievance concerns the payment of dirt pay to riggers for the removal and installation of batteries on board *HMCS Corner Brook*, a Victoria-class diesel-electric submarine.

[28] Riggers are responsible for the safe installation and removal of any equipment that weighs over 30 pounds. The equipment could be anything, including motors, pipes or cabinets, for example. Riggers have to design, make and test the slings, nets, sliding pads and ladders used in the process of moving heavy equipment into or out of place. Such work is particularly demanding on submarines, where spaces are tight and confined. As Mr. Davidson remarked at one point, *HMCS Toronto* is "a palace" compared to a submarine.

[29] Victoria-class submarines like *HMCS Corner Brook*, and Canada's predecessor fleet of Oberon-class submarines, are diesel electrics. Electrical power is supplied in part by banks of large batteries that are located in the bottom of the submarine. The battery compartment of a Victoria-class submarine holds 480 batteries, each of which weighs 1200 pounds. The batteries themselves are tall and narrow, with dimensions of about five-feet in height and a base of one square foot or so. They are full of sulphuric acid and are, save for their size and weight, not unlike car batteries.

[30] The installation and removal of batteries on both the old Oberon-class and the new Victoria-class submarines is for all intents and purposes the same. I will detail the

installation process. The removal process is essentially the installation process in reverse.

[31] The batteries are stored and serviced in the battery shop. During an installation, they are placed, four at a time, in a carrying box. The riggers use a forklift to take the box out of the battery shop and along the jetty to the side of the submarine. A crane then lifts one battery at a time, under the guidance of a rigger on the jetty, out of the box and up to the top of the submarine. The battery is then carefully lowered through an outside hatch. A rigger standing on top of the submarine helps guide it through the hatch, which is not much bigger than the battery. The battery is lowered down through two more hatches through two more levels. A rigger stands at each hatch at each level to guide the battery. The battery is lowered through the hatch at the lowest level into the battery compartment. The compartment is cramped. Several riggers in the compartment then push and pull the battery into place. They use soap to help move the batteries into place, which means that they end up covered in "soap slime." It is heavy work in a cramped space that smells of soap and acid. The Victoria-class submarines, unlike the Oberons, have rails that make the job of positioning the batteries in the compartment a little (but not much) easier. Mr. Davidson testified that, in response to a question from me, it was "usually the younger guys who worked in the battery compartment . . . it was very physical work." It was, he said, "definitely the toughest part of the job."

[32] There was no dispute that, in years gone by, on both the Oberon- and the Victoria-class submarines, each and every rigger on the crew – on the jetty, on top of the submarine, those guiding the batteries through the hatches inside the vessel and those labouring in the battery compartment – received dirt pay for most of their shifts. Mr. Davidson testified that, on previous installations and removals, all the riggers on the crew received 6 hours' dirt pay on an 8-hour shift and 8 hours' dirt pay on a 12-hour shift. That happened during a battery removal in June 2008.

[33] However, the practice changed at that point.

[34] LCdr Beaulieu had become technical services manager in 2007. He was concerned about the amount of dirt pay that was being paid throughout his operation because, as he testified, "management had noticed a steady increase in that premium." He ensured that he received biweekly reports on the circumstances in which the dirt pay allowance had been paid. In some cases, he questioned the technical service

supervisors to find out why it had been granted. In many cases, he agreed with the decision and let it stand. However, in June 2008, he received a report on the payment of dirt pay during the battery removal from *HMCS Corner Brook*. The removal had taken place over a weekend comprising 12-hour shifts. He stated that he noticed that "everyone involved with the battery change except the technical service supervisor received 12 hours of dirt pay, including the crane operator and all the riggers, including the forklift driver." This, he said, "piqued his interest."

[35] LCdr Beaulieu launched an investigation. He spoke to the president of the Boilermakers' Union, the supervisor and some of the riggers. He spoke to the technical services manager responsible for the electricians and discovered that the electrician who stood beside the rigger on the jetty did not get dirt pay, but that the rigger did. When he spoke to the technical service supervisor from the shift in question, LCdr Beaulieu testified that he was told that "it was a mistake, that [the technical service supervisor] didn't mean to pay the crane operator and the forklift operator . . . and that [the technical service supervisor] had only meant to pay 8 hours of dirt pay for the 12-hour shift, not 12." LCdr Beaulieu considered what he had learned and then spoke to the Boilermakers' Union president. LCdr Beaulieu was told that "there was an old book somewhere that said how much would be paid for dirt work . . . that there was a code, but it was never produced to [the Boilermakers' Union president]." LCdr Beaulieu testified as follows:

. . .

> *I made it clear that although it had been paid for 35 years or so, to me as a professional I couldn't accept that standing on a jetty was a dirty job . . . so I did not support paying that premium for all those outside of the* [the battery compartment]*.*

. . .

[36] LCdr Beaulieu did not dispute that dirt pay had been paid in the past, but he did not think that the wording of the 2006 and 2008 collective agreements applied to the facts before him. As he said at one point in cross-examination, "I determined that past practice did not mean correct practice." He did not agree with the past practice and said that he "applied [his] own interpretation [of clause 23.01(a) of the 2006 and 2008 collective agreements]".

[37] LCdr Beaulieu was also advised that the shop steward and the technical service supervisor had already agreed, at the beginning of the removal process on June 4, 2008 to pay dirt pay for those riggers doing the removal work, regardless of where in the process they worked. LCdr Beaulieu testified that he "consulted with an HR officer and came to the conclusion that it would not be proper to stop paying the premium after an agreement had been made." However, he did not consider himself bound by that agreement for the subsequent installation.

[38] Accordingly, on June 19, 2008, LCdr Beaulieu sent an email to people in his department about dirt pay for battery removal (Exhibit U2). He noted that some corrections had been made, primarily that only 8 hours' dirt pay would be paid for a 12-hour shift. He went on as follows:

. . .

> *Note that management is not supporting this amount of dirt pay in the future as it does not match our current interpretation of Art. 23.01. In the future, only the hours working in the Battery Tank before it is cleaned will meet the criteria of Dirt Pay. I'm directing the future TSSs supervising battery related work to apply this interpretation of Art. 23.01. If the supervisor cannot reach this agreement with the Shop Steward it is to be brought to the attention of the TSM.*

. . .

[39] Mr. Hawker took over from LCdr Beaulieu in August 2008. Mr. Hawker's education and work background were in electronics so he had, as he testified, very little experience with dirt work pay. As he testified at one point, "electrical work is very clean." When he assumed LCdr Beaulieu's position, Mr. Hawker was brought "up to speed by [LCdr Beaulieu] regarding the issues in the division . . . and dirt pay for the battery install was one of them." Mr. Hawker understood that LCdr Beaulieu did not think dirt pay was warranted outside the battery tank. Mr. Hawker had never witnessed a battery installation. He investigated, and checked with his supervisors and the Boilermakers' Union. He testified that the Boilermakers' Union's position was that "it was paid in the past so should continue to be paid, but they couldn't tell [him] why it was particularly dirty . . . the only thing that was dirty was work in the tank." In the end, Mr. Hawker decided that he agreed with LCdr Beaulieu's position, and he maintained it for the installation of batteries. Only those riggers working in the battery

tank would get dirt pay, which is what happened and what led to the grievance before me.

[40] I should note that some of Mr. Hawker's technical service supervisors did not agree with his decision. On October 20, 2008, four of them, including Mr. Lohnes, prepared a memo on the proposal that dirt pay be limited in the fashion described by LCdr Beaulieu. They stated as follows (Exhibit U3):

. . .

> *When the cells were removed from the HMCS Cornerbrook [sic] this consultation took place and it was agreed that dirt pay compensation would be paid as has been done previously on these shifts. Back as far as Ship Repair Unit – Atlantic (SRUA) there has always been a premium paid for handling submarine battery cells. In fact in the old SRUA dirt pay code manual there was a code that covered that specific job. This compensation was paid when the cells were removed from the Cornerbrook* [*sic*]. *TSM Prod. Sup.* [LCdr Beaulieu] *challenged this decision but subsequently conceded that the agreement that was made would stand. He also said at that time that when putting the cells back in only the folks in the battery compartment would be eligible for dirt pay and only while they are in the compartment. This decision is contrary to past practice and is also contrary to the previous intent. Dirt pay has always been paid when handling these cells. We're not sure what has changed other than a TSM has made a decision to contradict past practice.*

. . .

III. Summary of the arguments

A. For the bargaining agent

[41] Counsel for the bargaining agent broke his submissions into two parts, one for the grinder's grievance and one for the riggers' grievance. Both involved the application of clause 23.01 of the 2006 and 2008 collective agreements but focused on different questions. For the grinders' grievance, the work was said to be "particularly dirty or obnoxious". For the riggers' grievance, it was a case of "present practice" as a continuation of past practice.

1. <u>Grinders' grievance</u>

[42] Counsel for the bargaining agent submitted that the grinders' entitlement to dirt pay stemmed from the fact that the work was "particularly dirty or obnoxious". The fact that dirt pay had been paid on the earlier Light Armoured Vehicle project, which was for all intents and purposes the same as the Bison shields project, and that it had been paid for the first 10 days of the Bison shields project represented an acknowledgement by the employer that the work was in fact "particularly dirty or obnoxious". Otherwise, he asked rhetorically, why else did the employer pay it? That being the case, the issue became whether the employer's efforts to mitigate the working conditions by installing an improved ventilation system or supplying more cleaners was enough to make the work no longer "particularly dirty or obnoxious".

[43] Counsel for the bargaining agent referred to the definitions of "dirty" and "obnoxious" in the *Canadian Oxford Dictionary* (Toronto, 2001), as follows:

. . .

dirty *. . .* ***1*** *soiled, unclean . . .* ***4*** *unpleasant, nasty. . . .*

. . .

ob·nox·ious *. . . annoying, irritating, disliked, offensive. . . .*

. . .

[44] Counsel for the bargaining agent conceded that grinding was part of the normal job duties of a grinder and that not all grinding was "particularly dirty or obnoxious". It depended on the facts. The most important fact in this case was that the task of grinding did not last just 10 to 15 minutes but was a continuous operation that took hours. As he submitted at one point, "ad hoc grinding is not dirty work . . . but consistently performing it in an environment that produces dirt in the form of metal dust, fumes and sparks is." He submitted that 12 things made that type of grinding "particularly dirty or obnoxious", as follows:

- the accumulation of particulate on the work bench;
- working in a cubicle, which concentrated the sparks and fumes in the worker's workspace;
- having to wear a kerchief to prevent burns on the skin;

- the use of anti-vibration gloves;
- the need to tape the wrists of the coveralls to keep metal dust out;
- the grinders' freedom to take as many breaks as they wanted, which was a recognition by the employer that the work was particularly difficult;
- the employment of an extra cleaner working daily as opposed to only having sporadic cleanings of the work site;
- the opportunity to take more showers;
- exposure to sparks that burned holes in a grinders' coveralls, which necessitated changing them;
- sparks that burned through the coveralls and burned the skin;
- the unusual length of time grinding and grinding for an abnormal amount of time; and
- physical pain in the neck, shoulders and back.

[45] Counsel for the bargaining agent also pointed out that the work in its intensity and conditions was similar to work done on-board ships, where confined spaces and overhead work exposed the workers to excessive fumes, sparks and strain. Since dirt pay was paid in such cases, it should also have been paid on land, where the conditions in which the grinding took place were similar.

[46] Counsel for the bargaining agent submitted that all those conditions combined meant that the work was annoying in the dictionary sense of "obnoxious." The grinders' grievance should be allowed.

2. <u>Riggers' grievance</u>

[47] Counsel for the bargaining agent submitted that clause 23.01(a) of the 2006 and 2008 collective agreements was a benefit available to employees. It had been paid historically and without exception to every rigger on a battery removal or installation, not just to those in a submarine battery compartment. Under that clause, the employer had agreed ". . . to continue the present practice of paying a dirty work allowance . . . ."

The "present practice" that existed when the 2006 and 2008 collective agreements were signed was the long-standing practice – the past practice – of paying dirt pay for all the riggers on a battery removal or installation. The employer's witnesses agreed that that had been the past practice until the installation of batteries in fall 2008. Hence, it was the "present practice" that, under that clause, the employer had agreed to continue paying. If there was such a practice, then the employer was bound to pay the dirty work allowance unless it could establish that a material change occurred to the nature of the work or the environment in which it was carried out: see *Pyke v. Treasury Board (National Defence)*, PSSRB File No. 166-02-15645 (19860505); *Andrews et al. v. Treasury Board (Department of National Defence)*, PSSRB File Nos. 166-02-18580 to 18585 (19890915), 15 C.L.A.S. 44; *Mosher v. Treasury Board (National Defence)*, PSSRB File No. 166-02-16406 (19870324), 4 C.L.A.S. 86; and *Ehler et al. v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-23469 to 23471 (19930426), 31 C.L.A.S. 36. Counsel for the bargaining agent submitted that an adjudicator does not have to be concerned as to whether the work actually was "particularly dirty or obnoxious". All that matters is whether there was a past practice of paying dirt pay for the work. If one existed, it ended the enquiry: see *Grandy et al. v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-16321 to 16323 (19870311), 4 C.L.A.S. 85; and *Fillis and Wile v. Treasury Board (National Defence),* PSSRB File Nos. 166-02-14634 and 14637 (19850219). Counsel for the bargaining agent submitted that the thrust of that jurisprudence was that dirt pay was triggered in one of three ways, as follows:

- by a past practice of paying dirt pay for the work in question, under clause 23.01(a) of the 2006 and 2008 collective agreements;
- by an agreement of the employer and the bargaining agent under clause 23.01(c) of the 2006 and 2008 collective agreements; or
- by a decision of an adjudicator under clause 23.01(c) of the 2006 and 2008 collective agreements: see *Fillis and Wile,* at para 29; and *Andrews et al.*, at page 18.

In this case, the bargaining agent did not need to rely on the second or third way. It was enough that there was a long and well-established history of paying dirt pay for

the work at issue. The error was the employer's decision to change the practice, not the riggers' request for dirt pay.

B. For the employer

[48] Counsel for the employer followed counsel for the bargaining agent's approach of breaking the argument in two.

1. Grinders' grievance

[49] Counsel for the employer submitted that clause 23.01(a) of the 2006 and 2008 collective agreements was clear. The premium was payable for work that was "particularly dirty or obnoxious". It was not payable just because the work was uncomfortable, carried out in a confined area, dangerous or carried out for an extended period. Moreover, it was payable only for work that was "particularly dirty or obnoxious [emphasis added]".

[50] Counsel for the employer noted the counsel for the bargaining agent's concession that not all grinding was dirty work or even particularly dirty work. Counsel for the employer submitted that work that was not dirty did not become dirty or particularly dirty just because it carried on for a long period. In this case, the exposure was to metal, grinding dust and fumes that were a normal part of the grinding process. If the length of time increased exposure to those things, the increased ventilation and the right to take breaks lessened that exposure.

[51] Counsel for the employer submitted that it was not appropriate to rely on the fact that the employer had paid dirt pay for the first 10 days of the job. Doing so would use the employer's efforts to improve working conditions against it and discourage future attempts to improve conditions. Moreover, the issue that must be focused on is whether the conditions after May 14, 2007, were "particularly dirty or obnoxious".

[52] With respect to the 12 conditions listed by counsel for the bargaining agent, counsel for the employer submitted that the purpose of the cubicles was to prevent or reduce the shower of dust and sparks on the other grinders. It was done to ameliorate the working conditions, not worsen them. With respect to the sparks that might burn clothing or skin, counsel submitted that it could happen as easily in the first 15 minutes of grinding (which the bargaining agent had accepted was not payable as

dirt pay) as it could in the last of 6 hours. How then could sparks or the risk of burns from them make grinding "particularly dirty or obnoxious"? Turning to the cleaners and the ventilation system, he submitted that both were present during normal non-dirty grinding. That being the case, their use could not be said to make the grinding "particularly dirty or obnoxious".

[53] Counsel for the employer pointed to Mr. Joudrey. If, as the evidence was that Mr. Joudrey chose to wear a T-shirt and flash pants while grinding, how could it be said that the work was "particularly dirty or obnoxious"? Counsel submitted that, to say that Mr. Joudrey was a "jerk" (as was suggested by counsel for the bargaining agent) whom the employer ought to have ordered to protect himself, did not answer the question.

[54] Counsel for the employer submitted that all the conditions outlined by counsel for the bargaining agent were, in essence, part of the ordinary and regular task of grinding. The only real difference was time. The usual grinding job took 10 to 40 minutes. The work on the Bison shields might have taken much longer, but the working conditions were the same. The work might have been more tiring, but that did not make it "particularly dirty or obnoxious": see *Crane v. Treasury Board (Department of National Defence),* PSSRB File No. 166-02-15090 (19851209); and *Kennedy v. Treasury Board (Department of National Defence),* PSSRB File No. 166-02-12289 (19820714), at para 41-42. Moreover, the grinders could control their exposure to the one condition that was arguably different – the time spent grinding. Counsel for the employer submitted that it would not be right to permit the grinders to bootstrap themselves into dirt pay (if time spent grinding was indeed a factor in determining whether dirt pay was appropriate) by working excessive periods or by letting the dust pile up when they could request a cleaner.

[55] Counsel for the employer submitted that the onus was on the bargaining agent to prove that the grinders' work was "particularly dirty or obnoxious" for each day claimed. It was not enough to complain about a block of days or weeks. The grinders' had to object each day so as to give the employer an opportunity to consider the situation and to takes steps to correct conditions that might have been "particularly dirty or obnoxious": see *Spence and Williams v. Treasury Board (National Defence),* PSSRB File No. 166-02-16809 (19870922), at page 29; *Cameron and Ross v. Treasury Board (National Defence),* PSSRB File Nos. 166-02-16235 and 16236 (19870309), at

page 21; and *Primeau v. Treasury Board (National Defence),* PSSRB File No. 166-02-21783 (19920212).

2. Riggers' grievance

[56] Counsel for the employer submitted that the wording of clause 23.01(a) of the 2006 and 2008 collective agreements was clear. "Present practice" refers to paying for work ". . . requiring exposure to particularly dirty or obnoxious conditions . . ." not to a past practice. A past practice of paying dirt pay for certain work could not, in the absence of evidence as to why it was paid, establish that certain work was "particularly dirty or obnoxious". The jurisprudence was clear; the onus was on the bargaining agent to establish that the work was in fact "particularly dirty or obnoxious": see *Andrews et al.,* at page 17; *Mosher,* at page 7; *Ehler et al.,* at page 13; *Grandy et al.*; *Bowser v. Treasury Board (National Defence),* PSSRB File No. 166-02-16971 (19871105), at page 15; and *Crane,* at para 29. In this case, absolutely nothing about what the riggers did on the jetty or on or in the submarine (with the exception of the battery compartment) could be considered dirty or obnoxious, let alone "particularly dirty or obnoxious [emphasis added]".

C. Bargaining agent's rebuttal

1. Grinders' grievance

[57] Counsel for the bargaining agent submitted that there was no evidence that the ventilation system in place during the period in question was effective. No tests were conducted. No measurements were taken to determine if the new system was any better or worse than the old one. Turning to the argument that physical strain was not a factor, counsel submitted that, if it was a factor when a grinder worked in a cramped space on-board a ship, then why was it not a factor when a grinder worked in the metal shop? The fact that additional cleaning services were available demonstrated that the work was "particularly dirty"; otherwise, why supply them? With respect to the grinders' ability to control their environment, counsel pointed out that it was not always possible to call a cleaner. Moreover, the fact that cleaners might be on call did not detract from the fact that the grinders worked in a dirty environment.

[58] For the question of how much time it took to turn a normal grinding job into a "particularly dirty or obnoxious" job, counsel for the bargaining agent submitted that

the length of time the grinders laboured under those conditions was not the test. One had to look at the entirety of the job. That is what the employer did when it decided to pay dirt pay for the first two weeks of the Bison shields job. The 12 factors, taken as a whole, combined to convert the job into one that was "particularly dirty or obnoxious".

2. Riggers' grievance

[59] Counsel for the bargaining agent submitted that counsel for the employer was trying to reword the 2006 and 2008 collective agreements. Clause 23.01(a) referred to the "present practice" of paying dirt pay. In this case, the "present practice" was the long-standing practice of paying dirt pay to riggers for removing and installing submarine batteries. That is the "present practice" to be continued under clause 23.01(a).

IV. Reasons

A. Riggers' grievance

[60] I will commence with a discussion of the riggers' grievance because the submissions of counsel deal with the interpretation of clause 23.01(a) of the 2006 and 2008 collective agreements, which apply to both the grinders' grievance and the riggers' grievance.

[61] Before addressing the main thrust of counsel for the bargaining agent's submissions, I note that a number of the bargaining agent's witnesses suggested that the work was dangerous because the batteries might explode or, if tipped, leak acid. I was not persuaded on the scant evidence that such risks were anything more than remote. As well, any occupation that involves securing, hoisting and guiding large, heavy and cumbersome pieces of equipment or machinery contains an elevated degree of risk. Such tasks might be risky, but they are not dirty or obnoxious. It is not surprising then that counsel for the bargaining agent inasmuch as conceded that the riggers' work on the jetty or on or in the submarine when guiding the batteries down through the hatches was neither particularly dirty nor particularly obnoxious. However, he submitted that work did not have to be "particularly dirty or obnoxious" to warrant dirt pay.

[62] In making his submission, counsel for the bargaining agent relied upon *Fillis and Wile*, at para 29, as follows:

> *29. . . . the article anticipates payment of an allowance arising in any of three different ways. It can be paid as a continuation of "present practice", it can occur in a case where the parties have agreed that it is to be paid, or in situations which an adjudicator determines to be particularly dirty or obnoxious. . . .*

The statement that what is now clause 23.01(a) of the 2006 and 2008 collective agreements contemplates the payment of dirt pay under three different situations has been repeated a number of times since *Fillis and Wile*: see *Crane*, at para 28; and in *Andrews et al.*, at page 17.

[63] Counsel for the bargaining agent focused on the first way, ". . . a continuation of 'present practice' . . . ." He submitted that the jurisprudence was clear that a long-established practice of paying the dirt pay premium for a particular task or job constituted a "present practice" within the meaning of clause 23.01(a) of the 2006 and 2008 collective agreements. In other words, a "present practice" under that clause for the purposes of dirt pay for a particular job, task or working condition existed if there was a past practice of paying dirt pay for that job, task or working condition. That being the case, dirt pay was payable regardless of whether it was actually "particularly dirty or obnoxious". Thus, there was no need for me as an adjudicator to consider the actual working conditions of the riggers and, particularly, whether their tasks were "particularly dirty or obnoxious". It was enough for me to find that there had been a long-standing practice of paying the dirt work premium for such work. Since all witnesses agreed that the riggers had been paid dirt pay in the past, regardless of what task they performed during a battery removal or installation, I should conclude that the "present practice" in their case was to pay dirt pay for such work.

[64] I must confess that I had some difficulty with the interpretation of clause 23.01(a) of the 2006 and 2008 collective agreements that counsel for the bargaining agent pressed upon me. After all, the clause speaks of paying ". . . for work requiring exposure to particularly dirty or obnoxious conditions . . ." which suggests that the "present practice" is one that relates to work that is in fact "particularly dirty or obnoxious". However, *Fillis and Wile* and others like it, such as *Andrews et al.*, at page 17, or *Crane*, at para 28, can be read as supporting the bargaining agent's submission. The question I must address is whether those decisions did in fact decide that that was the correct interpretation of what is now clause 23.01(a) – or, at least, of

the first of the three ways in which dirt pay became payable. In my opinion, a close analysis of those decisions reveals that they did not.

[65] The notion that under clause 23.01(a) of the 2006 and 2008 collective agreements there are three ways of establishing a claim for dirt pay and in particular that one way lies in a finding that there is a continuation of a "present practice", has its genesis in *Allen et al. v. Treasury Board (Department of National Defence),* PSSRB File Nos. 166-02-1035 to 1115 (19741215).

[66] *Allen et al.* dealt with the Ship Repair collective agreement of 1973. Clause 24.01 of the 1973 collective agreement was similar but not identical to clause 23.01 of the 2006 and 2008 collective agreements. Clause 24.01 of the 1973 collective agreement provided as follows:

> *24.01 Dirty Work*
>
> *(a) The employer agrees to continue the present practice of paying compensation for work requiring exposure to particularly dirty or obnoxious conditions.*
>
> *(b) Consultation between the Foreman and Shop Steward will take place with a view to immediate resolution of disagreements on dirty work.*
>
> *(c) Recognizing that changes in methods will introduce new situations which may qualify for compensation as outlined above, and delete old situations, local management will consult with the Regional Council with a view to reviewing jobs for which compensation will be paid.*
>
> [Emphasis added]

Of significance is that the 1973 collective agreement did not directly refer to the amount of the dirt pay allowance (clause 23.01(b) of the 2006 and 2008 collective agreements specifies 25% of the base rate). Nor did it include a reference to a "Civilian Personnel Administrative Order" or anything similar (see clause 23.01(c) of the 2006 and 2008 collective agreements).

[67] The facts in *Allen et al.* were the following. From October 15 to 18, 1973, the 80 grievors worked in Building D-20 at the Halifax Dockyard. They claimed that, during that time, the areas in the building in which they worked ". . . were very uncomfortable due to excessive heat and low humidity." They asserted that the conditions were

". . . therefore 'obnoxious' and they should receive compensation . . ." pursuant to clause 24.01 of the 1973 collective agreement. The evidence was that, during those days, the temperatures in the different building shops were in the 80s Fahrenheit and that the humidity was as low as 23%. Heat-producing equipment, such as soldering irons, added to the grievors' discomfort, as did fumes from cleaners, solvents and paint. Before those days in October 1973, several complaints had been filed about the building's ventilation, but no dirty work premium had ever been paid.

[68] *Allen et al.* details evidence from L.D. Brown, at that time the president of the Halifax Dockyard Trades and Labour Council. He testified that, when the 1973 collective agreement was entered into:

. . .

> *. . . dirty work compensation was paid for some established jobs. These were, and are, listed in the employer's Administration and Accounting Manual. . . .*

. . .

Mr. Brown also testified about the two-stage process for handling a job or task that was not listed in the Administration and Accounting Manual or the Base Standing Orders. The first or "complaint" stage involved meetings between the shop steward and foreperson. If no agreement could be reached, the complaint escalated to higher levels, between the president of the Halifax Dockyard Trades and Labour Council and higher management. If a resolution still could not be reached, the matter went to the second stage, in which the grievance procedure was used. The same two-stage process continued to be used after the collective agreement was signed: see *Allen et al.*, at pages 4-5.

[69] T. MacL. Cantley also testified in *Allen et al.* For about the previous 16 years, he had been Base Civilian Personnel Officer for Canadian Forces Base (CFB) Halifax. He confirmed that:

. . .

> *. . dirty work compensation was paid in accordance with the "A & A Manual" and Base Standing Orders and that this had been authorized by Treasury Board Minute No. 666376 of March 15, 1967, filed in evidence. . . .*

. . .

Those governing documents were in effect when the 1973 collective agreement was signed.

[70] Counsel for the grievors in *Allen et al.* submitted on the facts at page 7 that the working conditions during the period examined in that decision were ". . . obnoxious, in the sense of being offensive, objectionable and disliked by the people subjected to them." With respect to a "present practice", he argued that the only "present practice" was the local one of paying a 25% premium for such work. He rejected the suggestion that the "present practice" was limited to those jobs or conditions described in the Administration and Accounting Manual, the Standing Orders or the Treasury Board Minute: see pages 7-8.

[71] The employer in *Allen et al.*, at page 9, argued that the "present practice" referenced in clause 24.01(a) of the 1973 collective agreement imported the following:

- the rate of compensation (which all agreed was an additional 25% of the basic rate); and
- the type of work warranting such compensation.

The employer's representative submitted that, when drafting article 24 of the 1973 collective agreement, preference was given

. . .

> *. . . to refer simply to "present practice", because at the time of signing of the agreement the practice was the payment of a rate of compensation for the type of work listed in the employer's directives. These directives were the "A & A Manual", the Base Standing Orders, and the Treasury Board Minute.*

. . .

The employer argued in the alternative that the evidence did not support a finding that the work was "particularly dirty or obnoxious".

[72] The adjudicator in *Allen et al.* considered that clause 24.01(a) of the 1973 collective agreement could be interpreted in three possible ways. The first was the following, at page 12: "'The employer agrees to continue to pay compensation for work in particularly dirty or obnoxious conditions'." This interpretation was in the

adjudicator's view ". . . least supportable." It said nothing about the rate of the premium, but since the parties in that case agreed that it was 25%, then some additional wording had to be added. In other words, the wording on its face was incapable of being read alone; something more had to be incorporated.

[73] The second possible option considered in *Allen et al.* was the following, at pages 12-13: "'The employer agrees to continue its present practice of paying compensation at the rate of time and one-quarter for work in particularly dirty or obnoxious conditions'." That incorporated the local practice of paying a 25% premium. However, the problem was that the collective agreement applied to both the west and the east coasts (unlike in this case), and on the west coast, two dirty work premiums existed. The description of the different tasks that were paid at different rates was set out in the Administration and Accounting Manual and the Treasury Board Minute. Hence a determination of what the "present practice" was on the west or the east coast ". . . requires that reference be made to the 'A & A Manual' and the Treasury Board Minute)."

[74] The third possible option considered in *Allen et al.*, which the adjudicator chose, was the following, at page 13: "'The employer agrees to pay dirty work compensation at the rates and under the conditions which are manifested in its present practice'." The adjudicator concluded at page 18 that clause 24.01(a) of the 1973 collective agreement, properly construed, ". . . provides for payment of dirty work compensation only in conditions which would attract such payment pursuant to the employer's practice existing at the time of the signing of the collective agreement." The relevant "present practice" was the one existing when the 1973 collective agreement was signed, which was ". . . a practice of paying compensation in accordance with the employer's Administration and Accounting Manual, CFB Halifax Base Standing Orders, and Treasury Board Minute 666376." On the facts before the adjudicator, those documents did not expressly or by analogy provide for dirt pay in conditions of high heat and low humidity. He denied the grievances.

[75] In short, *Allen et al.* did not stand for the proposition that "present practice" is established simply because dirt pay has been paid for the same or similar work in the past. Rather, it stood for the following proposition:

- if at the time the collective agreement was entered into dirt pay for a particular job or task, or for work under particular circumstances, was set

out in the employer's standing orders, or Treasury Board Minutes, or some other written document or manual, then

- dirt pay is payable for that job or task or under those conditions.

That that was in fact the finding or rationale of *Allen et al.* can be seen in the decisions that followed it.

[76] For example, *Joudrey and Craib v. Treasury Board (National Defence)*, PSSRB File Nos. 166-02-3717 and 3718 (19780915), dealt with a claim for dirt pay by two grievors who had had to work in a tightly confined space that they found "extremely uncomfortable." By the time of *Joudrey and Craib*, the relevant provisions of the 1973 collective agreement had been expanded, and read as follows in the 1977 collective agreement, as set out at para 2:

> *23.01 Dirty Work*
>
> *(a) The Employer agrees to continue the present practice of paying a dirty work allowance to an employee for work requiring exposure to particularly dirty or obnoxious conditions.*
>
> *The allowance will only be paid for actual time exposed to such conditions.*
>
> *Compensation shall be at the present rate. "Present practice" shall not be limited to work delineated in the "Civilian Personnel Administrative and Accounting Manual" or "Base Standing Orders" but shall include situations agreed to by the parties as being particularly dirty or obnoxious or which an adjudicator determines as being particularly dirty or obnoxious.*
>
> *(b) Consultation between the Foreman and Shop Steward will take place with a view to immediate resolution of disagreements on dirty work.*
>
> *(c) Recognizing that changes in methods will introduce new situations which may qualify for compensation as outlined above, and delete old situations, local management will consult with the Council with a view to reviewing jobs for which compensation will be paid.*
>
> *(d) The utilization of either clause 23.01 (b) or (c) will not serve to deny an employee the right to present a grievance arising out of the application of clause 23.01 (a).*

I pause to note that clause 23.01(a) of the 1977 collective agreement was clearly an attempt to incorporate the interpretation of "present practice" from *Allen et al.* by expressly providing as follows that dirt pay was payable:

- if the work or job or conditions were listed in the Administration and Accounting Manual or the Base Standing Orders, or
- if the employer and bargaining agent had agreed that it should be paid, or
- if an adjudicator had determined that the work or job or conditions were "particularly dirty or obnoxious".

[77] The adjudicator in *Joudrey and Craib* concluded that none of the three ways of obtaining dirt pay was satisfied. Dealing with the first, he observed as follows at para 7:

> *7. . . . article 23.01 anticipates the payment of this allowance if it is a continuation of "present practice". There is no evidence before me that this is work falling within the present practice provisions. . . .*
>
> [Emphasis added]

I take "provisions" to be a reference to the Administration and Accounting Manual or the Base Standing Orders. Were that not the case, one would not expect the adjudicator in that case to have used that word. Turning to the second way, the adjudicator noted that there was clearly no agreement: see para 7. And, for the third way, he was not satisfied on the evidence that working within a confined space amounted to working in "particularly dirty or obnoxious conditions": see para 7.

[78] *Fillis and Wile*, another decision relied upon by counsel for the bargaining agent, dealt with essentially identical wording to that considered in *Joudrey and Craib*. It involved a claim by two employees of the Ship Repair Unit (Atlantic) for dirt pay ". . . for work performed in tight quarters under conditions of excessive heat and high humidity . . ." in the lower motor room of the submarine *HMCS Ojibwa* on July 14 and 15, 1983.

[79] The grievors in *Fillis and Wile* had to perform a "running repair" generator rebuild in the lower motor room of the submarine. The compartment in which they worked was cramped and full of equipment. The temperature ranged from 104 to 110

degrees Fahrenheit. At one point on the second day, it rose to 115 degrees Fahrenheit, even though a fan and ventilation system were in place. The grievors were sweating constantly. They put in a claim for dirt pay. There was evidence that such work had qualified for dirt pay in the past.

[80] There was also evidence in *Fillis and Wile* of what were called the employer's "Dirt Pay Codes," which appear to have described particular conditions or tasks that warranted dirt pay: see para 18. It also appears that the "Civilian Personnel Administrative and Accounting Manual" and the Base Standing Orders were put into evidence: see para 21 and 29. After recounting the evidence and submissions, the adjudicator noted as follows at para 29:

> *29. . . . the article anticipates payment of an allowance arising in any of three different ways. It can be paid as a continuation of "present practice", it can occur in a case where the parties have agreed that it is to be paid, or in situations which an adjudicator determines to be particularly dirty or obnoxious. The burden, thus, is upon the grievors to establish the existence of either of the first two conditions or to convince an adjudicator on the merits of the last. We can dispense with the second ground as it is obvious there is no agreement . . . . It seems to me, though, that I have heard enough evidence to call for some comment with respect to "present practice" as delineated in the Civilian Personnel Administrative and Accounting Manual or Base Standing Orders. Alternatively, I may come to a determination of my own as to whether the work required exposure to particularly dirty or obnoxious conditions. Indicative of the way in which the Administrative and Accounting Manual and Base Standing Orders have been applied in the past are the Dirt Pay Codes (Exhibit 7) from the Job Numbering Book. These are a series of reasons or examples as set out by the Employer for which a dirty work allowance is payable.*
>
> [Emphasis added]

The point to note is that the adjudicator's analysis of "present practice" was bound up with evidence of and a consideration of the Administration and Accounting Manual or Base Standing Orders.

[81] Evidence was adduced in *Fillis and Wile* and discussion ensued about dirt pay Code 62, work on "especially dirty machinery", and Code 63. Apparently, some dispute arose as to whether the correct code had been applied in that case or indeed whether the codes were properly applicable. The adjudicator wrote as follows at para 37:

> *37. . . . Neither is it of any real consequence that the request for dirty work allowance was submitted in this instance (and refused) under Code 75 as opposed to Code 62 or 63. . . . The grievance is based on exposure to excessive heat and in my opinion there are sufficient similar examples of allowances being paid in the past for exposure to such conditions that it is equally warranted here regardless of how it has been categorized. . . .*
>
> [Emphasis added]

In other words, the "present practice" related not simply to an existing practice of paying dirt pay for the work in question; rather, it related to a past practice of paying for work under conditions that had in fact been recognized as warranting a dirty work allowance, either because the employer had coded it as such in its several directives or orders, or because it was, in fact, "particularly dirty or obnoxious". And indeed, in *Fillis and Wile,* the adjudicator wrote at para 37 that, even without a reference to a "historical example," he still would have found that ". . . the conditions under which the grievors worked on 14 and 15 July 1983 while not particularly dirty, were particularly obnoxious . . . ."

[82] To summarize, a close analysis of the jurisprudence does not reveal that "present practice" means that a past practice of awarding the dirty pay allowance for a particular job, task or working condition is alone sufficient to warrant the continuation of such a payment as a "present practice". Rather, the past practice had to relate to one or both of the following:

- the categorization in the employer's standing orders or directives of the job, task or working condition as one warranting the dirt pay allowance; or
- the job, task or working condition was in fact "particularly dirty or obnoxious".

[83] Later decisions that cite the "three ways" dictum in a rather cursory fashion do not negate that conclusion. For example, in *Pyke*, the grievance was about the work of a coppersmith that involved melting a metal amalgam of zinc, lead and other metals at extreme temperatures (well in excess of 400 degrees Fahrenheit) and then pouring it into a mould, where it cooled under controlled conditions. Great heat was needed, and noxious fumes were produced at all times during the process. Historically, time spent during all aspects of the process had been subject to the dirty work allowance. After

the process was moved to a new, larger building, the employer took the position that the cooling part of the process no longer attracted dirt pay because the confines of the smelting area were larger and the ventilation better.

[84] The adjudicator in *Pyke* noted at para 27 that ". . . past practice is accepted by the parties as being a major, indeed crucial, determinant in matters relating to 'dirt pay'. . . ." He stated that, when past practice ". . . has been demonstrated, the onus is on the party seeking to change such practice to show that there has been a significant change in material circumstances and that such change warrants the desired change in past practice." The adjudicator concluded that the employer had failed to adduce sufficient evidence to establish that the larger building or what it alleged was better ventilation had made any material change to the conditions present during the cooling process to warrant a cessation of dirt pay for that part of the process. The point, of course, is that simply to describe the working conditions that in the past had attracted the dirty work allowance is to know that the conditions were in fact particularly obnoxious.

[85] The same can be said of the decisions in *Grandy et al.* and *Mosher*, both of which were relied upon by counsel for the bargaining agent as supporting his "past practice is present practice" submission. In *Grandy et al.,* the work involved cleaning, greasing and oiling sonar cables, work that strikes me as "particularly dirty or obnoxious".

[86] *Mosher* involved melting lead out of a sonar unit known as a "VDS canoe". A torch with a very-high-temperature tip was used to melt the lead, a process that resulted in a very strong acid smell, smoke and fumes. The employees used respirators, but they were not sufficient to absorb all the fumes. The employees suffered from nausea and headaches during the process. Sometime after 1984, the work was moved from an older, more cramped building to the newer, and larger, Building D200. The employer argued that conditions were better in Building D200 and that dirt pay, which had been paid in the past, was no longer appropriate. However, one of its witnesses who took that position also admitted at page 3 that ". . . he never, 'for his well-being' . . . stayed inside the room while the operation was going on. . . ."

[87] The adjudicator in *Mosher*, following *Grandy et al.*, ruled that, if there was a past practice of paying the dirty work allowance for a particular task, the onus was on the employer to show that conditions had materially changed. The employer failed to

satisfy that onus. Moreover, ". . . and notwithstanding the question of the past practice, [the adjudicator was] satisfied that the work carried on by the grievor should qualify as particularly dirty or obnoxious. . . . [page 7]"

[88] As another example, *Andrews et al.* involved the installation of fibreglass casings on *HMCS Ojibwa*. That task required using an air drill, which sprayed fibreglass particles, not all of which could be removed by an air extruder. The particles caused skin irritations. The work was carried out in cramped quarters, and there were large amounts of grease and dirt. Dirt pay had always been paid for this work in the past. The employer argued that a change to refurbished fibreglass casings that were much cleaner had changed the nature of the work. The adjudicator referred to *Crane*, which in turn referred to the three ways in which dirt pay could be awarded. He noted that it was "undisputed" that dirt pay had been awarded for that type of work in the past. He went on to find that at para 41". . . the drilling of the holes in the fibreglass part of the casings did create particularly obnoxious conditions which were not overcome by the use of the excluders or the disposable coveralls. . . ." Moreover, he added at para 41, ". . . if indeed the refurbished casings did justify a deviation from previous practice, this change in itself constituted a new and, in [the adjudicator's] view, particularly obnoxious condition of work." Once again, the continuation of a "present practice" related to a task that was in fact "particularly dirty or obnoxious".

[89] This analysis reveals that the reference to "present practice" in clause 23.01(a) the 2006 and 2008 collective agreements is a reference to a practice that:

- existed at the time the 2006 and 2008 collective agreements were entered into; and
- was contained in or described by a written document which, by the time of the 2006 and 2008 collective agreements were entered into, was known as Civilian Personnel Administration Order 6.18.

[90] In my opinion, the interpretation of clause 23.01(a) of the 2006 and 2008 collective agreements that is consistent with its overall wording and with past adjudicative decisions is in effect set out in clause 23.01(c), and provides that dirt pay is payable for work:

- that is delineated in Civilian Personnel Administrative Order 6.18 (Dirty Work Allowance), or

- that has been agreed upon by the employer and the bargaining agent as being particularly dirty or obnoxious, or

- that is determined by an adjudicator to be "particularly dirty or obnoxious".

In other words, and dealing with the first option, the "present practice" that is 'continued' under clause 23.01(a) is whatever practice, as delineated in a written directive of the employer, existed at the time the 2006 and 2008 collective agreements were entered into. This interpretation is consistent with *Allen et al.* It is also consistent with – and explains – the change between clause 24.01(a) of the 1973 collective agreement and clause 23.01(a) of the 1977 collective agreement. *Allen et al.* had ruled that one needed to look to the employer's written directives which existed at the time the collective agreement was entered into in order to interpret and apply the continuation of "present practice" mandated by clause 24.01(a) of the 1973 collective agreement. That requirement was then expressly incorporated into what became clause 23.01(a) of the 1977 collective agreement considered in *Joudrey and Craib* – which was complied with inasmuch as the adjudicator considered those written directives in coming to his decision.

[91] The requirement that the "present practice" that is 'continued' under clause 23.01(a) is whatever practice, as delineated in a written directive of the employer, existed at the time the 2006 and 2008 collective agreements were entered into makes sense. Cape North is a large and sprawling work site, involving many trades working under a wide range of conditions on a wide variety of jobs and tasks. Work on or for ships, submarines and other military equipment can take years to complete. It can be and is performed in all conditions, in the shops or on-board vessels, in winter or in summer. Once completed, the work may not need to be repeated for months or years. To leave the determination of the "present practice" with respect to a particular job, task or working condition to the memories of employees is to invite confusion and disagreement. Moreover, it seems to me that to bind the employer (which is, after all, one of the parties to the 2006 and 2008 collective agreements) to a particular interpretation or application of a collective agreement, one needs more than that a foreperson agreed, possibly mistakenly, to a particular practice or payment that could

in fact have been contrary to the provisions of the collective agreement. A requirement that the "present practice" to be continued was written by the employer (as in a standing order or a Treasury Board minute or directive) addresses both problems. It ensures continuity and certainty, and it ensures that the employer is aware of what it has decided to pay for "particularly dirty or obnoxious" work.

[92] In this case evidence was adduced that dirt pay in the past was paid to riggers who stood on the jetty or who guided the batteries into or out of submarines, no evidence was adduced that those tasks were delineated in Civilian Personnel Administrative Order 6.18 or in any similar predecessors to that order, such as the Administration and Accounting Manual or the Treasury Board Minutes referred to in *Allen et al.* or *Joudrey and Craib*. It is true that there was some evidence that at one time some form of book or code existed with respect to the battery removal and installation tasks. For example, Mr. Davidson testified in cross-examination that in the "old" Ship Repair Unit there had been a "dirt pay schedule for the battery job, but it doesn't exist any more." In cross-examination, Mr. Lohnes confirmed that, although dirt pay had been paid back as far as 1978 if not earlier, to his knowledge, there was no written agreement between the bargaining agent and the employer to that effect. There is also the evidence of LCdr Beaulieu that he had been told that there used to be a book somewhere, but that it had never been produced to him. However, such evidence in my opinion was not clear or solid enough to satisfy the requirement (that in my opinion is necessary) under clauses 23.01(a) and (c) of the 2006 and 2008 collective agreements that dirt pay is to be paid because either it was listed in Civilian Personnel Administrative Order 6.18 (Dirty Work Allowance) or there was an agreement between the employer and the bargaining agent.

[93] Turning to the third possibility, it is clear that, and I so find, those tasks are neither particularly dirty nor particularly obnoxious.

[94] Hence, the riggers' grievance must be dismissed.

B. <u>Grinders' grievance</u>

[95] As noted, Civilian Personnel Administrative Order 6.18 was not put in evidence before me. Nor was there any agreement between the employer and the bargaining agent to pay dirt pay for the work at issue. Thus, it is left to me to determine, under

clause 23.01(c) of the 2006 and 2008 collective agreements, whether the work was "particularly dirty or obnoxious".

[96] I will start with a few observations. Grinding steel is part of a grinder's job. Exposure to sparks, dust and fumes is to be expected when grinding and so cannot be considered particularly dirty or obnoxious (even though it might seem dirty or obnoxious to an outsider): see *Kennedy*, at para 41-42, and *Crane*, at para 32-33.

[97] The fact that the grinders might wear protective clothing, face shields or respirators while grinding in my opinion on the evidence does not take the work beyond what might normally be expected of a grinder while grinding steel: see *Kennedy*, at para 43-44.

[98] In essence, the following was said to have taken the Bison shields job outside the ordinary:

- the grinders worked in close proximity to each other, hence exposing them to each other's flying dust and sparks; and
- the grinders spent an extraordinary length of time performing the grinding activity, thereby exposing them to excessive amounts of physical strain, dust, dirt and fumes.

[99] On the evidence, the employer appears to have agreed with the bargaining agent for the work done from May 1 to 13, 2007. However, the employer stopped paying dirt pay on May 14 on the grounds that it had ameliorated the working conditions such that they could no longer be considered "particularly dirty or obnoxious".

[100] It is clear from the jurisprudence about the provisions that paved the way to clause 23.01 of the 2006 and 2008 collective agreements that tasks or working conditions that might initially be considered "particularly dirty or obnoxious" can be reduced to being only dirty or obnoxious (or indeed, to being not dirty or obnoxious at all) by steps taken by the employer. This flows from the content of clause 23.01(d), which has existed since at least 1973 and that requires consultation between the supervisor and shop steward ". . . with a view to immediate resolution of disagreements on dirty work . . ." and from the jurisprudence that has considered it. In *Cameron and Ross*, the adjudicator stated at page 21 that the grievors had had ". . . the obligation to report the alleged or believed particularly dirty conditions during the

period in question so as to enable the employer to remediate the situation or consider the proper dirty pay allowance . . . [emphasis added]": see also *Spence and Williams*, as cited and approved in *Primeau*, at page 11. In my opinion, I find that that is in fact what happened in this case. The remedial steps taken by the employer consisted of the following:

- blocking the sparks and dust from entering the other grinders' workspaces;
- improving the ventilation;
- increasing the access for the cleaning of the work site; and
- allowing the grinders to rest or shower whenever they wanted.

[101] In my opinion the steps taken by the employer in the case before me were sufficient to bring the grinders' working conditions into what could be called ordinary working conditions. The step of allowing the grinders to rest or shower whenever they wanted was particularly important in my view, given that one of counsel for the bargaining agent's main points was that the grinders were required to spend excessive amounts of time performing what was otherwise a normal part of their duties. Moreover, given that at least one of the grinders chose to work in a T-shirt and nylon flash pants, one is hard pressed to see how such conditions could be termed "particularly dirty or obnoxious".

[102] The fact that dirt pay might have been paid for grinding work on-board ships in my view does not assist the bargaining agent. Every fact situation – every working condition – is different. The hangar-like Building D200, in which the grinding work was carried out, is a far cry from the cramped, poorly ventilation confines on-board a ship: see *Kennedy*, at para 45. The onus was on the bargaining agent to establish that the grinders' work in Building D200, not that done on-board a ship, was "particularly dirty or obnoxious". It failed.

[103] Since the bargaining agent failed to establish that the grinders' work or the conditions under which they performed it were particularly dirty or obnoxious during the period in question, I must dismiss the grinders' grievance as well.

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

(The Order appears on the next page)

V. Order

[105] The grievances are dismissed.

October 05, 2012.

Augustus Richardson,
adjudicator