File: 166-2-28869

Public Service Staff Relations Act

Before the Public Service Staff Relations Board

BETWEEN

ARTHUR T. COUGHTRY

Grievor

and

TREASURY BOARD
(Fisheries and Oceans)

Employer

Before: Evelyne Henry, Deputy Chairperson

For the Grievor: David Jewitt, Counsel, Canadian Merchant Service Guild

For the Employer: André Garneau, Counsel

Heard at Ottawa, Ontario,
July 7, 13, 14 and 15, 1999.

Arthur Coughtry, Chief Engineer on the Coast Guard vessel "Samuel Risley", grieved on October 30, 1998 as follows:

…

> *I wish to grieve the Employer's stated intent to misapply the administration of my vacation leave credits in my recently negotiated collective agreement as stated in Mr. Peter Ballard's undated communication.*
>
> *I request the Employer be instructed to apply my entitlement in accordance with the wording of the Collective Agreement as contained in Appendix "H".*
>
> *I further request in accordance with the provisions of Article 18.15 of the Collective Agreement that this grievance be moved to the final level because that is where the inappropriate instructions originated.*

…

The Canadian Merchant Service Guild (the Guild) and Fisheries and Oceans had agreed, on October 23, 1998, that all grievances relating to the new Ships' Officers' collective agreement, Appendix "H", Code 410/98 application of the 2.1 factor to vacation leave with pay, would be submitted to the final level of the grievance procedure, and that one grievance chosen by the Guild would be a representative grievance for all grievances in this matter. This collective agreement was signed by the parties on September 17, 1998 and has an expiry date of March 31, 2000. The Guild chose the Coughtry grievance to be the representative grievance and referred it to adjudication on February 18, 1999.

Exhibits U5 to U8 were introduced by consent. Exhibit U5 is an undated memorandum signed by Peter J. Ballard, A/Director of Fleet Services, entitled "New Ships' Officer Collective Agreement: Appendix 'H', Application of the "2.1 Factor"". Exhibit U6 is a letter dated October 13, 1998 from Ken Herbert, Chairman of the Guild's Negotiating Committee, to Peter J. Ballard in response to his memorandum. Exhibit U7 is the Ships' Officers' collective agreement, Code 410/98, with an expiry date of March 31, 2000. Exhibit U8 is the Ships' Officers' collective agreement, Code 410/91, with an expiry date of March 31, 1994.

The issue is whether the 2.1 factor in Article 20, Vacation Leave with Pay in Appendix "H", Lay-Day Operational Crewing System, page 107, of the Ships' Officers' collective agreement (Exhibit U7), should be interpreted in accordance with the employer's position as described in Mr. Ballard's memorandum (Exhibit U5) or in accordance with Mr. Herbert's letter (Exhibit U6). Article 20 reads as follows:

…

> ***Article 20 – Vacation Leave With Pay***
>
> *An officer shall earn vacation leave credits at the rate prescribed for his years of continuous employment, as set forth in Article 20 of the Collective Agreement, for each calendar month for which he receives at least two (2) weeks' pay.*
>
> ****
>
> *For the purpose of granting vacation leave for officers subject to the lay-day system, in accordance with this Appendix, all vacation leave credits for officers entering or in the lay-day system will be multiplied by a factor of two decimal one (2.1). For employees leaving the system, vacation leave credits will be adjusted by reversing the factor.*

…

Mr. Ballard, in Exhibit U5, describes the factor and an example in the following manner:

> *The new Ships' Officer Collective Agreement was officially signed on September 17, 1998 by the Canadian Merchant Service Guild (CMSG) and the Treasury Board (TB).*
>
> *There has been a lot of confusion over the application of the amended wording in Article 20 of the Lay-Day Crewing Appendix 'H'. The new wording reads "*For the purpose of granting vacation leave for officers subject to the lay-day system in accordance with this Appendix, all vacation leave credits for officers entering or in the lay-day system will **be multiplied by a factor of two decimal one (2.1).** For employees leaving the system, **vacation leave credits will be adjusted by reversing the factor".**
>
> *I am informed that some Ships' Officers are under the impression that this means that they will now have double the number of leave credits. As a member of the Management bargaining team, I can assure you that this interpretation is incorrect. The change in the language was*

> *made in order to be consistent with the change in Article 20 of the general portion of the new agreement.*
>
> *Vacation Leave credits are now to be accumulated in hours rather than 'days' as was the case in the previous agreement. Therefore, when a SO enters the Lay-Day system, his/her vacation leave credits will be recorded in 'hours' (as per Article 20).*
>
> *Because SO's on the Lay-Day system work twelve hour days, they require twelve hours of leave credits to cover off each day away from work on annual leave. A factor has therefore been developed to facilitate the calculation of the hours required in order to cover off each day of annual leave. This factor is based on the number of hours worked per week by an officer on the Lay-Day system divided by the number of hours worked by an officer on the conventional system, (84 hours divided by 40 = 2.1).*
>
> *For example; if an officer has 5 years of continuous service, he/she is entitled to 10 hours of vacation leave for each calendar month (Article 20.02). Thus; under the previous Collective Agreement:*
>
> *10 (hours) x 12 (months) = 120 hours.*
>
> *120 (hours) divided by 8 (hours per day) = 15 days, and the conversion to lay days was provided for in the formula;*
>
> *15 (days Conventional) x 7/5 = 105/5 = 21 (days in L-D)*
>
> *This still remains the case, except that the factor is used to represent the 7/5 (days) or 84/40 (hours) expression, therefore:*
>
> *120 (hours) x factor 2.1 = 252/12 = 21 (days in L-D)*
>
> *10 (days) x 2.1 (factor) = 21 vacation days on the lay-day system.*
>
> *Pay and Benefits will be advised of the above application of the new agreement. I ask that you take steps to ensure that all SO's are aware of what the new factor is intended for.*
>
> …

Mr. Herbert agrees with part of Mr. Ballard's description but takes issue with the number of hours per day that must be debited when a Ships' Officer goes on leave. His letter to Mr. Ballard dated October 13, 1998 (Exhibit U6) reads in part:

We have just been provided a copy of an undated communication that was sent to the Regions under your signature on the above noted matter.

We cannot agree with the manner in which you characterized the recent negotiations. We would remind you the proposals to change the methodology with respect to the accumulation, use and tracking of vacation leave credits were in fact made by the Treasury Board.

Ever mindful of the manner in which the Treasury Board has changed the interpretation of recently negotiated clauses in a Collective Agreement (1991 Negotiations – Penalty Clause Appendix "H"). The Guild's Negotiating Committee twice sought clarification from Mr. Bennett with regard to the impact of the factor ***"2.1 in Appendix "H"****. The Guild's Negotiating Committee also requested that we provide the Treasury Board with a copy of what was to be sent to the members for ratification prior to it being sent out to ensure there were no disagreements with respect to interpretation. This was done, and Mr. Bennett did in fact review the draft documents with Mr. Dempsey, the Guild's National Executive Secretary-Treasurer.*

Mr. Bennett concurred with the language in our draft document which contained the following explanation of the above noted clause:

> **"The inclusion of this factor now means that four (4) weeks vacation leave is four (4) weeks off the job and there are sufficient credits to cover a corresponding number of lay-days."**

While we may not have any difficulty understanding most of the mathematical details contained in your communication, we do not agree that the 252 hours used in your example can be simply stated as 21 days. In practical terms a lay-day or for that matter an Officer's daily pay is equivalent only to (6) hours. If you were to take 12 hours from someone's bank while only maintaining their basic daily pay, what happened to the other 6 hours that were taken from their bank?

We can liken this to an Officer's use of sick leave, where if one day is used you will take 12 hours from the Officer's accumulated sick leave credits which will be distributed as follows: 6 hours to cover the current work day and 6 hours to cover the subsequent lay-day that will be needed in the next time off period. The same process is followed when an Officer uses his/her compensatory leave.

It is the position of the Canadian Merchant Service Guild that this methodology must be used and is the only possible

> *application of the above noted factor and the usage of vacation leave credits.*
>
> *We do not agree this constitutes a doubling of vacation credits but rather it insures that an Officer who is entitled to 3 weeks vacation on a lay-day vessel gets 3 weeks of the job the same as someone on a conventional vessel.*

On behalf of the grievor, the Guild called as their first witness Ken Herbert, who has been the Assistant Secretary-Treasurer (Western Branch) of the bargaining agent since 1992. His responsibilities include the negotiation of collective agreements, grievance handling and general membership services. From 1983 to 1992 Mr. Herbert was a Business Agent of the Guild which involved similar responsibilities. Mr. Herbert has been involved in the negotiation of the Ships' Officers' collective agreements since 1984-85. The first time, he was Vice-Chairman of the negotiation team but in the following four rounds of negotiation he was the Guild's chief spokesperson. His counterpart for the employer changed for every round. Mr. Herbert chaired the negotiation team for the Guild in the negotiation of the last two collective agreements (Exhibits U7 and U8).

Mr. Herbert explained the structure of the current Ships' Officers' collective agreement with different wage rates applicable to officers under the conventional system and those working under the lay-day operational manning system. The conventional wage rate is based on a 40-hour work week and a yearly 2087.04 hours of work, while under the lay-day averaging system the annual hours are 2180. Appendix "H" applies to the lay-day operational crewing system, Appendix "I" to the 42 hours averaging system and Appendix "J" to the on call system – average 46.6 hours. It is the employer who decides under what system vessels will operate with the exception of 400 class vessels under Appendix "J". Article 20 of the collective agreement deals with vacation leave with pay.

The witness introduced a document which is the projected schedule for the West Coast for the year 1998-99 (Exhibit U9). On this schedule, which applies to two bargaining units, one can see that there are two crews per vessel: the red crew and the white crew. Each crew works a 28-day cycle and is off 28 days. A 56-day period is a full work cycle. While on duty, a crew works 12 hours a day, seven days a week, or 84 hours a week, but receives pay for 42 hours a week; the other 42 hours a week

cover the pay for the off-duty cycle. The earned lay-day system is a deferred earning system. When an officer is on vacation he cannot earn a lay-day. Since all days are work days, an officer may take vacation leave during an on-duty cycle or on a lay-day or off-duty cycle. Mr. Herbert explained that under the old agreement (Exhibit U8), under clause 22.02, an officer with 10 years of continuous employment earned 20 days vacation leave or four weeks of five days each a year. For officers on the lay-day system, the agreement provided, on pages H-6 and H-7, the following:

…

> ***Article 20 – Vacation Leave With Pay***
>
> *An officer shall earn vacation leave credits at the rate prescribed for his years of continuous employment, as set forth in Article 20 of the Collective Agreement, for each calendar month for which he receives at least two (2) weeks' pay. The leave credits will not be converted to hours.*
>
> *For the purpose of granting vacation leave for officers subject to the lay-day system, in accordance with this Appendix, all vacation leave credits for officers entering or in the lay-day system will be adjusted by a factor of 7/5. For employees leaving the system, vacation leave credits will be adjusted by a factor of 5/7.*

…

If an officer at the SO-MAO6 top level worked or took a week's vacation, he was paid $1,005.58 for that week. If he took vacation, he would not earn a lay-day as per paragraph (c) on page H-2 of Exhibit U8, which reads:

> …
>
> **
>
> *(c) The workday will consist of twelve (12) hours of work per day. For each day worked or for each day on which an officer is on authorized leave with pay other than compensatory leave and vacation leave with pay, an officer shall earn 1.00 lay-day in addition to the officer's Lay-day pay.*
>
> …

If the officer took four weeks vacation, he would not earn lay-day credits for the off-duty cycle and might not be able to maintain his weekly pay unless he had other

accumulated credits. This is the consequence of paragraph (d) on page H-2 of Exhibit U8, which reads:

…

> *(d) An officer will be compensated at the applicable annual rate of pay as described in Appendix "A3", "B3" or "C3" of the Ships' Officers Collective Agreement. In order to maintain the officer's weekly rate of pay, the officer must either:*
>
> *(i) work,*
>
> *(ii) be on lay-days, or*
>
> *(iii) be on authorized leave with pay.*
>
> *In the event that an officer does not work and is neither on lay-days nor on authorized leave with pay, his regular pay shall be deducted by an amount equal to his lay day rate of pay for each day's absence.*

…

Referring to the projected schedule (Exhibit U9), if someone on the red crew started vacation on April 9, used up 28 days vacation and returned to work on May 6, he would find his crew off duty and the white crew on duty. This is why Ships' Officers on the lay-day system take vacation leave every second year or they take only two weeks off, use two weeks vacation for the two weeks on-duty cycle and use the two remaining weeks of credits to cover the two weeks off cycle for which they would have failed to earn lay-days. Using calendar charts for the months of April to September 1998, Mr. Herbert coloured in red the days the red crew was on duty and left blank the days the white crew was on duty. In Exhibit U10, he showed an officer taking four weeks vacation from August 1, 1998 and on Exhibit U11 an officer taking vacation from August 13 to 26. In the Exhibit U10 example, an SO-MAO6 loses four weeks income or $4,205.40; in the Exhibit U11 example, an SO-MAO6 loses two weeks pay or $2,102.70. Traditionally, an officer in the Exhibit U11 example would use the two remaining weeks of vacation to cover the period where there would be no income. How does this compare to officers not on the lay-day system? The officer on the regular system takes his vacation a week at the time and his pay is maintained. On the lay-day system, for every day an officer takes, he needs two days of vacation leave credits to cover it off.

After negotiation, Mr. Herbert prepared a ratification package of documents that was sent to all Ships' Officers. These documents were introduced as Exhibit U12. Exhibit U12(a) was the covering letter dated July 6, 1998; Exhibit U12(b) was a summary of the collective agreement changes with comments; Exhibit U12(c) was rates of pay prepared by the Guild; Exhibit U12(d) was a memorandum of settlement with an official ballot; Exhibit U12(e) was a schedule of regional meetings that took place between July 30 and August 13, 1998; and Exhibit U12(f) was a document relating to Article 23, "Maternity Leave Benefits". The collective agreement was ratified and Mr. Dempsey, the National Secretary-Treasurer, wrote a letter (Exhibit U13) to all Guild members advising them of that fact.

During negotiations in the last round of bargaining, the Guild had no proposal on Article 20. There was a general proposal from Treasury Board to clean up the language of the leave articles, to convert calculations from days to hours. The parties had agreed in principle to the conversion to hours but the Guild had reserved its concurrence until the conversion factors were submitted. The Treasury Board negotiator, Mr. Bennett, tabled a document in June in which the conversion factors were listed. Mr. Herbert introduced a copy of the proposal made by Mr. Bennett, which was marked as Exhibit U14. This was a working paper, given to the bargaining agent, with a number of others, at the end of a day during meetings taking place in June 1998. The negotiations took place in separate periods. On February 10, 1998, there was an exchange of proposals. Then discussions took place from March 30th to April 3rd when the parties explained their proposals. In June, further discussions took place and new positions were taken by the parties.

Mr. Herbert explained that in Exhibit U8 under appendices "I" and "J" the Ships' Officers' vacation credits were already calculated in hours and affected by a factor as can be seen on page I-2:

> *An officer shall have his accrued days of vacation leave with pay converted to an hourly credit by multiplying the number of days by eight point four (8.4) hours.*

Similarly, under Appendix "J", officers who work eight hours and are on call 16 hours have their vacation leave affected by a factor as provided on page J-2:

…

> *An officer shall have his accrued days of vacation leave with pay converted to an hourly credit by multiplying the number of days by nine point three (9.3) hours.*
>
> …

In Appendix "H", Lay-Day Operational Manning System, the leave credits were not converted into hours; they were calculated in days by converting the number of weeks with a factor of 7/5 as can be seen on page H-7:

> …
>
> *For the purpose of granting vacation leave for officers subject to the lay-day system, in accordance with this Appendix, all vacation leave credits for officers entering or in the lay-day system will be adjusted by a factor of 7/5. For employees leaving the system vacation leave credits will be adjusted by a factor of 5/7.*
>
> …

Mr. Bennett submitted to the Guild negotiator the factors for all the different appendices at the same time. For Appendix "J", the factor was 1.6275 now found at page 115 of the new collective agreement (Exhibit U7); for Appendix I" it was 1.47 now at page 112; and for Appendix "H" it was 2.1 as can be found at page 107. The Guild negotiation team had questions because the factors for appendices "I" and "J" worked out to the hours that were previously in the collective agreement but for Appendix "H" it was different; it did not bear any relation to 7/5. The next morning, Mr. Herbert asked Mr. Bennett if factor 2.1 was correct. The reply he got was to the effect that a Ships' Officer, with his week of vacation leave, was entitled to take a week off the job; therefore he had to turn the 7/5 into hours by multiplying seven days of 12 hours over five days of eight hours or 84/40, hence the 2.1 factor. Mr. Herbert suggested that if the officer gets his week off, he gets enough hours to cover his lay-days and Mr. Bennett agreed with that. It made sense that by giving 84 hours of credits per week it gives an officer the number of hours to cover his pay for the on-duty cycle as well as that on the lay-day; that is the reason he does not earn a lay-day while on vacation because the factor takes care of that.

Mr. Herbert conveyed to his committee his conversation with Mr. Bennett. They were satisfied with the explanation. The negotiations with the two teams carried on with other items. At the mid-morning break, Mr. Herbert, some three-quarters of his

team and Mr. Bennett went out for a cigarette. Mr. Herbert was asked to double check if four weeks vacation meant four weeks off the job with a corresponding four weeks of lay-days and Mr. Bennett's unequivocal answer was yes.

This was very important to the group because it resolved a long-standing problem. While outside having a cigarette, a member of Mr. Herbert's team confirmed with Mr. Bennett that the new factor was correct and that it would cover the pay for the on-duty and off-duty cycle. Mr. Herbert understood the operation of the factor to operate in the case of the officer with 10 years of continuous service to mean that his 160 hours of vacation multiplied by 2.1 equates to 336 hours. Twenty-eight days of 12 hours equates to 336 hours and, when working, an officer is paid for 168 hours during the on-duty cycle and also paid 168 hours during his off-duty cycle. In a work cycle, he has 336 hours of work and 336 hours of pay. The same applies to sick leave; if an officer is sick for the same period, the employer will take 336 hours out of his bank. Under the old agreement, if the officer took four weeks vacation leave, he lost $4,205; under the new agreement, he does not lose pay. During his discussion with Mr. Bennett in June, Mr. Herbert was not told that 12 hours would be debited as opposed to the six-hours per day of leave in each cycle. There were no specific discussions about the application of clause 20.04. Mr. Herbert's understanding was that the proposal was tabled to streamline the administration of leave and to resolve the festering problem of Ships' Officers being unable to take their leave in the year it was earned.

Mr. Herbert met with Mr. Bennett on June 12 and collected all the final drafts of language changes; then he returned to Vancouver and prepared the summaries to be sent to the members of the bargaining unit under Exhibit U12. Prior to translating and issuing the ratification documents, the Guild submitted them to Mr. Bennett for his approval. This had been previously agreed to during the negotiation meetings; the Guild would send what they were submitting to their members to ensure that Treasury Board and the Guild had the same interpretation of the changes to the collective agreement. In the previous round of negotiations, there had been a difference of interpretation that ended up at adjudication and the Guild lost. The negotiation team of the Guild had come under severe criticism from its members and wanted to avoid a repetition of that experience. Mr. Herbert had asked that Exhibit U12 be approved by Mr. Bennett before it was sent to translation.

Mr. Herbert pointed out that Exhibit U12(b), on page 12, indicates the change of factor relating to vacation leave in Appendix "H" and the comment on the Guild's interpretation of that change:

…

> *The inclusion of this factor now means that four (4) weeks vacation leave is four (4) weeks off the job and there are sufficient credits to cover a corresponding number of lay-days.*

…

The Guild made a different comment on pages 13 and 14 regarding the factors for Appendix "I" and Appendix "J" for which the change was merely administrative since it provided the same number of hours that existed in the old agreement. Mr. Herbert explained that under Appendix "I" an officer normally worked 12 hours a day for which he was normally paid six hours but for vacation his credits were adjusted to 8.4 hours. He cannot explain why he was debited 8.4 hours under the old agreement but it was in the agreement. Only 35 or 36 people were working under Appendix "I" as of early 1998; all were in DND and there were none left in the Coast Guard. When asked why he made a different comment for the change of factor in Appendix "H", Mr. Herbert said it came from Mr. Bennett when giving the explanation of how he arrived at the 2.1 factor. Mr. Herbert forwarded the ratification documents to the National Office by courier and Mr. Dempsey arranged to meet with Mr. Bennett and Mr. Herbert believes they met on July 2nd. If Mr. Bennett had disagreed with the ratification documents, Mr. Herbert would have had to get together with him to make amendments or return to the table. The report he got from Mr. Dempsey was that there were no problems from Mr. Bennett with the package. The package of ratification documents was translated and went out to members on July 6, 1998. Mr. Herbert confirmed that this was the first time he had ever sought prior approval of ratification documents from the employer. The Guild has on its ratification documents mailing list, but one day later, the Director of Operations, Marine Superintendent and Human Resources Advisor; the Guild makes the employer aware of what they send to their members.

The contract was ratified with a higher approval rate than in other years. The change to Appendix "H" accounted for 90% of those on the West coast who voted in

favour of ratifying the contract; the percentage was as high in the Laurentians but slightly lighter on the East coast and in Newfoundland.

Mr. Herbert had many discussions with various managers about the change to Appendix "H". In the Pacific region, some were upset because officers had a substantial carry over of credits and wanted to know why it was not adjusted from this day forward and left the rest as it was.

At the end of August, Mr. Herbert had a "shouting match with Mr. Bennett over the telephone". Mr. Bennett was annoyed and asked him if he told anyone that the vacation leave was doubled. Mr. Herbert answered no but he indicated to Mr. Bennett that if you multiply the leave credits by 2.1 that is the effect of it.

Mr. Herbert received Mr. Ballard's undated memorandum (Exhibit U5) in October 1998. It was the first time he had seen this formula. He reviewed it and wrote Exhibit U6 as a response. Mr. Herbert explained his letter. The pay administration works in such a way that, if a person is sick, the employer takes 12 hours out of his bank of sick leave credits, pays him for six hours today and puts six hours in his lay-day bank. Once the language of Appendix "H" was changed, the only mathematical conclusion was that six hours of vacation leave credits would be taken to cover the pay in each cycle. Mr. Herbert said he had twice checked this interpretation with Mr. Bennett and he also had an opportunity to review this explanation. In discussion with management, no one disagreed with the method of calculation. Mr. Bennett, at the bargaining table around June 9 or 10, had stated that the employer had to know what its liability was; therefore he included the bank of leave already in place.

Mr. Herbert introduced Exhibit U15, which consists of some pay stubs for R.J. McGarvie and a Time Sheet Report. Under the new system, the officers are provided with a statement of leave by the employer. From these documents, one can see that Mr. McGarvie was on vacation leave from February 7 to 26, 1999, and from March 4 to 25, 1999 and on compensation leave half a day on March 31, 1999. The first pay stub covers the period March 18 to 31, 1999, and the second, April 1 to 14, 1999. On both these stubs, he is paid for 42 hours a week. So, for two weeks on leave he is given two weeks of pay; on the second stub he is at work and he is paid for two weeks of 42 hours. For 21½ days they paid him at 42 hours a week, or 126 hours; no

lay-days were earned during the vacation but 258 hours were debited from his vacation leave credits. "Something has happened to this man's money." says Mr. Herbert.

Mr. Herbert introduced excerpts from the old Ships' Crews' collective agreement (Exhibit U16) and excerpts from the new Ships' Crews agreement (Exhibit U17). Mr. Herbert explained that the 42 hours averaging and the 46.6 hours systems under that agreement were administered identically to the Ships' Officers' agreement. In Appendix "H", there were a number of similarities, but their lay-day system is not the same as the Guild's. In the Ships' Crews' agreement, there is a 1.17 lay-day factor and there is no wage differential; there are a couple of other clauses that are identical to the Ships' Officers' agreement. The negotiation of the Guild's agreement occurred first and this grievance was filed prior to the conclusion of the Ships' Crews' negotiations. In Exhibit U17, which was signed in 1999, one can see language in Appendix "G", that is different from that in the previous collective agreement (Exhibit U16) and from the Ships' Officers collective agreement (Exhibit U7).

Mr. Herbert believes his conversation with Mr. Bennett took place during the week of August 24, one week after the ratification meetings had been completed while ballots were on their way but not yet counted. He had no conversation with Mr. Bennett or other members of the management negotiation team prior to completion of the ratification process.

In cross-examination, Mr. Herbert confirmed his familiarity with Exhibit U7 and that the definition of work day, or paragraph "c" of Appendix "H", meant the same in the old and in the new agreement. Clause 20.04 is also the same under the old and the new agreement. It reads:

> *Vacation leave with pay shall be granted on an hourly basis with the hours debited for each day of vacation leave being the same as the hours the officer would normally have worked on that day.*

No changes were made with respect to those items.

With respect to Exhibit U10 and the problem of the officer taking four weeks of vacation leave during an on-duty cycle and not having enough lay-day credits to cover his off-duty cycle, Mr. Herbert indicated that this problem was due to the fact that the collective agreement, Exhibit U8, provided that no lay-day credits were earned during

vacation leave. When asked how many people have faced the problem of not being paid when returning from leave, Mr. Herbert said it did not happen very often because officers did not use their vacation leave that way; as they could not afford to lose a day's pay, they waited to have enough credits to take leave. Neither Mr. Herbert nor the Guild raised this problem at the beginning of the negotiations. The Guild made no proposal to resolve that problem. It was Treasury Board which made a proposal to address Article 20 and it was a general proposal to convert leave from days to hours because the old agreement had a computation in days. Mr. Herbert confirmed that the Guild had agreed to convert the computation of leave from days to hours subject to seeing the factors. The Guild did not raise at that point the problem of officers wanting to earn lay-days while on vacation leave.

Mr. Herbert had sought clarification of the 2.1 factor because the previous factor of 7/5 was seven days over five days; he wondered if four weeks had to be multiplied by 2.1; before an officer earned one and two-third (1 2/3) days; now it was three and one-third (3 1/3) days if the 2.1 factor was mathematically correct. Under the old agreement, under Appendix "H", the 7/5 factor represented seven days on the lay-day system to five days on the conventional system. Why did Mr. Herbert not understand that 2.1 represented in hours 84/40? Mr. Herbert replied that he thought one and two-third (1 2/3) days became three and one-third (3 1/3) days using the example of someone earning $10 and hour. A person only making $10 an hour on the conventional system taking a 40-hour week off is paid $400. A person on the lay-day system works 84 hours in a week and earns $840, if off, he gets paid $420 (if paid at $10 an hour), he earns $840 but gets paid $420, but the minute someone multiplies his credits by 2.1, there is enough to pay him the other $420. Mr. Herbert had gone to Mr. Bennett, before the meeting of the negotiation teams, because he wanted some answers before that meeting to enable the members of his team to take a position before they met with the other side. There were other points that needed clarification and there were a number of questions he raised with Mr. Bennett. This was a normal practice between negotiators. Mr. Herbert explained why his team thought the 2.1 factor was not correct. In its opinion, it did not match the 7/5 factor. Because everything happens in 12-hour days, except pay which is in six-hour days, Mr. Herbert asked Mr. Bennett, if 2.1 meant that "a guy off the job got the credits for the scheduled hours on duty and the corresponding hours on lay-day" and Mr. Bennett said yes.

Mathematically, the factor worked to 84/40 a week off plus corresponding leave to cover lay-days. Mr. Herbert was not concerned that Appendix "H" still said that an officer would not be earning a lay-day while on vacation leave because if you multiply his leave credits, it is natural that he should not earn lay-days.

Mr. Herbert told his committee that the 2.1 factor was indeed correct. It provided for a credit of 84 hours for 40 hours of work; it provided for a week off and a week of leave for the period off cycle. Mr. Herbert did not think to discuss the factor in the actual meeting; other items were on the agenda. On his committee, some members still had doubts about what the 2.1 factor meant; therefore at break one of their francophone members, Mr. Michaud, approached Mr. Bennett and asked him if one week off the job provided for a week for the off cycle, and the answer he got was yes. Mr. Herbert stated that Mr. Bennett understands the lay-day system and the meaning of a week off plus the number of corresponding lay-days. Mr. Herbert confirmed that, in practical terms, the officers on the lay-day system would end up with twice as much vacation as they did under the previous agreement as opposed to those on the on-call system who would get the same as before. Mr. Herbert did not see any problem with the language at the top of page 105 of Exhibit U7:

> *For each day worked or for each on-duty cycle day on which an officer is on authorized leave with pay other than compensatory leave and vacation leave with pay, an officer shall earn 1.00 lay-day in additional to the officer's Lay-Day pay.*

It was necessary; otherwise one would be quadrupling the leave that was previously provided for under the lay-day system.

Mr. Herbert stated that Mr. Bennett's role in the ratification process was crucial in securing the ratification. Because of the past difficulties in the previous negotiations, the Guild wanted Mr. Bennett to endorse Mr. Herbert's interpretation. This had never been done before, but Mr. Bennett was told why he was being asked to do so and he understood why.

Mr. Herbert was taken through Exhibit U5 and confirmed that his main disagreement is with page 3 where "120 (hours) x factor 2.1 = 252/12 = 21 (days in L-D)". Mr. Herbert thinks there is no need for a formula or a factor if 12 hours is

12 hours of work; to him, to be on a comparable basis to a conventional officer where a week off the job equals 40 hours of pay, one needs sufficient credits to cover the "on" and "off" duty pay.

Mr. Herbert stated that, with regard to Exhibit U15 a lay-day officer was paid for 42 hours a week every pay period, that Mr. McGarvie was on the white crew on the Gordon Reid vessel. The schedule (Exhibit U9) for the Gordon Reid was produced for March 1998. Mr. Herbert confirmed that ships' officers could exchange lay-days up to the penalty provided under Appendix "H", section (f), page 105 of Exhibit U7. Mr. Herbert agreed that Mr. McGarvie's leave was calculated as per Mr. Ballard's formula.

In re-examination, Mr. Herbert stated that clause 20.04 does not apply to lay-day officers, that it has never been applied to lay-day officers and that Appendix "H" starts off by stating: "Notwithstanding the provisions of the Ships' Officer Collective Agreement, the following conditions shall apply." Under the old agreement, in order to get one day off the job an employee used two days calculated at six hours each; four weeks vacation meant only two weeks off the job. Under Appendix "I", where the factor is 1.47 and where the hours of work are also a 12-hour day averaging 42 hours a week, what is being debited is 8.4 not 12 hours. Clause 20.04 does not apply to Appendix "I" or to Appendix "J" where vacation is deducted on the basis of weekly averages of 46.6 hours or 9.3 hours a day. Clause 20.04 applies to Appendix "K" but not to the other appendices. Under Appendix "H", a six-hour day would be equivalent to the 9.3-hour day under Appendix "J" and 8.4-hour day under Appendix "I". There were no changes made to the deductions under Appendix "I" and Appendix "J". There is nothing in the documents provided by the Treasury Board or in the collective agreement that says that the administration of pay is changed and that they will deduct 12 hours for every day of vacation taken while paying for only six hours.

The grievor, Mr. Arthur Coughtry, is Chief Engineer on the Coast Guard vessel "Samuel Risley" which has been subject to the lay-day system since 1985. Mr. Coughtry has worked under the lay-day system from 1985 to 1991 and from 1993 to the present. Mr. Coughtry looked at Exhibits U10 and U11 and confirmed that in his region it operates the same except that they use the title "A" crew and "B" crew instead of the "red" and "white" crews. Mr. Coughtry stated that an officer with four weeks

vacation normally requests two weeks off at the end of an on-duty cycle and for the two weeks of his lay-days.

Mr. Coughtry did receive the ratification documents package, Exhibit U12; he reviewed it and attended a meeting where the changes were reviewed and discussed. His understanding of the commentary with regard to Article 20 was that, when taking vacation during an "on cycle", he would have enough leave to cover the "off cycle". Looking at the example of Exhibits U10 and U11 and the change in Appendix "H", Article 20, Mr. Coughtry explained; "if I took my leave July 31 to August 26, that is my on-cycle; for the subsequent lay-days I would have enough leave credits in my bank". This, he explained, was made possible by his annual leave being multiplied by 2.1.

Looking at Exhibit U12(e), the schedule of ratification meetings, Mr. Coughtry said he was present at the Parry Sound meeting on August 5, 1998; there was a crew change on that day and both crews were present. The understanding of those present was that the collective agreement offered minor monetary gains but that the change in Appendix "H" was "very lucrative" because they would get their full leave entitlement. For a lay-day person, it was a fairly attractive article; "it swayed everybody's vote".

In cross-examination, Mr. Coughtry stated that there was no proposal submitted prior to the negotiations to obtain twice as much leave. He got a copy of Exhibit U12(b) and saw that clause 22.02 had changed. In the past, he accumulated leave in days. It was not understood before the negotiations that their team was to obtain twice as much leave from this negotiation. What was explained at the shipboard meeting after they received their package was that the problem with vacation, which was not a new problem, was addressed and fixed. Mr. Paul Turner was his representative on the committee.

Richard Michaud was the third and last witness for the Guild. He has been a labour relations officer with the Guild since 1992 for the Laurentians Region, which covers the area from Cornwall to Sept-Iles. His general responsibilities include negotiating contracts, handling grievances and day-to-day Guild business. Mr. Michaud was involved in past negotiations between Treasury Board and the Guild. He attended the 1990 negotiations as a government Ships' Officers (GSO) representative. He had a position on the committee that negotiated the 1990 agreement (Exhibit U7).

Mr. Michaud testified that he takes care of government Ships' Officers in his region. There are three vessels on the lay-day system and two on the conventional system in Quebec City; Rimouski has four vessels on the lay-day system at the present time. Prior to becoming a Guild officer, he was a government Ships' Officer from 1975 to 1992; he went into the college system in 1975 and graduated in 1978 as a third mate SOMA2. In 1992, he had reached the level of SOMA5 in a position commonly known as first mate. He did not work on a lay-day vessel.

As a Guild officer since 1992, he has dealt with all the grievances for the old collective agreement (Exhibit U8) including lay-day interpretations and the rest. Approximately 75% of his membership are now covered by the lay-day system. Mr. Michaud is familiar with the accumulation of vacation leave, specifically under appendices "H", "I" and "J". He is familiar with the lay-day system and the example provided in Exhibit U11. Mr. Michaud stated that an officer had to earn two years of vacation or more to get a full cycle off. The norm was 28 days on and 28 days off; the extra lay-days earned by working on statutory holidays could not provide enough extra credits to permit taking a full complement of leave in the year it was earned. Mr. Michaud stated that officers are classified the same under both the conventional and the lay-day system but lay-day officers work more hours per year. There is no hourly rate of pay for lay-day officers but if you take their annual rate divided by the number of hours worked, they are paid at a higher rate than officers under other crewing systems. There is a differential of 12.75% in the rates of pay in Appendix "A" and in Appendix "A-3",but for the purpose of paragraph (g), on page 106, "For the purpose of overtime or any other hourly rated benefit, the hourly rate shall be the appropriate rate found in Appendix A-2". Those are the rates found on pages 71 and 72 for the officers on the conventional system.

Mr. Michaud attended all the negotiation sessions in 1998. The first time the proposal to convert the vacation leave entitlement to hourly leave was raised was in March. The Guild agreed to convert from days to hours; it did not have "hang-ups till it saw the wording". No wording was provided in March; only the general view was expressed. The specific discussions took place in June, right at the beginning of a week; "Mr. Bennett came to us with his wording." At the end of the day, Mr. Michaud received a big package; the negotiations broke up and the team went back to the hotel to caucus. During the discussions, calculations were made, the factors of 1.47 and

1.6275 worked out to the number of hours mentioned in the old agreement. The committee had some doubts about the 2.1 factor; it wondered why the employer had not used the same factor as for Appendix "I"; they had a 12-hour per day schedule also and the old agreement provided for a 7/5 factor. The committee concluded that, if 2.1 was correct, it provided enough time that four weeks vacation meant four weeks off the job with enough time to take care of the off-cycle. The committee asked Ken Herbert to check with Mr. Bennett if the figures were correct and if he stood by his word of 2.1. Mr. Herbert spoke to Mr. Bennett and then told them Mr. Bennett was maintaining his current proposal or offer. Mr. Michaud was present when Mr. Herbert happened to be talking to Mr. Bennett during a smoking break. He joined the conversation and asked Mr. Bennett directly if his numbers were okay as "we had some doubts about it." Mr. Bennett said they were okay; he might go and check back but he had done the calculations and they were okay. "We were ready to break off to go to our members and we told Bennett he had the night to recheck his numbers if he had to." Mr. Michaud's understanding of the impact of the 2.1 factor on the accumulation of leave was that by multiplying by 2.1, an employee had enough annual leave credits to cover a full cycle because pay was based on six hours for a day. An officer on the lay-day system received six hours' pay for a day on vacation whether it was taken during an on or off cycle. At no time during the negotiations did Treasury Board or the employer say there would be a change in the pay administration, nor did they suggest that 12 hours would be deducted from the leave bank for a vacation day.

Mr. Michaud attended the ratification meeting in Quebec on August 6, 1998. He is familiar with the documents in Exhibit U12. The documents sent to his members were the same except they were in French. The commentary on page 12 of Exhibit U12(b) following the change in Article 20 was translated and said the same thing in French. Mr. Michaud's members did raise the question of the change in vacation and it "was a deal breaker as far as selling the contract". Most of his members are on the lay-day system and "they didn't care much about a wage increase of 2%." Mr. Michaud had discussions with regional management after the ratification meetings; they were very curious about the changes since very little was coming from Treasury Board; therefore, he offered them a copy of the ratification package. They just looked at the 40-hour week and the lay-day changes and said: "You managed to

double up vacation leave entitlement for lay-day officers." Mr. Michaud answered: "About time a guy on lay-day gets his four weeks of vacation off the job."

In cross-examination, Mr. Michaud stated that all the negotiations took place in English. Mr. Michaud confirmed there were no changes to the definition of "work day". When asked if the only matter checked when Mr. Michaud was present was the question of whether 2.1 was the right factor, Mr. Michaud said: "It was raised if that meant a full cycle off that you get four weeks off the job and get the other four weeks." Mr. Michaud did not at all feel that Mr. Bennett had fallen into a trap. His membership was quite pleased with the 2.1 factor; it became a major factor in this vote. Ken Herbert was chairman of the committee; he was the spokesperson during negotiations; they sent small pieces of paper to him. During negotiations, Mr. Bennett spoke for the employer; when operational matters were raised, Mr. Ballard would come on. If it was a very special case, Mr. Herbert could ask someone to add something in speaking for a proposal from the bargaining agent's side. When Mr. Michaud went into negotiations, he did not know what to expect; there were rumors that the employer wanted to revert to the 1.17 factor which existed prior to the 1990 contract, that there would be a reverse in Appendix "H" which was the focus of all their dealings at Treasury Board but they didn't deal with Appendix "H" till the end. The other issue with the members was the wish for a big raise. Mr. Bennett had mentioned he wanted to rectify the way the leave was administered as members were not entitled to a full cycle off with four weeks of vacation. Mr. Michaud understood that the 2.1 factor, if divided by a six-hour day, achieves what it is set for.

This was the end of the Guild's evidence.

The first witness for the employer was Philip Murdock, Senior Crewing Specialist in the Fleet System Branch of the Canadian Coast Guard, which is part of Fisheries and Oceans Canada. The Ships' Officers comprise approximately one thousand employees, the vast majority of whom work with the Canadian Coast Guard; some are employed on civilian DND vessels, maybe 70 to 80 officers. Mr. Murdock's role globally is to deal with human resources issues with the sea-going population. Mr. Murdock has been in his present job for five years. He began at the Coast Guard College in 1978; from 1981 to 1990 he worked on several ships, all based in Eastern Canada. He left in 1990 as a chief officer to come to Ottawa to do the same type of work he does now but in a

junior position. Mr. Murdock was not at the bargaining table for the Ships' Officers in 1990. His job evolved. Mr. Yves Villemaire had the senior job then. He joined the bargaining team in June 1998; he could not do so before because his position had not been excluded.

Mr. Murdock is the author of Exhibit U5, which was signed by Peter Ballard, Acting Director of the Fleet Services Branch within the Coast Guard, the person he reports to. Mr. Ballard was the departmental representative for the entire set of negotiations. His was a leading role as departmental representative; the Coast Guard is a major user of the Ships' Officers group; it had a significant interest in the decisions taken at that table as they would affect its operations. The memorandum (Exhibit U5) was signed during the last part of September and delivered to the regions in the first part of October 1998. Mr. Murdock became aware, in the middle part of August, of the confusion over the application of the amended wording in Article 20 of the Lay-Day Crewing Appendix "H" when he got a call from an employee in Newfoundland, Glen Mackie, a Ships' Officer acting in a management position ashore. He had phoned in a message on voice mail asking for clarification of the 2.1 factor in Appendix "H", as he had been advised that it would in effect double the leave of lay-day officers. Mr. Murdock did not speak to Mr. Mackie; he only got his message. Mr. Murdock called Stephen Decker, the Marine Superintendent in Newfoundland, Mr. Mackie's supervisor. The reason he did not speak to Mr. Mackie was that the management bargaining team, at the conclusion of negotiations, were advised to be careful about whom they talked to and what they said about the new collective agreement until it was ratified. He was advised that the ratification process was an opportunity for the bargaining agent to shine in the glory of obtaining a collective agreement. Mr. Bennett had given these instructions.

Mr. Murdock felt awkward discussing it but related that, based on what Mr. Mackie had said and the briefing material the Guild had sent, the impression the employees had was that there was a doubling of leave credits. Mr. Decker did not have the ratification material at the time but the impression came more from the discussions at the actual meeting with the Guild representative and what he said. Mr. Murdock indicated that it was not the intent; that it was to reflect the fact that what had been accumulated in days would now be accumulated in hours. Then Mr. Murdock stated that he was reluctant to discuss the matter in great detail because

of Mr. Bennett's recommendation. On August 31, he received a fax copy of Exhibit U12(a), (b) and (f) from Mr. Decker. Mr. Murdock was concerned about a misunderstanding concerning the issue of the 2.1 factor on page 12 of Exhibit U12(a), and specifically the comment by the Guild. He spoke to Mr. Ballard when he got the fax about the impression the employees got that they were going to get double leave credits, that somehow lay-day credits accumulated by the use of the factor. Mr. Ballard looked at him with a look of disbelief; how could it be; it was not what was discussed at the table. They looked at the document some more, at appendices "I" and "J" at the bottom of page 13 and on page 14 where the comment was that the leave was the same. They scratched their heads because they understood the factor for appendices "I" and "J"; how could they misunderstand the factor in Appendix "H"? They contacted Jeannette Leduc, Chief of the Staff Relations Group at DFO and also a member of the management bargaining team, to make her aware of the problem and discuss what exactly they should do. Since it was not the intent of the employer, this was going to be an issue with the Guild. She contacted Mr. Bennett to discuss this issue. As Mr. Murdock had to get direction out to their managers, during the first week in September he prepared the first draft of the undated memorandum. He met with Mr. Ballard, who made changes, and with Ms. Leduc (more changes) and at some point it was sent to translation. The final text was prepared on September 30. The date was omitted but it was signed off at the end of September 1998. The collective agreement had been signed off on September 17, 1998. The interpretation was sent out after signature.

Mr. Murdock explained the interpretation on page 2 of Exhibit U5. He described how leave was accumulated under the old agreement (Exhibit U8); a day is eight hours as provided under clause 20.05 and clause 20.04 provides a general principle that applies to the entire collective agreement. Mr. Murdock stated that the 7/5 factor made five days equivalent to seven; therefore they were equivalent to the amount to which every officer, regardless of the work system, was entitled. Mr. Murdock explained the example of three weeks leave multiplied by seven and divided by five equals 21 days. In H7 of Exhibit U8 it is stated: "The leave credits will not be converted to hours"; it provided for the same period to be off. He is not aware of anyone taking leave in accordance with the example in Exhibit U10. If anyone did not have the lay-day credits to take his or her leave, either management would advance the

credits or tell the officer about the disadvantages. Mr. Murdock does not know of any situation where an officer was placed by management in a situation of leave without pay. Under the old agreement, under the conventional system officers got 15 days; under the lay-day system they got 21 days; both meant three weeks of vacation. The problem described in Exhibits U10 and U11 could occur because of paragraph "c" of Appendix "H" but the bargaining agent never raised it as an issue. It never came to his attention. He had worked according to the lay-day system himself; it was understood no one would put himself in that situation. Lay-day officers took leave every second year. Every second year, they were off for three months.

Mr. Murdock was at the negotiation sessions of 1998 for the Ships' Officers' collective agreement and there were no proposals on the table regarding vacation leave other than the Treasury Board's undertaking to convert to hours the calculation of all leave. This was affecting all collective agreements across the government; it was a government-wide change. Mr. Murdock did not deal with any other agreements except the Ships' Officers' and the Ships' Crews'. Mr. Murdock did not attend the earlier bargaining meetings but was present when the conversion factors for vacation leave were tabled. Mr. Murdock stated: "The factors were created to ensure that all officers had an equivalent amount of vacation leave based on years of service regardless of work system or crewing they worked on." That principle was spoken to at the table. Mr. Murdock believed this same principle was in the old agreement and the intent behind the factor was to provide an equivalent amount of leave; the factors were to equalize the leave in amount of hours. Mr. Murdock went over clauses 20.02, 20.04 as well as pages 105 paragraph (c) and 107 of the new collective agreement (Exhibit U7) to explain the formula described in the memorandum of Peter Ballard (Exhibit U5). "That is what we wanted to do, that an officer on lay-day would have the number of hours to get the same amount of days but in hours." That "problem" (of taking leave every second year) is still there as it was there before; the factor is not the same but the result is the same.

Mr. Murdock commented that the systems are not comparable. The lay-day system is not the same because there are no days of rest; they work 365.[2] days a year. Under Appendix "I" and Appendix "J", it is quite different; the calculations use average number of hours. Under Appendix "I", there is a 42-hour averaging; the 12 hours per day schedule is still used in one location; it was used on larger ships with two crews. It

is restrictive with "on" and "off" cycles and with penalties if they don't get off the vessels on time because it involves displacing weekends. On the lay-day system, there are no weekends, there are no days of rest; there are 365.[5] working days. Mr. Murdock stated: "Hours don't work on a lay-day system."

Mr. Murdock stated that there were no discussions at the table over the factors. Looking at Exhibit U14, he indicated that it looks like the document that was presented by the employer at the bargaining table. Mr. Murdock confirmed Mr. Herbert's testimony on the exchange of documents. He remembers one specific issue about the lay-day cap as found on page 105, paragraph (f). The bargaining agent wanted tighter wording on the penalty associated with going over the 45-day cap. There were officers who had more than 45 lay-days and management was more concerned about that issue than the 2.1 factor. The vacation bank is different from the lay-day bank.

Mr. Murdock indicated that the employer does not normally schedule vacation leave but looks at the requests made by the employees. During refit and when ships are stopped, the regions ask employees what they wish to do; whether they wish to take lay-days, leave, or be assigned to other ships. These are also occasions for training or for maintenance of ships. With regard to dividing leave by six-hour days as opposed to 12-hour days in the formula, Mr. Murdock indicated that if you divide the total number of leave credits by six you get 42 days of vacation leave; that is not what is said at page 12 of Exhibit U12(b). Management was very concerned about the Guild's interpretation. The cost for Fisheries and Oceans would be significantly higher; it would affect their operations. The proposals made were very carefully looked at by their department as they are the major user of Ships' Officers.

In cross-examination, Mr. Murdock indicated that Exhibit U17, the Ships' Crews' agreement, was signed on April 16, 1999. Mr. Murdock provided the same technical support and participated in all of the negotiation sessions of that agreement. He indicated that Appendix "G" of Exhibit U17, at pages 343 to 347, in addition to the part of the main agreement, constitutes the collective agreement for the Ships' Crews. Mr. Murdock and the Treasury Board negotiator were well aware of the issue of this grievance when negotiating the Ships' Crews' agreement. Mr. Murdock went over the similarities and differences between the Ships' Officers' and the Ships' Crews' agreements. He indicated that clause 22.03 in Exhibit U16 is equivalent to the

46.6-hour averaging on-call system under Appendix "J" of Exhibit U8. Mr. Murdock indicated that the main difference was that in the Ships' Crews' agreement, you had an appendix only for the lay-day system, while in the Ships' Officers', there are four appendices. In the Ships' Crews' agreement, the 46.6 and 42-hour averaging are in the main body of the agreement. Generally speaking, crews and officers work under the same systems. In the Ships' Crews' agreement, clause 16.05 is equivalent to clause 20.04 in the Ships' Officers' agreement. Appendix "B" of Exhibit U16 compares to wording in Appendix "H" of Exhibit U8; the set up is the same; the format is similar but subparagraph (c) is different; the lay-day conversion is different: crews earn 1.17 lay-days while officers earn one lay-day. Mr. Murdock indicated that officers turned the .17 of the 1.17 factor to a higher pay rate; this accounts for the 12.75% pay differential; hence, the different rates of pay in the Ships' Officers' collective agreement. In the Ships' Crews' collective agreement, employees all earn the same rates of pay. A lay-day officer is not entitled to less leave. There is recognition of the 28 days at sea and 28 off in both agreements. The vacation clause under the old Ships' Crews' agreement (Exhibit U16), at page B5, refers back to Article 16. This compares to officers in the old agreement (Exhibit U8), at page H6, which refers back to Article 20. The movement of changing the accumulation of leave from days to hours was the same for Ships' Crews in their agreement. In Exhibit U17, the new Ships' Crews' agreement, Article 16 from Exhibit U16 was replaced by Article 35 on page 45. The provision for the accumulation of leave in Exhibit U17 is found in the main agreement but Appendix "G", "the specific overrides the general", is almost its own agreement for the Ships' Crews. At pages 344 and 345 of Exhibit U17, there are references to annexes; the makeup of the new Ships' Crews' agreement more closely resembles the Ships' Officers' agreement as there is an annex for each system. Annex "C", starting at page 372 of Exhibit U17, corresponds somewhat to Appendix "I" at page 111 of Exhibit U7 but there is no equivalent to the clause found on page 373, which reads:

> *Vacation Leave With Pay*
>
> *Vacation leave with pay shall be granted on an hourly basis, with the hours debited for each day of vacation leave being equal to eight decimal four (8.4) hours per day.*

What is deducted for Ships' Officers under Appendix "I" is 8.4 hours as it is the average hours they work per day over a five-day week; the average comparison is with

someone on a normal five-day work week. Annex "D", at page 376 in Exhibit U17, is comparable to Appendix "J" in Exhibit U17; there are three clauses dealing with vacation leave with pay in Exhibit U17 that are identical to the language at pages 376 in Exhibit U17 but there is a new clause that makes it very explicit the number of hours to be debited. That number is 9.3 hours, the same as for officers under Appendix "J" although they all work eight hours and are on-call for 16 hours and get paid 13 and 1/3 hours per day. This is the averaging used to keep the playing field level. Annex "E", the "Lay-Day Work System", in Exhibit U17 at page 380 is somewhat similar to Appendix "H" of Exhibit U7 except for paragraph (c) where the factor is 1.17 in the Ships' Crews' agreement as opposed to 1.00 in the Ships' Officers'. And on page 383 of Exhibit U17, the 2.1 factor is the same except for an * where there is a clarification to avoid an adjudication with the Ships' Crews: It reads:

> *The factor is determined by dividing the number of hours worked in the Lay-Day Work System (7 x 12 = 84) by the hours worked in the conventional work system (5 x 8 = 40) equals two point one (2.1).*

There is a new clause in the Ships' Crews' agreement on page 383 which states:

> *Vacation leave with pay shall be granted on an hourly basis, with the hours debited for each day of vacation leave being equal to twelve (12) hours per day.*

This language was proposed and agreed to by their teams.

Mr. Murdock is familiar with the "Time Report Sheet" (Exhibit U15) but "not that familiar" with the codes. The "Time Report Sheet" was a planning tool originally in days but changes were made to the system and on September 17, 1998, the system was reviewed. "We had concerns about the employees' records so we reverted the balances to a conventional balance; then we applied the factors. When the change was made to the system around September 17, we converted the lay-day officer's records to that of a conventional officer using the 5/7 factor then multiplied by eight hours. The 2.1 factor was applied to give the officers new lay-day officers' leave records." Therefore, looking at Exhibit U15, 37.2 hours equal 4.6 conventional days, or 6.5 vacation days as a lay-day officer. Mr. Murdock indicated that the Maritime Fleet Management System was in existence for at least two years at all locations, and close to five years in the Western Region. The Gordon Reid vessel is a Pacific area vessel. Looking at the record,

from the bottom line of the last page of Exhibit U15, one sees 200 hours which represent five weeks of 40 hours of vacation. If one divides 200 by 5.714 hours, one gets 35 days which was the lay-day vacation entitlement under the old Ships' Officers' agreement. Using the 7/5 factor came to the same result if you calculated in days five weeks of five days equal 25 days multiplied by 7/5 equal 35 days. Mr. Murdock believes the 5.714 factor was being used for the administration of other leave credits but not for vacation leave credits.

Mr. Murdock attended the June sessions of the negotiations for the Ships' Officers. His role was one of technical support. It was not his job to create the language for the collective agreement but he had some input. Mr. Bennett created the language. Mr. Murdock was not present at the signing of the agreement on September 17, 1998. Mr. Murdock confirmed that Exhibit U15 (pay stubs) were typical pay stubs for purposes of pay. The 42 hours noted are for a seven-day week. When asked if it represents a six-hour day, Mr. Murdock stated that there are no hourly rates of pay for lay-day officers. Mr. Murdock added that the 5.714-hours factor came from dividing a 40-hour week by seven days. Conventional officers are scheduled on a 40-hour week; the averaging system 42 hours (Appendix "I") officers work a schedule of 12-hour days but are debited 8.4 hours per day of leave because it is the average day they work; days off are displaced weekends and not days of work: this average work week is 42 hours, divided by five working days equals 8.4. When asked about the lay-day officers, whose work day average is six hours, Mr. Murdock stated that "it does not work that way".

William Allan Bennett was the Chairperson of the employer's negotiation team involved in the bargaining of the Ships' Officers' collective agreement (Exhibit U7). He was also involved, at the last moment, in the negotiation of the previous agreement (Exhibit U8). His involvement was to replace the chief spokesperson during the last week or so of the 1990 round of bargaining. He has some familiarity with the lay-day operating system, going back to the early eighties when he was working with Fisheries and Oceans. It started with two vessels. It is a system which enjoyed widespread use on the West Coast with "tugs". The Guild and the employer adapted to their needs the concept that was "kicking around" in the "tug" industry.

In March or April 1998 negotiations began for Exhibit U7. The main proposals from the bargaining agent concerned money issues or related to long-standing differences in Exhibit U8 which had been without adjustment and which needed to adapt to the management of the fleet. The issue of vacation leave was raised by the employer "to change the manner of using vacation leave from days to hours everywhere. We did this everywhere; it is a proposal my colleagues and I made at all the tables." What was conveyed was that they had to change the accumulation of vacation and sick leave from days to hours. "In principle, it was fine, only a matter of getting down and writing it." Article 20 had to change from days to a number of hours that correspond to the same number of days based on an eight-hour day. This was applicable to all Ships' Officers. He had to take the 40-hour work week and match that to the work systems they had to work with. They had to change from 40 hours to reflect the work weeks under Appendices "J", "I" and "H". There was no intent to change paragraph (c) of page H2 in the old agreement. They had to add a paragraph before (c) on page H7 because the factor 7/5 had to be changed. With regard to vacation, Mr. Bennett had not intended to change anything. The change was proposed in March 1998, agreed to in principle, and the wording submitted in June 1998. Exhibit U14 looks like the wording he submitted but he submitted the wording for Appendix "I" and Appendix "J" at the same time. This was done at a meeting of the two teams, face-to-face at L'Esplanade Laurier. Mr. Bennett cannot recall exactly when that was done. Mr. Bennett cannot recall the discussions he had in this regard with the representatives of the bargaining agent; he remembers there were a couple of discussions. Mr. Bennett remembers there was a slight error for the 46.6-hour system which was picked up by the other party and it was corrected. The discussions were about the bargaining agent's concerns that the factor would generate the right amount of vacation leave, i.e. the 10 hours for those earning three weeks of vacation. From Mr. Bennett's perspective, the wording created the same amount of leave the Ships' Officers already had. In one case, the factor was adjusted. Mr. Bennett had discussions with Mr. Herbert when Mr. Herbert pointed out an error on the 46.6-system. He is pretty sure that is what Mr. Herbert did. The discussions were held in a room next to where the two teams met. Mr. Bennett explained to Mr. Herbert how the employer team generated the factors. He does not recollect how he explained it but believes that this was done "by taking 120 hours to generate 21 hours" or "252 hours for three weeks" to come up with the factor. Mr. Bennett does not recollect if he

mentioned "84/40". In Mr. Bennett's mind, this was an "administrative issue as opposed to substance"; he was not proposing a change to the amounts.

Asked to look at the commentary on page 12 on Exhibit U12(b), Mr. Bennett was asked if Mr. Herbert has asked him at the meetings questions that were the same as the comments and he replied: "Not that I recollect. I'm not sure what this means". When asked if anybody else asked him something similar, Mr. Bennett pointed out that only Mr. Herbert and he were present during those discussions. Asked about discussions at smoking breaks, Mr. Bennett said they "had a lot of those". "I don't recollect this being a big issue." Mr. Bennett said he did not recollect much. Asked if he recollects stating, regarding 2.1, that four weeks of vacation would be equal to four weeks off the job with sufficient credits to cover lay-days, Mr. Bennett replied: "There should be sufficient credits." "One issue was that they, the Ships' Officers, had a lot of lay-days in their bank." On this issue, Mr. Bennett does not recollect other discussions. Sometime late in August, Mr. Bennett learned from Jeannette Leduc or Bob Temple that the Guild, as part of their ratification process, was telling its membership that the vacation leave had been doubled. Mr. Bennett had seen Exhibit U12(b) and the comment on page 12 when Mr. Dempsey had given him a copy sometime in mid-June. He met Mr. Dempsey after they reached an agreement in principle or right around that time. The meeting occurred on the second floor of L'Esplanade Laurier in the restaurant area. Mr. Dempsey had asked that he take a quick look at documents to see if there was anything he disagreed with because of difficulties encountered by the bargaining agent in the past round with ratification. Mr. Bennett had never done this before, "not with any union". Mr. Bennett knew there had been an issue with the last collective agreement, with the penalty clause; the parties had two different interpretations. The question subsequently went to adjudication and the Guild lost. What Mr. Dempsey wanted was that Mr. Bennett take a quick look to see if it stood. Mr. Dempsey took back the copy Mr. Bennett had scanned. Mr. Bennett did the scan; he concentrated on a few things like the change to the penalty clause. Looking at the comments after the change to "Vacation Leave with Pay" in Exhibit U12(b), Mr. Bennett said he would have ignored those; his only comments then were about pointing to inflammatory words about management. Mr. Bennett never saw Exhibit U12(a).

After he received the call from Jeannette Leduc or Bob Temple, Mr. Bennett's reaction was to call the president of the Guild, Maury Sjoquist, to say "we never did

that." He also talked to Mr. Herbert. They spent a couple of hours trying to convince each other of their interpretation and ultimately agreed to disagree. Mr. Bennett had one conversation with Mr. Herbert and a "couple" with Mr. Sjoquist. The gist of Mr. Herbert's suggestion to Mr. Bennett was "the employer must have double the leave to generate some money for the Ships' Officers". Mr. Bennett disagreed with Mr. Herbert and stated that if this had been the intent, the employer would have done it through Article 20 not through the factor.

In cross-examination, Mr. Bennett confirmed that he does not recollect what was said. Mr. Bennett stated he operates from the principle "never give them more than they ask for". Mr. Bennett agreed that he had discussions with Mr. Herbert a day or so after he tabled the wording and that they had a chance to study the factors. Mr. Bennett admitted there were questions raised by Mr. Herbert about the factors and that there were discussions with Mr. Michaud during smoking breaks. Mr. Bennett had daily discussions or conversations with Mr. Herbert and Mr. Michaud; they "were chatting". Mr. Bennett does not recollect the substance of the "chats" he had; he recalls what occurred during the negotiation meetings but not the discussions. Mr. Bennett believes that the Guild did bring up at the conclusion of the negotiation that the bargaining agent would send him the ratification documents for the reason explained as relating to problems with the last set of negotiations. They wanted him to review the package before they sent it to their members. When Mr. Dempsey gave him Exhibit U12(b), Mr. Bennett scanned each page. Mr. Bennett did not have any problem with the document or said something to that effect. Mr. Bennett believed the Ships' Officers had sufficient lay-days to cover their vacation. If the question had been put to him to the effect that the change in the factor meant that four weeks vacation leave is four weeks off the job and there are sufficient credits to cover a corresponding number of lay-days, Mr. Bennett would have answered "yes" but he cannot recall whether he did or not. Mr. Bennett claims it is not his role to approve what the Guild says to its members. Perhaps in looking at Exhibit U12(b) if the comment had said "generate" Mr. Bennett might have paid more attention but he doubts it because, in his mind, the change was only an administrative one.

Mr. Herbert did not tell him that if Mr. Bennett's interpretation was correct they did not have a deal. Mr. Bennett says he almost did not sign the collective agreement. Mr. Bennett was familiar with the fact that Ships' Officers would save up two years of

vacation so that when they would complete their on-cycle on vacation they would have enough lay-days to cover their off-cycle.

Mr. Bennett reviewed the document (Exhibit U5) drafted by Mr. Murdock before it was signed by Mr. Ballard. Mr. Bennett knew that as soon as the collective agreement was signed, a grievance would be filed. Mr. Bennett was involved in negotiating the Ships' Crews' agreement after the filing of the present grievance.

After discussions with Mr. Sjoquist, Mr. Bennett was convinced that the words in the collective agreement were clear and that they did not give an increase in leave credits.

Mr. Bennett explained that the weekly rates of pay (on page 73) are obtained by dividing the annual salary by 52.127 and the daily rates (on page 77) by dividing the weekly rates by seven. Mr. Bennett also stated that, when Ships' Officers take two full complements of leave together, they get two months off and, if that was such an injustice, he would have expected to hear about it but he did not.

Argument for the Guild

The Guild's arguments are in three parts: first, what is clear under the old agreement and what has happened in negotiations; second, what is clear and uncontradicted in the new agreement; and third, as an alternative argument, the estoppel created by the employer's actions leading to the signing of the new agreement.

It will be the Guild's submission that because of the employer's actions leading to the signing of the agreement, the employer is now estopped from ascertaining an interpretation contrary to the clear language found in Exhibit U12(b) and to the interpretation put forward by the bargaining agent since June 16, 1998.

Mr. Bennett said he almost did not sign the collective agreement and his answer as to why he did speaks volumes as to why the parties are here; Mr. Bennett ultimately said the words supported management's interpretation. The Guild submits the words do not support those statements and the events between August and the signing of the agreement in September, as well as the efforts to review, revise and come up with Exhibit U5 in October, also indicate management was not convinced the language

supported their view. That is the position adopted since Exhibit U5 but was not the reaction of management in the regions when they read the changed clause. The Guild will turn to the Ships' Crews' agreement only to point out the language in that agreement, which admittedly is clear and which was negotiated in the face of the present grievance; it confirms the Guild's interpretation of the language previously negotiated in the Ships' Officers' collective agreement. In its simplest terms, there was a mistake of law negotiated by management's negotiation team in the drafting of language in the Ships' Officers' collective agreement, a mistake which management sought to distance itself from in the Ships' Crews' negotiations by utilizing different language to achieve their stated purpose. Mr. Jewitt added that the adjudicator is powerless to relieve against a mistake of law because the collective agreement must stand as agreed.

Turning to the old Ships' Officers' collective agreement (Exhibit U8), what is clear is starting at Article 20 page 28, Vacation Leave With Pay. The language of clause 20.02 speaks of vacation leave credits and accumulation for all work systems and is expressed in number of days based on years of service. One notes in clause 20.02 as well that the clause was subject to three appendices and those contain a number of clauses. It suffices to note that clauses 20.02 and 20.04 are subject to the appendices. In clause 20.03, there is a conversion to an hourly credit using eight hours and that is subject to Appendix "H", Appendix "I" and Appendix "J" but not subject to Appendix "K", which deals with the 40-hour work week.

Appendices "H, "I" and "J" are always dealt with in a block under the old collective agreement. Clause 20.02 really deals with the accumulation of a bank of credits. Clause 20.03 was an administrative clause that converted vacation leave to an hourly credit and permitted officers on a 40-hour week to have their day's pay on a day of vacation leave. When going to Appendices "H", "I" and "J", the evidence is clear that the appendices were created to provide a day's pay while on vacation leave and in all of those systems it is clear these officers were paid their average day's pay because the number of hours each of these officers worked per day was not equal to eight hours.

The evidence is clear under this agreement (Exhibit U8) that an officer on the lay-day system who was on vacation on any work day, whether on an "on" cycle or on

an "off" cycle, received the equivalent of six hours pay, this for vacation leave or any other leave. Under Appendix "I", officers also work a 12-hour work day schedule but are paid for vacation the equivalent of 8.4 hours per day. In Appendix "J", the 46.6-hour system, officers received 9.3 hours per day although they work eight hours on a regular work day but were on call the other 16 hours (46.6 divided by 5 equals 9.3 hours per day).

Clause 20.04 never had any application to any work system except the 40-hour work system under Appendix "K". It had no application and was never applied to appendices "H", "I" and "J". Again, the equivalent of six-hours pay per day is the daily pay for officers under Appendix "H". There is another logical explanation why clause 20.04 had no application under the old Appendix "H": vacation was permitted on days when the officers would have no work at all, on their lay-days.

The example of Mr. Murdock who waited two years to get three months off is a useful illustration, but Mr. Jewitt disagrees with its implications. In that example, there are eight weeks of vacation and four weeks of lay-days. There is a problem to separate the leave. If clause 20.04 is applied to vacation leave and 12 hours are debited for an on-cycle, there is nothing for the lay-day or "off" cycle. Mr. Jewitt submitted that, based on the evidence of all parties and clear wording of clause 20.04 under the old agreement, it had no application to officers on the lay-day system and under the new agreement it cannot have application to them. It makes no sense to debit hours on lay-day and, in fact, when one turns to Appendix "H" in the old agreement at pages H6 and H7 the only portion of Article 20 imported into the appendix is just the rate set in Article 20. Then there is a note: "leave credits will not be converted to hours". There is a good reason for this phrase. Then going to the top of page H7, there is the factor 7/5 which, it was said, covered the fact that on a lay-day system, it was designed so that all days would be considered working days with no days of rest; there was no need to convert a day of vacation for a day's pay because all days are working days. One simply accumulated days per month and used the 7/5 factor to ensure the bank represented seven days per week for pay purposes or 42 hours of pay or the equivalent of 42 hours of pay for a week of seven days or six hours per day was the officers' pay per day. The evidence confirms that it was what indeed happened. The officers received a day's pay of six hours just as they did on any other day. The pay is maintained at the same daily rate, which is all a lay-day

system does. The factor was expressed as 7/5 because they worked seven days per week, all days were working days and there were no days of rest. When attention is directed to H7, one sees the words which can be contrasted to those in Appendices "I" and "J". Let's note that it is "credit" again:

> *… all vacation leave credits for officers entering or in the lay-day system will be adjusted by a factor of 7/5…*

Under Appendix "I":

> *An officer shall have his accrued days of vacation leave with pay converted to an hourly credit by multiplying the number of days by eight point four (8.4) hours.*

Under Appendix "J":

> *An officer shall have his accrued days of vacation leave with pay converted to an hourly credit by multiplying the number of days by nine point three (9.3) hours.*

Going back to H1, the structure of this appendix has a bit of a preamble; the employer has the option of adding vessels to that system and there is: "Notwithstanding the provisions of the Ships' Officers Collective Agreement, the following conditions shall apply." There is mandatory language. For the purpose of this appendix, the following applies, then one goes to Article 20; the specific overrides the general. Article 20 is a general clause and the "Notwithstanding" indicates that the provision of clause 20.04 does not apply.

Going back to page 77 of the main agreement, there are the hours of work and overtime clauses. Article 30, it should be noted again, is subject to appendices "H", "I" and "J". Clause 30.02 makes it clear that officers under those appendices are subject to these appendices "H", "I" and "J" with a catch-all phrase that "all other officers are subject to Appendix "K"". This reinforces that the plain meaning of the agreement is that clause 20.04 has no application to appendices "H", "I" and "J".

Mr. Jewitt added that a further reason why clause 20.04 could not have application to the appendices is that it would upset the concept of equivalency for vacation under the old agreement. Appendix "I" has no provision "shall not convert to hours". In fact, it provides a conversion factor to come up with an hourly credit of 8.4. If one were to deduct 12 hours, which is what these officers would work after using

that factor, in other words applying clause 20.04, one would be depleting these officers' accumulated vacation credits at a rate greater than what was accumulating per day. That is why both the agreement and the practice provided that only 8.4 hours were to be deducted. The effect would have been to deduct more hours than officers were receiving pay.

Under the old agreement, there was a daily credit and the average daily pay was expressed in hours; that's how all were paid. In practice, for lay-day officers, a day was six hours; there was no question of 12 hours being their average daily pay.

What was clear in the evidence of the negotiations is that the specific factors and language in the new agreement for adjusting were not tabled until June. What is also agreed is that it was the employer's proposal and that Exhibit U14 was the language proposed. The concept was introduced in principle in April and the Guild accepted it, in principle, subject to reviewing the factors. It is agreed on the evidence that there was very little discussion surrounding this proposal and, to sum up the evidence, the factors were presented at the end of a day at the beginning of a week with very little explanation or discussion when they were tabled and the Guild took the factors and the language away in caucus. The witnesses from the Guild's bargaining committee effectively made sense of the factors for appendices "I" and "J", but the 2.1 factor on its face increased and the credits also increased. It is effectively a doubling of the credits and as a result of their review of the language presented, the committee asked its spokesperson to go and verify that the factor was correct as stated and this was done. Mr. Bennett confirmed it was done during a discussion outside of the committee. Mr. Herbert has testified that he asked if the new factor meant that there would be sufficient credits to cover the lay-days. Mr. Bennett has little recollection of specific conversations and his evidence is that, if there was discussion about there being enough credits to cover lay-days, Mr. Bennett would have said yes because he thought the problem was the reverse, that there were more than ample credits in the officers' lay-day banks and that most officers had accumulated lay-day banks. He testified to seeing the explanation of Exhibit U12(b), page 12. Mr. Jewitt had pointed out to Mr. Bennett that Mr. Herbert talked of the festering problem of having enough credits to cover lay-days for vacation. He also pointed to the language used by Mr. Bennett and that used in Exhibit U12(b) and Mr. Bennett agreed he was aware of it. In light of the fact that Mr. Bennett had testified that he

does not understand the comments and given his difficulty in recollecting, Mr. Jewitt submitted there is no major contradiction or conflict in the evidence that needs to be resolved. The fact of the matter is the bargaining agent did question the meaning of the factor and Mr. Bennett agreed about the accuracy of their interpretation and correctness of the factors; clearly Mr. Bennett was aware the bargaining agent had questioned it and Mr. Bennett reconfirmed the 2.1 factor and clarified and corrected one of the other factors. There is absolutely no question that as a result of applying the employer's plain language, the Guild's negotiating committee understood that both the effect and intent of this proposal would be to provide sufficient vacation credits to cover the festering problem of the "on" and "off" cycle. Mr. Jewitt submitted that the case law provides that the party on one side of the negotiations does not have an obligation to make it clear to a party negotiating on the other side what the actual impact of the negotiated principle might be. Mr. Jewitt submitted as well that it is not the first time parties have walked away from an agreement with different understandings. He submitted that counsel for the employer does not argue that the employer made a mistake in law. Mr. Jewitt indicated that he understands why the employer takes that position but submitted that on the law, the Guild did question these factors and then accepted a proposal as drafted and put it forward to the membership. Mr. Jewitt submitted as well that what the Guild understood, when they accepted that proposal, was that it was intended to correct how vacation was accumulated under the lay-day system and in effect did provide for lay-day officers to have a full four weeks off the job with pay when entitled to, not get only half of that amount because of the "on" and "off" duty cycle.

The language proposed and accepted, when compared to the language in the old agreement, is clearly for the purpose of granting vacation leave. It is clear that all vacation leave credits will be multiplied by a factor of 2.1; that was understood. Pursuant to Mr. Michaud's explanation that 2.1 times 160 hours equals four weeks of vacation or 336 hours divided by six-hour days, which is what the officers pay per day was, one arrives at 56 days which represents a complete "on" and "off" duty cycle. It is simple to understand when it is applied that way and Mr. Jewitt submitted it is the only way to apply it.

During any of the discussions there was no mention made about altering the pay artificially or of debiting 12 hours instead of six hours. There were no discussions

except the proposal put forward; there was no discussion about clause 20.04 that had never applied in the past having suddenly an application.

When one looks at the new agreement, the old clause 20.03 is removed which had "Subject to Appendices "H", "I" and "J"" and if clause 20.04 would find new application in the new agreement, and Mr. Jewitt insisted it cannot apply for reasons stated above, if it is to apply it must apply to appendices "H", "I" and "J. However, the employer continues to use the average for officers covered in appendices "I" and "J" and Appendix "H" is simply singled out from the appendices. That shows that there was not an agreement to start to use clause 20.04.

Then there is the issue of the language of the following clause that is not there in the Ships' Officers' agreement but which is found in the Ships' Crews' agreement (Exhibit U17) at page 383:

> *Vacation leave with pay shall be granted on an hourly basis, with the hours debited for each day of vacation leave being equal to twelve (12) hours per day.*

Mr. Murdock testified that Appendix "G" of the new Ships' Crews' agreement (Exhibit U17) is now more in the same format as the Ships' Officers' agreement with a main agreement dealing with vacation leave at pages 348 to 350. The same language is found in the main agreement for the conversion to hourly credits but a different clause is found at the bottom of page 349; the clauses are almost a mirror of Article 20 but when one comes to clause 20.04, it has been amended. This point is notable as in the old Ships' Crews' agreement (Exhibit U16) there was a clause identical to clause 20.04 at page 81; it was clause 16.05.

If the language in clauses 20.04 or 16.05 is supposed to operate in the fashion that Mr. Ballard's memorandum (Exhibit U5) suggests and if it is supposed to be clear, then there was no need to change that clause in the Ships' Crews' agreement. This change and the clauses referred to at page 383 are confirmation of the fact that the language drafted and proposed by the employer to the Guild, as well as any of the negotiations, was not drafted to debit 12 hours and the effect under this agreement is that six hours have not disappeared and there is no authority to make those six hours disappear. There is no authority for this Board to rectify the agreement to make those six hours disappear as Mr. Ballard and Mr. Murdock attempted to do through U5.

Mr. Jewitt has submitted a book of authorities containing twenty-one decisions and referred me to excerpts from *Canadian Labour Arbitration*, Third edition, by Messrs. Brown and Beatty at section 4.1000. Mr. Jewitt argued that it is rare that a collective agreement is set aside because of a mutual mistake. Mr. Jewitt also referred to a definition of "notwithstanding" from the Oxford Dictionary as well as excerpts from *Canadian Labour Arbitration* about estoppel. Mr. Jewitt indicated that many cases involved fact situations extremely similar where a debate arose whether a collective agreement was concluded because the parties walked away with different interpretations or where the actual agreement signed has, even in transcription, mistakenly stated a premium or a rate or a clause. In these cases, there are comments to the effect that one party would not have entered into the agreement if it had known of the other party's interpretation. Mr. Jewitt went to tab 15, the decision in *PPG Industries vs Energy and Chemical Workers Union*, [1986] OLRB Rep. January 143; paragraphs 5 to 7 page 144 describes the essence of the case where both parties had mistaken the COLA fold-in rate. This did not invalidate the agreement. At tab 13, is a decision which deals with one party making a unilateral mistake; *Niagara Bronze Limited v. Glass, Molders, Pottery, Plastics and Allied Workers International Union* [1989] OLRB Rep. August 857 is again dealing with a COLA clause which was supposed to lapse but the employer did not notice a note, see paragraph 2, page 857, which maintained the articles and sections not mentioned in the proposals, and wished to rely on the clause in the earlier agreement that said the clause would lapse with the agreement. Mr. Jewitt referred me to paragraphs 5, 6, 7 and then to paragraph 9 which specifically deals with the concept of whether the union should have said something when an offer by the employer was made.

At tab 7 is a decision where the mistake and confusion were that the union believed the wage offer was offered across the board while in fact the documents do not reflect that; *White Spot Limited and Canadian Food and Associated Services Union* [1976] CLRBR 145 deals with a situation where a memorandum of agreement is found to satisfy the definition of a collective agreement. Mr. Jewitt directed me to page 152, the second paragraph and the last part of the third paragraph.

At tab 5 the decision in *Manitoba Government Employees' Union and ISM Information Systems Development Manitoba Corporation* (1993), 30 CLRBR (2d) 89 deals with confusion and direct differences in intent of negotiated increase. The

employer had made an offer believed to apply to the annual rate but instead it applied to the hourly rate which made a difference to amounts calculated. Mr. Jewitt directed me to the third paragraph on page 89. The employer was present at the meeting where the increase was described as an hourly rate and it was ratified by the union membership; then the employer representative refused to sign the agreement, but the issue had crystallized at that point. The collective agreement was upheld as ratified despite the different intent and mistake made.

At tab 3 is the decision in *Puretex Knitting Co. Ltd. and Canadian Textile and Chemical Union, Local 560* (1975), 8 LAC (2d) 371 where two different interpretations were held by the parties. Mr. Jewitt directed me to page 373 to the second and third paragraphs.

At tab 10 is a British Columbia Court of Appeal decision in *Saanich Police Association v. District of Saanich Police Board* (1983), 43 B.C.L.R. 132. The Court reviewed a decision upholding a grievance where the interpretation of a clause was disputed. The interesting part is, the union knew the employer held a completely different view of the interpretation it held. Mr. Jewitt directed me to pages 133 and 134 and to the last two paragraphs on page 137. The Court upheld the board's decision that refused rectification and denied the estoppel argument. The Guild believes the position is similar in the present case where the employer believes its proposal did not confer a benefit but it does.

At tab 1 is a decision of the adjudicator in *Trane* (Board file 166-2-13737), dealing with an appendix improperly transcribed as the transcription was taken from another agreement used for the transcription. Mr. Jewitt directed my attention to page 9 which deals with the equitable doctrine of rectification. After reviewing the evidence, the adjudicator found there appeared to be no consensus on the intent and there could be no rectification. He applied the clear words of the provision.

At tab 11 the decision in *Hamilton Medical Laboratories and County Medical Laboratory and Ontario Public Service Employees Union* (1983), 10 L.A.C. (3d) 106 reviews the law relating to the doctrine of mistake. Mr. Jewitt referred me to pages 122 to 124 where classic reasoning is found as to why a mistake should not render void a collective agreement. He referred as well to page 124 to the indented

quote to the situation where people walk away from the table presumably not "*at idem*" but wishing to avoid a strike or ensure that the matter is concluded. At page 125 Mr. Jewitt referred me to the second paragraph. In that case the arbitrator found that no cap was placed on what the total increase would be for an employee under the agreement.

Turning to the question of estoppel as the Guild's alternative agreement Mr. Jewitt submitted that an examination of Exhibit U12(b) and the clear and uncontradicted facts that at the conclusion of negotiations the Guild expressed concern and Mr. Bennett confirmed their understanding of the disputed provision and when Mr. Dempsey brought him Exhibit U12(b) for review the concerns there were expressed. Mr. Bennett was as aware as Mr. Herbert that in the past there had been language change to a penalty clause. In Mr. Herbert's words when the employer took a contrary interpretation to what its team took at the bargaining table and succeeded at adjudication in having its interpretation upheld, the Guild was accused of lying to the membership in order to get approval for their contract. Mr. Bennett knew that the Guild in this round did not want to be in that position again and wanted to ensure both parties agreed with the interpretation of the collective agreement. They had agreed, and it was admitted that this was an unusual step, that prior to sending the ratification package to its members, Mr. Bennett, chief spokesperson for the employer, would review and approve the package. This was done. Mr. Bennett confirmed but tried to distance himself, and he said he "scanned each page"; he said he found inflammatory words; therefore he scanned clearly enough to have noticed words that were "pejorative to the employer". Mr. Bennett was sufficiently aware of the reliance the Guild would put on that review and by scanning each page he had to have looked at the explanation for changes in Appendix "H", "I" and "J". When one looks at "I" and "J" the explanation given is clearly and simply different and it "jumps out" when compared to the explanation given for Appendix "H". Appendices "I" and "J" talk of administrative amendments that clearly have "no effect on actual vacation entitlement". Appendix "H" is totally different it states "The inclusion of this factor now means that four (4) weeks vacation leave is four (4) weeks off the job and there are sufficient credits to cover a corresponding number of lay-days". All other witnesses knew what that means, Mr. Coughtry, Mr. Michaud and Mr. Murdock. Mr. Murdock confirmed that Mr. Bennett as a lay-day expert is aware of the problem

described in U10 and U11 and he knows lay-days don't accumulate during vacation leave and Mr. Bennett says he didn't find any problem with the package. The Guild relied on that review and the package was translated and sent to the Guild members. The detriment with respect to reliance on the interpretation contrary to Article 20 is that the bargaining agent further relied to its detriment on a major component supporting the ratification of the collective agreement. Even though the employer was admittedly aware of the bargaining agent's interpretation in August, the agreement was signed on September 17 and it is only after the agreement was signed that Exhibit U5 was issued. At that point the deal was concluded.

The evidence of Mr. Michaud and Mr. Murdock is that members of regional management reviewed the change to the language and immediately understood it to double the previous vacation leave entitlement. The importance of the benefit cannot be emphasized enough; to 60% to 70% of the members it was a major benefit. Despite conversations with Mr. Herbert, after the ratification was concluded, Mr. Bennett said initially he almost didn't sign the agreement; then "I was convinced that the language favored Management"; he knew it had been ratified. This is a classic situation of detrimental reliance by the bargaining agent on an interpretation; the employer is now estopped from advancing a contrary interpretation.

Mr. Jewitt referred to one last case at tab 18 between *Sperry Vickers Division Sperry Inc. Canada v. International Association of Machinists and Aerospace Workers, District Lodge 717*, [1983] O.L.R.B. July 1208. This case is the reverse of the *Niagara Bronze* (supra) case. Mr. Jewitt referred me to paragraphs 22 and 26 to 30 and to pages 1217 and 1218 and paragraph 31. He drew my attention to this in regard to the reliance of the union and the employer being estopped from alleging a different interpretation.

In summary Mr. Jewitt stated that on the clear language of the clause the grievance should be allowed; the bargaining agent at no time induced the employer to make false promises; it questioned three times the proposal; the proposal was reviewed and the proposal was ratified. The proposal was clear and the employer is now estopped from alleging a different interpretation.

For the Employer

Mr. Garneau started his argument stating that the issue to be decided can be found in three documents: the grievance, Exhibit U1, which states in part: "I wish to grieve the Employer's stated intent to misapply the administration of my vacation leave credits in my recently negotiated collective agreement as stated in Mr. Peter Ballard's undated communication"; Mr. Ballard's memo, Exhibit U5, which deals specifically with the wording of Appendix "H"; and the collective agreement, Exhibit U7, Appendix "H" at page 107 under Article 20 that states:

> *An officer shall earn vacation leave credits at the rate prescribed for his years of continuous employment, as set forth in Article 20 of the Collective Agreement, for each calendar month for which he receives at least two (2) weeks' pay.*
>
> ****
>
> *For the purpose of granting vacation leave for officers subject to the lay-day system, in accordance with this Appendix, all vacation leave credits for officers entering or in the lay-day system will be multiplied by a factor of two decimal one (2.1). For employees leaving the system, vacation leave credits will be adjusted by reversing the factor.*

These are the words, Mr. Garneau indicated, Mr. Ballard interpreted in his memo, with reference to an example which can be found at the bottom of page 2 and the top of page 3. Mr. Ballard gave an example of 120 hours multiplied by the factor 2.1 to get a result of 252 hours and then to return to a number of days he divided by 12. The grievance is a disagreement with that interpretation. Then there is Exhibit U6 which is a response to Mr. Ballard's memo.

Mr. Garneau stated that, when an adjudicator is asked to interpret a clause of a collective agreement, the "specific rule" applies. Mr. Jewitt has said several times that the wording is clear, that there is no ambiguity and Mr. Garneau says the same thing; it is clear. The interpretation advanced by the employer is clear because it is based on the wording of the collective agreement and nothing else but the collective agreement. The formula in Mr. Ballard's memo reflects specifically what the agreement says.

It is Mr. Garneau's submission that the interpretation Mr. Jewitt advances and that Mr. Herbert was advancing in Exhibit U6 is not in the collective agreement. This is the reason that three days of hearing were used presenting evidence on the interpretation of this clause, hearing extrinsic evidence to justify the interpretation advanced by the bargaining agent, namely that six hours by which they seek to calculate vacation leave credits in terms of days. It is a fundamental rule of interpretation of collective agreement that generally the intention must be gathered from the instrument itself; the expressed meaning stated the intention.

Mr. Garneau referred me to Palmer's *Collective Agreement Arbitration in Canada*, (Third Ed.) (1991), Chapter 4 on the Interpretation of the Collective Agreement. There are exceptions to every rule and, if there is an ambiguity in the terms of a collective agreement, other extrinsic matters must be referred to in order to resolve that ambiguity such as the negotiating history. An ambiguity can be latent or patent but neither party has alleged that there was an ambiguity.

Mr. Garneau proposed to show with reference only to the words of the collective agreement that Mr. Ballard's memo is clear and correct. He went back to Exhibit U5 and the example and he read from paragraph 2. Why divide by 12 because the agreement says at (c) that the work day will consist of 12 hours. In Appendix "H" that is the only definition of the work day for the lay-day system in that collective agreement.

There is no reference to "six hours" anywhere in this collective agreement, nor in the previous collective agreement; it is simply not there. Much has been said in extrinsic evidence that this "six hours" come from the pay system but the pay provisions of this agreement make no reference to an hourly rate of pay for lay-day officers. In this agreement one is looking at a pay system based on an annual rate of pay not an hourly rate of pay. When pay in hours occurs the hours are converted from the lay-day system to the conventional system. When pay for an hour occurs, it is in accordance with the conventional system. The provisions for pay when dealing with the lay-day system are found on three pages: they start with page 73 for annual rates, at page 75 for weekly rates of pay which is the annual rate divided by the number of weeks in a year and at page 77 for the daily rates of pay achieved by dividing the annual rate by the number of days in the year or 365.25.

Going back to Appendix "H" at (d) it is stated:

> *(d) An officer will be compensated at the applicable annual rate of pay as described in Appendix "A3", "B3" or "C3" of the Ships' Officers Collective Agreement. In order to maintain the officer's weekly rate of pay, the officer must either:*
>
> *(i) work,*
>
> *(ii) be on lay-days, or*
>
> *(iii) be on authorized leave with pay.*
>
> ****
>
> *In the event that an officer does not work and is neither on lay-days nor on authorized leave with pay, his regular pay shall be deducted by an amount equal to his lay day rate of pay for each day's absence, unless the officer has received an advance of lay-day credits.*

Then, by proceeding to Exhibit U7 at page 104 at (b) is a definition of "lay-day" followed by (c) which states that:

> *The work day will consist of on-duty cycle of twelve (12) hours of work per day. For each day worked or for each on-duty-cycle day on which an officer is on authorized leave with pay other than compensatory leave and vacation leave with pay, an officer shall earn 1.00 lay-day in addition to the officer's Lay-Day Pay".*

It is clear that an officer has to work 12 hours. On the lay-day system officers work six months of the year and are off six months of the year. The great majority of the officers work one year; they then use two years vacation the following year to cover a work cycle and the subsequent "off" cycle. They work one day and are off another; their pay is an annual rate of pay and is maintained over 365 days; they get paid every day. Nowhere in there is there a reference to "six hours"; what there is, is a 12 hours work day. This is what the formula has done; it has calculated vacation leave using the 2.1 factor to multiply the vacation leave credits by 2.1.

Mr. Jewitt has alleged here, in the alternative, an estoppel argument. An estoppel argument is used to say that an adjudicator can interpret a collective agreement not in the way it reads because one party made a clear, unambiguous

promise to the other party, that it would do it in another way and made it very clear and the other side relied on that promise to its detriment; "it's too bad if it says what it says because you told us you wouldn't read it that way". Was a clear unambiguous promise made that it was so, that the employer wanted not just to double the leave credits as 2.1 does but also double the days of vacation which lay-day officers were entitled to? Going back to the example in Exhibit U5 one would end up with 42 days of vacation leave. The result of the equation will not be 21 days but 42 days resolving the "festering problem", a phrase Mr. Garneau coined using an expression of Mr. Herbert, caused by the fact that the agreement said "you can't get a lay-day credit while on vacation" see paragraph c at page 105. If the vacation is used up on a work day cycle and there are no lay-days in the bank during the next off cycle there is nothing to use to be paid; that problem doesn't arise because vacation leave credits are only three weeks a year but because of the cycle system. Nobody puts themselves in that position. Mr. Michaud never recalled anybody who did. What happens generally is that the employees go on leave when they have enough leave credits to cover the off cycle after their leave, as a general rule every two years; then they can be sure of having enough. They don't lose any pay and they get as much leave as anybody else over a two-year period. All have three weeks; after ten years it's four weeks; whether on the conventional system; whether on one or the other system all have the same number of days of leave per year. The officers had that under the old agreement; it was accomplished by the factor and they have the same thing under the new agreement with the new factor.

On the question of estoppel there were no promises made by the employer that the bargaining agent relied on to its detriment. What the employer representatives did, when they started negotiations, was say that they wanted to change Article 20, the accumulation of leave under 20.02 from days to hours because they were doing that everywhere; that's all they wanted to do. The employer didn't say it wanted to increase the leave or that it wanted to deal with the "festering problem" or maybe that there were not enough leave credits. At the beginning for everyone, for the whole population, the employer wanted to change from calculating these credits from days to hours so that employees would all continue to have the same things in terms of vacation leave and the factors will change to do that. In case of the lay-day system in

particular what needed to be changed was the "7/5"; this is how it started and how it ended.

Going through the evidence Mr. Garneau explained that on a day in early June Mr. Bennett, who had said he would present some factors, presented them. They had agreed in principle to that change. Mr. Bennett was asked: "Will that look after the lay-day credits?" To him in that context nothing had to do with lay-day credits. The only meaning to him was that officers had big banks of lay-day credits on which there was a cap; to Mr. Bennett this was the way the lay-day credit was an issue. The new factor 2.1 was not a lay-day credit issue and he simply has no recollection of Mr. Herbert raising the issue. All Mr. Bennett wanted to do was use 84/40 to multiply the vacation leave credits. There was no promise made by Mr. Bennett that the Ships' Officers would have eight weeks of vacation a year. Mr. Michaud at the smoke break heard something about it and asked: "Are you sure about 2.1?". Apparently Mr. Bennett said clearly 2.1 was O.K.

Mr. Garneau invited me to look at Exhibit U12(b), the union ratification package, where Mr. Herbert puts his best foot forward to obtain the ratification of the collective agreement. Looking at Exhibit U12(b), which was scanned by Mr. Bennett, regarding factor 2.1 it is impossible to arrive at the conclusion that it means that there are sufficient credits to cover lay-days, and that Mr. Bennett would understand that it meant a doubling of vacation leave credits. Mr. Bennett was asked to check the whole thing. What is being done here is saying that Mr. Bennett was making promises that lay-day officers would be getting eight weeks of vacation per year. It is not clear that is what is meant. The first element of an estoppel is missing. Estoppel is not to be used as a sword but as a defense; in other words "you don't suck people in". Estoppel arises when someone has come out and himself as negotiator, made a promise knowing full well Mr. Herbert wanted their interpretation to be put on these words. These principles are explained well in Palmer's text and the three cases submitted: two from the Federal Court of Appeal in *Reardon v. Canada* [1976] 2 F.C. 767; *Légaré v. Canada (Treasury Board*) F.C.A. (1987) 76 N.R. 353 and *Murray* (Board files 166-2-26588 to 26592). *Reardon* deals with the use of extrinsic evidence at page 3 paragraph 8. *Légaré* touches on whether a clause is ambiguous, also with the estoppel argument where extrinsic evidence is considered for that purpose. *Murray* is an adjudication decision that deals with an issue where estoppel was raised and where extrinsic

evidence was heard but rejected by the adjudicator because the collective agreement was clear.

In summary Mr. Garneau stated that the interpretation of the article is clear and should be as it is stated in Mr. Ballard's memo and that the argument of estoppel should fail because no promises were made to that effect. Whatever discussions existed they were not initiated with a view to having them believe that they would have eight weeks of vacation leave.

In rebuttal Mr. Jewitt stated that the adjudicator in *Murray* at page 27 paragraph 15 sets out the doctrine of estoppel. Mr. Garneau speaks of promises, but this theory does not refer to promises but to "representation by words or conduct"; "promises" is but elevating it to something else. On all the facts there is representation by conduct; estoppel applies. The employer is estopped from suggesting a contrary interpretation. On the evidence of Mr. Bennett and the explanation set out in Exhibit U12(b), his approval of that document was immediately understood and clear. Mr. Jewitt noted that Mr. Garneau made no references to clause 20.04. There is no debiting clause in the collective agreement; that's the mistake made by the employer; the 12-hour work day cycle cannot be relied on for that purpose.

Reasons for Decision

This grievance relates to the interpretation of Article 20 and Appendix "H" of the Ships Officers collective agreement which reads:

ARTICLE 20

VACATION LEAVE WITH PAY

20.01 Vacation Year

The vacation year shall be from April 1st to March 31st inclusive of the following calendar year.

**

20.02 Accumulation of Vacation Leave Credits

An officer who has earned at least eighty (80) hours' pay during any calendar month of a vacation year shall earn vacation leave credits at the following rates provided he/she has not earned credits in another bargaining unit with respect to the same month:

(a) ten (10) hours per month until the month in which the anniversary of his eighth (8th) year of continuous employment occurs;

or

(b) thirteen decimal three-three (13.33) hours per month commencing with the month in which his eighth (8th) anniversary of continuous employment occurs;

or

(c) sixteen decimal six-seven (16.67) hours per month commencing with the month in which his nineteenth (19th) anniversary of continuous employment occurs;

or

(d) twenty (20) hours per month commencing with the month in which the officer's thirtieth (30th) anniversary of continuous employment occurs.

****

20.03 *For the purpose of clause 20.02 only, all service within the Public Service, whether continuous or discontinuous, shall count toward vacation leave except where a person who, on leaving the Public Service, takes or has taken severance pay. However, the above exception shall not apply to an Officer who receives severance pay on lay-off and is reappointed to the Public Service within one year following the date of lay-off.*

20.04 *Vacation leave with pay shall be granted on an hourly basis with the hours debited for each day of vacation leave being the same as the hours the officer would normally have worked on that day.*

Entitlement to Vacation Leave With Pay

20.05 *An officer is entitled to vacation leave to the extent of his/her earned credits but an officer who has completed six (6) months of continuous employment may receive an advance of credits equivalent to the anticipated credits for the vacation year.*

Scheduling of Vacation Leave With Pay

20.06 *Officers are expected to take all their vacation leave during the vacation year in which it is earned, and the Employer shall, subject to the operational requirements, make reasonable effort to schedule the officer's vacation leave during the vacation year in which it is earned.*

****

20.07 *Vacation leave may be scheduled by the Employer at any time during the vacation year. However, consistent with efficient operating requirements, the Employer shall make every reasonable effort to schedule vacations in a manner acceptable to officers and to give the officer two (2) months notice.*

****

20.08 *The Employer will advise the officer within thirty (30) days of receiving a request for vacation leave that the vacation leave has or has not been approved.*

20.09 *When during a period of vacation leave, an officer is granted bereavement leave, the period of vacation leave so displaced will either be added to the vacation period if requested by the officer and approved by the Employer or reinstated to the officer's credit for use at a later date.*

20.10 Carry-over Provisions

With the consent of the Employer, vacation leave credits not utilized in the vacation year in which they are earned may be carried over into the following vacation year. Carry-over beyond one (1) year will be by mutual consent.

20.11 Recall From Vacation Leave With Pay

(a) *The Employer shall make every reasonable effort to assign available officers in such a manner that an officer who is on vacation leave is not recalled to duty.*

(b) *When during any period of vacation leave or combination of vacation and compensatory leave, an officer is recalled to duty, he/she shall be reimbursed for reasonable expenses, as normally defined by the Employer, that he/she incurs:*

(i) *in proceeding to his/her place of duty,*

and

(ii) *in returning to the place from which he/she was recalled if he/she immediately resumes vacation upon completing the assignment for which he/she was recalled,*

after submitting such accounts as are normally required by the Employer.

(c) *The officer shall not be considered as being on vacation leave or a combination of vacation and compensatory leave during any period in respect of*

which he/she is entitled under clause 20.11(b) to be reimbursed for reasonable expenses incurred by the officer.

Leave When Employment Terminates

20.12 *When an officer dies or otherwise ceases to be employed, he/she or his/her estate shall be paid an amount equal to the product obtained by multiplying the number of hours of earned but unused vacation leave with pay to his/her credit by the hourly rate of pay to which he/she is entitled by virtue of the certificate of appointment in effect at the time of the termination of his employment, but such rate of pay shall not include a rate of pay pertaining to a position held for a temporary period.*

20.13 *Notwithstanding clause 20.12, an officer whose employment is terminated by reason of a declaration that he/she abandoned his/her position is not entitled to receive the payment referred to in clause 20.12 unless he requests it in writing within six (6) months following the date upon which his employment is terminated.*

*****APPENDIX "H"***

LAY-DAY OPERATIONAL

CREWING SYSTEM

****

This is to confirm the understanding reached between the Employer and the Canadian Merchant Service Guild with respect to the operation of vessels, or other appropriate situations where the Employer deems that continuous operations are desirable, on the lay-day crewing system.

The Employer shall make every reasonable effort to allow an officer the option of electing not to serve on a lay-day system, if the officer does so in writing.

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The number of vessels operating on the lay-day crewing system can be modified from time to time through consultation by the parties.

Notwithstanding the provisions of the Ships' Officers Collective Agreement, the following conditions shall apply:

Lay-Days

General

(a) Subject to operational requirements, the Employer will operate the selected vessels on a lay-day system. Under this system, all days will be considered as working days and there will be no days of rest.

****

*(b) **"Lay-day"** means a day off work with pay to which an officer becomes entitled by working on the Lay-Day Crewing System for a number of days. A lay-day shall be considered a part of the work cycle and as such is not considered as a day of authorized leave with pay.*

****

Officers will be informed of the anticipated work schedule for the operational year. Officers will be notified of changes to the anticipated work schedule at the earliest possible time. Normally, officers will receive two (2) months notice of changes to the anticipated work schedule, with a minimum of fourteen (14) days notice.

(c) The workday will consist on-duty-cycle of twelve (12) hours of work per day. For each day worked or for each on-duty-cycle day on which an officer is on authorized leave with pay other than compensatory leave and vacation leave with pay, an officer shall earn 1.00 lay-day in addition to the officer's Lay-Day pay.

(d) An officer will be compensated at the applicable annual rate of pay as described in Appendix "A3", "B3" or "C3" of the Ships' Officers Collective Agreement. In order to maintain the officer's weekly rate of pay, the officer must either:

(i) work,

(ii) be on lay-days, or

(iii) be on authorized leave with pay.

****

In the event that an officer does not work and is neither on lay-days nor on authorized leave with pay, his regular pay shall be deducted by an amount equal to his lay day rate of pay for each day's absence,

unless the officer has received an advance of lay-day credits.

(e) It is recognized that lay-days are intended to be taken as time off work with pay. Normally, lay-days shall be paid in cash in cases of termination of employment or permanent appointment to a position which is not on a vessel operating on the lay-day system, or is not within the same department or region. However, at the request of the officer and with the concurrence of the Employer, lay-days may be converted into compensatory leave.

For the purpose of cashing in earned lay-days, a lay-day will equal the lay-day rate of pay multiplied by 1.5.

****

(f) An officer shall not accumulate more than forty-five (45) days in their lay-day bank. In circumstances where an officer is required to work after accumulating forty-five (45) days the officer shall be paid, in addition to his/her regular pay and lay-day factor, the cash equivalent of 1.5 lay days for each day worked beyond the forty-five (45) day cap.

The premium payment may be waived after agreement between the Employer and the Guild.

(g) For the purposes of overtime or any other hourly rated benefit the hourly rate shall be the appropriate rate found in Appendix "A-2".

Advancement of Lay-Day Credits

At the Employer's discretion, lay-day credits may be advanced to an officer, subject to the deduction of such advanced credits from any lay-day credits subsequently earned.

In the event of termination of employment for reasons other than death or lay-off, the Employer shall recover the advance from any monies owed the officer.

Leave – Interpretation

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Sick leave With Pay and Injury on Duty Leave can only be granted during the on-duty cycle.

Administration

(a) Lay-day credits shall be accumulated at the rate of pay for the sub-group and level at which they are earned.

(b) Lay-day credits may be prorated on the basis of the hours in the normal work day.

****

(c) Lay-days which have been displaced by training periods or vacation leave may be paid out at the direction of the Employer. The officer will have the option of converting these days to either cash or compensatory leave. When cash is chosen by the officer, lay-days displaced by training will be paid in cash at the officer's lay-day rate of pay multiplied by 1.5. Lay-days displaced by vacation leave will be paid in cash at the officer's lay-day rate of pay multiplied by 2.0.

****

(d) An officer who has reported for work without being notified not to report, and remains ashore waiting to board his or her vessel for crew change, shall be considered to be at work and is entitled to meals and quarters under Article 25.

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(e) Where the Employer alters the scheduled "off-cycle" the Employer shall reimburse the officer's non-refundable portion of travel contracts or reservations made by the officer with respect to that period, subject to the presentation of such documentation as the Employer may require. The officer will make very reasonable attempt to mitigate any loss incurred and will provide proof of such action to the Employer.

(f) At the request of the officer and with the concurrence of the Employer, compensation earned in accordance with Article 21 – Designated Holidays, may be converted into compensatory leave.

Article 2 – Interpretation and Definitions

*(f) "**Day**" in relation to an officer means the twenty-four (24) hour period during which that officer is normally required to perform the duties of his/her position and commences at the designated crew change time.*

Article 20 – Vacation Leave With Pay

An officer shall earn vacation leave credits at the rate prescribed for his years of continuous employment, as set forth in Article 20 of the Collective Agreement, for each calendar month for which he receives at least two (2) weeks' pay.

****

For the purpose of granting vacation leave for officers subject to the lay-day system, in accordance with this Appendix, all vacation leave credits for officers entering or in the lay-day system will be multiplied by a factor of two decimal one (2.1). For employees leaving the system, vacation leave credits will be adjusted by reversing the factor.

Article 21 – Designated Holidays

(a) For each designated holiday for which an officer does not work, the officer shall receive his regular pay for that day plus eight (8) hours pay at the straight-time rate, and a lay-day will be deducted from the officer's lay-day bank.

(b) For each designated holiday for which an officer is required to, and does work:

(i) an officer shall receive, in addition to his regular pay and lay-day factor, the cash equivalent to 2.50 lay-days;

(ii) an officer shall be entitled to be compensated in accordance with the overtime compensation clause above, for work performed on a designated holiday in excess of twelve (12) hours.

****

(c) For each designated holiday for which an officer is scheduled to work, but is granted the designated paid holiday off, the officer will receive his/her regular lay-day pay and his/her lay-day credit for that day. A lay-day credit will not be deducted from the officer's lay-day bank and the officer will not be entitled to any additional pay.

(d) At the request of the officer and with the concurrence of the Employer, compensation earned in accordance with (a) and (b) above, may be converted into compensatory leave.

Article 22 – Sick Leave With Pay

An officer shall earn sick leave credits under Article 22 for each calendar month for which he receives at least two (2) weeks' pay.

Article 24 – Travelling

An officer who is subject to Appendix "H" and who travels on a lay-day in accordance with the provisions of clauses 24.02 and 24.03 of the Collective Agreement shall be paid at the applicable overtime rate as specified in the overtime clause of Appendix "H" for travelling time to a maximum of eight (8) hours' pay at the applicable overtime rate.

Article 25 – Meals and Quarters

Notwithstanding clauses 25.01, 25.02 and 25.03, but subject to clause 25.06, when an officer is required by the Employer to attend legal proceedings, training or other such work related activities, the Employer reserves the right, where in its opinion circumstances warrant, to reimburse actual and reasonable costs incurred for meals and/or lodging, where such costs exceed the amounts in 25.01, 25.02 or 25.03.

Article 29 – Severance Pay

For the purpose of this Article, "weekly rate of pay" means the officers lay-day rate of pay as set out in Appendices "A-3B", "B-3B" and "C-3B" multiplied by seven (7), applying to the officer's classification, as shown in the instrument of appointment.

Article 30 – Hours of Work and Overtime

(1) Overtime compensation will be subject to:

(a) clauses 30.07 and 30.08 of the Ships' Officers Collective Agreement, except that clause 30.07(c), 30.08(b) and (c) shall not apply; and

****

(b) an officer shall be entitled to compensation at time and one-half (1 1/2) for overtime worked in excess of his/her regularly scheduled hours of work, except when an officer works more than eighteen (18) consecutive hours without six (6) consecutive hours of rest, he shall be paid at the double time rate (2T) for all hours in excess of eighteen (18) hours.

****

(c) an officer shall be entitled to compensation at time and one-half (1 1/2) for overtime worked in excess of his/her regularly scheduled hours of work. An officer shall be entitled to compensation at double time for overtime work of more than six (6) hours in excess of his/her regularly scheduled hours of work.

(2) An officer may leave the vessel after receiving permission from the Master/Commanding Officer.

(3) In the case of vessels assigned primarily to Search and Rescue operations, officers shall be available to return to the vessel within thirty (30) minutes. In the case of vessels whose primary function is not Search and Rescue, officers shall be available to return to the vessel within one (1) hour.

(4) All overtime earned and all compensation earned for performing security duty, shall accumulate as compensatory leave at the rate of pay at which it is earned. Such accumulated compensatory leave shall be held in reserve to be liquidated in leave or cash at the request of the officer and the discretion of the Employer.

(5) When an officer commences compensatory leave, such leave shall be granted at the sub-group and level at which it is earned and at the rate of pay for that sub-group in effect on the day on which the compensatory leave is granted. Compensatory leave will be liquidated in the order in which it is earned, commencing with the earliest accrued credits.

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Non-Watchkeeping Vessels

Standby

Where the Employer requires an officer working on "non-watchkeeping" vessels to be available on standby during off duty hours, an officer shall be entitled to a standby payment of one (1) hours pay, at the straight time rate, for each eight (8) hours, or part thereof, that he/she is on standby.

Hours of Work

Hours of work for non-watchkeeping vessels shall be consecutive.

While paragraph (c) under General in Appendix "H" describes how an officer is to be paid for working 12 hours of work per day, the collective agreement appears to

be silent on the number of days during an "on-duty" cycle and on how leave credits are to be debited when an officer is on vacation. Since paragraph (a) under General in Appendix "H" provides that all days are work days, if one were to apply clause 20.04 when officers take vacation during their on-duty cycle, 12 hours would be debited from their credits; but if they took vacation during their off-duty cycle no hours would be deducted as they are not scheduled to work during those days yet they may be required to take vacation leave to maintain pay as per paragraph (d)(iii) under General in Appendix "H". The evidence submitted is to the effect that officers on the lay-day system work cycles of 28 days "on" and 28 days "off". Traditionally officers on the lay-day system would take leave every other year using credits to cover both their "on" and "off" duty cycles; therefore vacation leave was and is still used for both the "on" and "off" cycles. In Appendix "H" under Leave – Interpretation, there is a clause that states: "Sick leave with pay and Injury on Duty Leave can only be granted during the on-duty cycle." This clause also implies that other leave can be granted during both cycles. Clause 20.04 which was not applicable previously to officers on the lay-day system and which is not presently applied to officers under Appendix "I" and under Appendix "J" cannot be applicable to officers under Appendix "H" because lay-days are working days during which no work is scheduled but during which vacation leave can be taken.

There remains the question of how many hourly credits must be deducted when an officer on the lay-day system takes vacation whether during the "on" or "off" duty cycles. It appears that officers under Appendix "I" have 8.4 hours deducted and under Appendix "J" it is 9.3 hours. In both these cases the average week is divided by the number of working days to provide the number of hours in an average working day. If we apply the same formula to the lay-day system where every day is a working day and the work cycle is 56 days (or eight weeks) during which officers work 28 days of 12 hours (or 336 hours), the average day is six hours and the average work week is 42 hours spread over seven days or again an average six hour day. It follows that for each day of vacation an officer takes, the same number of hours which he would have to work to maintain pay, for that day should be debited from his leave credits. This method is the one usually applied to other employees in the federal Public Service who have to produce either the required number of hours of work or of leave to maintain

their normal salary. The fact that the agreement does not provide an hourly rate of pay for lay-day officers is immaterial.

The problem with the employer's interpretation as described in Mr. Ballard's memo is that it applies vacation leave to the on-duty cycle and to the off-duty cycle as if clause 20.04 were applicable but read differently i.e. as if officers were scheduled to work 12 hours on lay days. It also implies that vacation leave would either not apply to lay-days or would apply at a cost greater than what a lay-day is worth since officers receive six hours pay for every day. The interpretation of the Guild is more in keeping with the scheme of the collective agreement and the usual administration of pay and leave credits in the federal Public Service.

The effect of the new factor under Appendix "H" was the doubling of leave previously enjoyed by lay-day officers which is only one segment of the bargaining unit. The employer may initially have thought that the status quo was being maintained by the factor but the employer was made aware of the Guild's view and did not question it. The employer approved the ratification document which clearly implied a departure from the status quo, or at the very least that the Guild did not perceive the change as strictly administrative in nature. Had I not allowed the grievance on the basis of the interpretation of the collective agreement, I would have allowed it on the basis of the estoppel argument. The employer was made aware of the political difficulties the negotiation team was facing with the Guild's membership and was asked to review the ratification document to ensure a common interpretation of the changes to the collective agreement. I cannot understand in those circumstances why nothing was done by the employer, as soon as the misunderstanding came to light, if any misunderstanding existed, to clarify the employer's intention or interpretation. No one contradicted Mr. Herbert's evidence that the employer is on its ratification mailing list, but one day later, than its members. By allowing the Guild to carry out the ratification on its interpretation of the negotiated changes and by waiting until after the signing of the collective agreement to publish an explanation of its interpretation, the employer has, by its conduct, taken the Guild out on the proverbial limb and then proceeded to saw it off.

If the intention was to move from an administration of leave in days to one in hours, why was the opportunity not used to remove the "festering problem" of

vacation leave taken every second year, by eliminating the factor and allowing the lay-day officers to earn lay-day credits when on vacation? Their situation would have become the same as that of other public servants for whom an hour of vacation leave is equivalent to an hour of work. This would have been the same as for sick leave and would have done away with the awkward calculations being conducted to maintain leave records for a large proportion of Ships' Officers. Introducing a 2.1 factor under Appendix "H" was not maintaining a somewhat unfair status quo; it has swung the pendulum the other way and created an increase in vacation leave for Ships' Officers on the lay-day system. It has ensured the ratification of a collective agreement but possibly created resentment for employees working under the other appendices who did not receive an increase in their leave. The next round of negotiations for the Ships' Officers is just a few months away; this will be an opportunity for the parties to experiment with a different approach to negotiations.

For the reasons above the grievance is allowed and the employer is directed to modify the direction given by Mr. Ballard in Exhibit U5 and to deduct six hours of leave credits for a vacation day whether taken during the "on" or "off" cycle by a Ships' Officer working under the lay-day system.

I will remain seized with this matter should the parties encounter any difficulties in implementing my decision.

Evelyne Henry,
Deputy Chairperson.

OTTAWA, October 25, 1999.