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Federal Public Sector Labour Relations and Employment Board Act and *Federal Public Sector Labour Relations Act*

Before a panel of the Federal Public Sector Labour Relations and Employment Board

BETWEEN

ALYM RUSHWAN

Grievor

and

TREASURY BOARD
(Department of Transport)

Employer

Indexed as
Rushwan v. Treasury Board (Department of Transport)

In the matter of an individual grievance referred to adjudication

Before: Nathalie Daigle, a panel of the Federal Public Sector Labour Relations and Employment Board

For the Grievor: Julia McDonald, grievance and adjudication officer

For the Employer: Marie-France Boyer, counsel

Heard at Vancouver, British Columbia,
February 6 and 7, 2020.

REASONS FOR DECISION

I. Introduction

[1] On October 17, 2014, Alym Rushwan ("the grievor") referred to adjudication a grievance he had filed against a decision of Transport Canada ("TC" or "the employer") to deny his request to become qualified as a port warden and to be added to a list named the "Port Warden Standby List".

[2] The grievor alleged that the employer's decision violated clause 30.02 of the collective agreement between the Public Service Alliance of Canada and the Treasury Board for all employees of the Technical Services group, which expired on June 21, 2011 ("the collective agreement"). (Note: it still applied because the new agreement was dated October 18, 2013, and expired on June 21, 2014.)

[3] For the following reasons, the grievance is allowed.

II. Background

[4] Each party provided a summary of the key facts and dates in this case. They agreed at the hearing that the exact names of the standby lists at issue are provided in the employer's summary. The applicable part of the summary of key facts and dates provided by the employer reads as follows:

> *Mr. Rushwan has been a TI-07 Marine Safety Inspector in the Compliance & Enforcement Unit since January 2000.*
>
> *On July 10, 2012, Management announced that there would be one standby system in the Pacific Region. Previously, there had been two standby lists in the Pacific Region: (1) Port Warden* [Standby] *List, which was assigned to the Cargo Services Unit; and (2) Second Standby List, which was assigned to the Compliance & Enforcement Unit.…*
>
> *On July 10, 2012, after the announcement, Mr. Alym Rushwan, a Compliance & Enforcement Unit employee, sent an email to Mr. Mohit (Mike) Ghoshal, Manager of Cargo Services, requesting to be included on the Port Warden Standby list of the Cargo Services Unit.*
>
> *Mr. Ghoshal denied Mr. Rushwan's request to be included on the Port Warden Standby list stating that, based on the operational requirements of the unit, there were a sufficient number of staff on the standby list to accomplish the required work.*
>
> *On August 15, 2012, Mr. Rushwan filed a grievance. The grievance was presented to management on September 5, 2012.*

> *On October 29, 2012, the first level grievance response denied Mr. Rushwan's grievance. On November 6, 2012, the grievance was transmitted to the second level.*
>
> *On December 17, 2012, the former Compliance and Enforcement Division and the former Cargo Services Division were integrated into one division called the Compliance, Enforcement and Cargo Services Division.*
>
> *On the same day, Mr. To For (John) Yeung, Manager of the Compliance, Enforcement and Cargo Services Division, sent an email to all staff in the Division indicating that the training of Port Wardens would begin the following day.*
>
> *On December 18, 2012, Mr. Rushwan began the training required to become qualified as a Port Warden. He was added to Port Warden Standby roster on April 29, 2013.*
>
> *On May 31, 2013, the second level grievance response was issued. As the employee had been included on the Port Warden Standby list, Mr. Rushwan's requested corrective action had already been granted. Mr. Rushwan's request for retroactive payments was denied.*
>
> *On June 13, 2013, the grievance was transmitted to the third level.*
>
> *On July 23, 2014, the final grievance response denied Mr. Rushwan's request for retroactive payments.*
>
> *On September 12, 2014 the grievance was referred to adjudication.*

[5] On November 1, 2014, the *Public Service Labour Relations and Employment Board Act* (S.C. 2013, c. 40, s. 365) was proclaimed into force (SI/2014-84), creating the Public Service Labour Relations and Employment Board to replace the former Public Service Labour Relations Board as well as the former Public Service Staffing Tribunal. On the same day, the consequential and transitional amendments contained in ss. 366 to 466 of the *Economic Action Plan 2013 Act, No. 2* (S.C. 2013, c. 40) also came into force (SI/2014-84). Pursuant to s. 396 of the *Economic Action Plan 2013 Act, No. 2*, an adjudicator seized of a grievance before November 1, 2014, continues to exercise the powers set out in the *Public Service Labour Relations Act* (S.C. 2003, c. 22, s. 2) as that Act read immediately before that day.

[6] On June 19, 2017, *An Act to amend the Public Service Labour Relations Act, the Public Service Labour Relations and Employment Board Act and other Acts and to provide for certain other measures* (S.C. 2017, c. 9) received Royal Assent. It changed the name of the Public Service Labour Relations and Employment Board to the Federal Public Sector Labour Relations and Employment Board ("the Board") and the name of

the *Public Service Labour Relations Act* to the *Federal Public Sector Labour Relations Act* (*FPSLRA*).

III. Summary of the evidence

[7] The grievor explained that he has been employed by TC as a marine safety inspector, classified at the TI-07 group and level, in the Compliance and Enforcement unit since January 2000. He works in an office in Vancouver, British Columbia, which is responsible for work related to ships docking in the Port of Vancouver.

[8] The grievor presented an overview of the organizational structure of his unit. As of his grievance, the Vancouver office had five units, each with a different mandate and headed by a different manager. As stated, he worked in the Compliance and Enforcement unit. The other units were Cargo Services, Technical Services, Inspection Services, and Office of Boating Safety.

[9] The grievor explained that in the Compliance and Enforcement unit (which was later merged with the Cargo Services unit), the marine safety inspectors are responsible for ship compliance, and they inspect Canadian and foreign commercial vessels. They also respond to marine emergencies. In June of 2012, the Compliance and Enforcement unit manager was To For (John) Yeung.

[10] The grievor also explained that in the Cargo Services unit, the inspectors are called “port wardens” and are responsible for ship cargo services and loading. They issue certifications for cargo loading and for fitness to proceed to sea. Three cargo types are inspected, grain, concentrate, and timber. The wardens also investigate complaints and work stoppages (or refusals) under the *Canada Labour Code* (R.S.C., 1985, c. L-2). In June of 2012, the manager of the Cargo Services unit was Mohit (Mike) Ghoshal.

[11] The parties jointly submitted that before July 10, 2012, TC’s Pacific Region had two standby lists in place to address specific port-related after-hours work. They were the Port Warden Standby List, which was assigned to the Cargo Services unit, and the Second Standby List, which was assigned to the Compliance and Enforcement unit.

[12] The Port Warden Standby List was created to deal with after-hours certification for cargo loading and fitness to proceed to sea along with investigating complaints and work stoppages under the *Canada Labour Code*. The Second Standby List was in place

to respond to after-hours marine-safety-related incidents and accident and pollution investigations, among other duties.

[13] After-hours work on the Second Standby List was done on weekends and on weekdays between 4:00 p.m. and 8:00 a.m. (over two shifts: 4:00 p.m. to 12:00 a.m., and 12:00 a.m. to 8:00 a.m.). After-hours work on the Port Warden Standby List was done on weekends and on weekdays between 10:00 a.m. to 6:00 a.m. on the next day (over three shifts: 10:00 a.m. to 6:00 p.m., 6:00 p.m. to 2:00 a.m., and 2:00 a.m. to 10:00 a.m.).

[14] The grievor was on the Second Standby List.

[15] On July 10, 2012, management announced that there would be only one standby system in the employer's Pacific Region. The Second Standby List was eliminated, and all standby done after hours began to be assigned only to port wardens.

[16] According to the grievor, when management announced the abolition of the Second Standby List, an employee asked for a reason for the abolition. He recalled that an employer representative stated that the list generated approximately four calls per week, which did not justify paying standby premiums, given the budgetary constraints in place.

[17] The grievor recalled talking to a manager after the meeting and advising him that the information was not correct. More than four calls were received per week. In fact, four calls were received per day. He communicated his view that the port wardens were in high demand and that they would not have time to carry out the inspections that had been done under the Second Standby List. Management responded that the decision was irreversible.

[18] The same day, July 10, 2012, after the announcement was made, the grievor emailed Mr. Ghoshal, Manager of Cargo Services, and asked to be included on the Port Warden Standby List of the Cargo Services unit. He also forwarded his request to his manager, Mr. Yeung.

[19] On July 11, 2012, Mr. Yeung responded "… I leave it to Mike Ghoshal to provide you with a proper response." The grievor then responded as follows:

> *It's clearly understood that the interim decision made yesterday was to announce that there would be a single standby system, no decision was made to exclude a MSI* [Marine Safety Inspector] *from joining that single standby system. Concerning training, I can provide proof of my experience as cargo surveyor for two years before joining TC, and to my 11. 5 years of work experience as certified "Health and Safety Officer" in Ontario, handling both OHS Act, and Canada Labour Code Part II safety matters. Historically, training of new MSI's across the department to perform cargo service duties (except in Vancouver office), takes not more than 2:3 moths [sic], after which, new inspectors have been conducting cargo service duties as required.*

[20] On August 3, 2012, Mr. Ghoshal denied the grievor's request. He responded to the grievor as follows:

> *First of all, let me express my sincere appreciation for your very professional attitude and assistance during renewal my [sic] certificate.*
>
> *And thank you for your interest in Port Warden Standby. As a follow-up to our conversation on the subject, please note that based on the operational requirements of the unit, we have sufficient number of staff on the standby list. At this time, I do not have a need to include other individuals on the list, therefore I will have to deny the request. Please feel free to contact me any time if you require additional information or if you have any questions.*

[21] The grievor explained that he lost the additional income he had been receiving regularly when on standby. According to him, Mr. Ghoshal did not fully understand how he had to designate people on the standby list. Clause 30.02 of the collective agreement provided at the time that when designating employees for standby, the employer had to attempt to distribute standby duties equitably.

[22] The grievor highlighted that Mr. Ghoshal denied his request to be included on the Port Warden Standby List and that he stated that based on the unit's operational requirements, the list had a number of staff sufficient to accomplish the required work.

[23] The grievor explained how in his view he was qualified to be on the Port Warden Standby List. He first described the qualifications necessary for inclusion on the Second Standby List before July 10, 2012. A marine safety inspector had to have knowledge of safety procedures. For example, there are established procedures for engine failures. It is a question of seeing if the vessel will be repaired immediately. Radar malfunctions, for example, have to be repaired before the ship can depart.

Marine safety inspectors prepare reports for management, conduct accident investigations, and prepare marine safety reports following pollution incidents.

[24] The grievor explained that he has been doing this work every day since 2000. Among other things, he inspects ships, deals with defects, requests rectifications, investigates oil pollution incidents, investigates accidents, and carries out inspections related to the cargo operations of ships.

[25] The grievor also presented in evidence a list of items to be inspected under the "Paris MoU on Port State Control". At the top of the list, the document specifies that these are "[s]pecific items to be inspected during an expanded inspection."

[26] Among the items listed on 4 pages, the grievor had highlighted in yellow a dozen (out of about 60), which he said are inspected by both marine safety inspectors like him (he has a port state control inspector designation) as well as port warden inspectors. Examples of the items highlighted are "Condition of hull and deck", "ventilators, air pipes and casing", "hatchways", etc.

[27] The grievor also brought to my attention the "Lower Mainland Standby Procedures Manual" ("the Manual"), dated October 27, 1999, which he explained was the policy in place in 2012. It states, "The purpose of this document is to provide an overview of standby services." On page 4, section 6 states the minimum requirements for standby. He brought to my attention sections (a) for port warden standby and (b) for other standby, which read as follows:

> *6. Minimum Requirements for Standby*
>
> *(a) "Port Warden" - Standby*
>
> *(1) Appropriately qualified nautical marine surveyor.*
>
> *(2) Significant experience and knowledge in cargo work, marine practices and seamanship, etc.*
>
> *(3) Complete on the job training.*
>
> *(4) Accepted by the Manager - Cargo Services as competent in carrying out the duties.*
>
> *(b) "Other" - Standby*
>
> *(1) Marine Surveyor of any discipline.*
>
> *(2) Complete on the job training on duties specified* [incomplete text].

> *(3) Trained in Pollution, O.S.H., Dangerous Goods, Container or as required by the [sic] Management.*
>
> *(4) Accepted by Manager Compliance and Enforcement as competent in carrying out the duties.*
>
> *(5) Notwithstanding the above (1) to (4), an inspector may commence standby duties with the minimum of pollution prevention officers training, certification and on-the-job experience (see Annex 1). This relaxation is valid for 6 months, unless all the requirements of subsection (3) above are fulfilled.*

[28] The grievor explained that being on the Second Standby List meant that he met the minimum requirements for standby under section (b).

[29] The grievor explained how in his view he also met the criteria set out in section (a) for port warden standby. First, he stated that he met the criterion under subsection (1) since he is a qualified nautical marine surveyor. He actually holds the highest nautical qualification of a master mariner.

[30] He then explained that he had accumulated the experience noted in the second criterion. He described his experience before he arrived at TC. After obtaining his master mariner certification in 1985 from the Minister of Transport, he worked in Hamilton, Ontario, for two companies, Ocean Marine and Crown Marine, as a cargo surveyor. Similarly, before his Ontario work, from 1985 to 1999, he worked for Desgagnés, a company in Quebec, as an officer on a grain ship.

[31] He also added that he was and still is an examiner of apprentice seafarers. He explained that the matters he examines in this capacity include cargo work and ship stability. He stated that port wardens must study these subjects to obtain their certificate of competency. As such, he addresses them with apprentices.

[32] Therefore, he asserted that he met the second criterion, which is, “Significant experience and knowledge in cargo work, marine practices and seamanship, etc.” He added that it would have been easy for him to become familiar with how to fill out forms and invoices. In just a few hours, he would have become a fully trained port warden.

[33] He submitted as evidence the three forms, or checklists, which port wardens complete. One is entitled, “Marine Safety Inspector - Grain in bulk Inspection Checklist”. The second is entitled, “Marine Safety Inspector - Concentrate Inspection Checklist”. And the third is entitled, “Marine Safety Inspector - Timber Deck Cargo

Inspection Checklist". Each contains three columns with the following headings: "Yes", "No", and "N/A".

[34] He explained that filling these forms is routine work. When they are completed, certificates can be issued, such as "Readiness to Load" or "Fitness to Proceed". Thus, he was not lacking any qualifications. He simply had to familiarize himself with how to fill out the forms and the invoices for the services provided.

[35] With respect to the third criterion, which is "Complete on the job training", he explained that he could simply have received guidance to fill out the forms and prepare the invoices, and he would have met this criterion.

[36] Therefore, what he lacked to qualify as a port warden was simply the requirement set out in the fourth criterion, which is "Accepted by the Manager - Cargo Services as competent in carrying out the duties."

[37] The grievor explained why he wanted to be added to the Port Warden Standby List. First, he said that he was experienced and qualified for standby services. Standby refers to the hours during which employees must be able to take up work. In addition, it would have ensured a fair distribution of the additional income generated by standby hours. He explained that standby duties greatly increase an employee's annual salary. Also, the Port Warden Standby List included only a limited number of employees, no more than eight, who shared the standby duties and the additional income those standby duty hours provided. According to the grievor, the number of employees on the list was limited and controlled to ensure that only those employees maintained higher salaries.

[38] The grievor also pointed out that Mr. Ghoshal refused his request because of a sufficient number of staff on the standby list. However, the grievor insisted that when an employee meets the minimum requirements for standby, including those set out in the Manual, the employee should be eligible for standby. However, Mr. Ghoshal did not consider these requirements before denying the grievor's request.

[39] The grievor said that Mr. Ghoshal's decision was wrong for two additional reasons. First, the workload was very high — up to 18 ships could dock in just 2 days. And second, the average age of the port wardens was rising, and it is physically

demanding work. So it was inaccurate to state that "… we have sufficient number of staff on the standby list."

[40] Therefore, the grievor filed his grievance to challenge Mr. Ghoshal's decision.

[41] On December 17, 2012, the former Compliance and Enforcement and Cargo Services units were integrated into one called Compliance, Enforcement and Cargo Services. The new unit consisted of approximately 22 inspectors.

[42] Mr. Yeung was appointed as the manager of the new unit. The same day, in that role, he opened to any interested employee, including the grievor, the opportunity to be placed on the standby list, pending the successful completion of training or job shadowing for cargo services work. In his email to all the staff, he indicated that the port warden training would begin on the next day.

[43] On December 18, 2012, the grievor replied with the following to Mr. Yeung:

> *Thank you for taking this step towards the PW's Standby duties, which I will be glad to participate in as job shadowing. Just to clarify, my reply to your "Expression of Interest" email last Friday has [sic] meant "Yes I'm interested", but did not mean that I needed to be trained, which I have explained in my email to M. Ghoshal, and yourself dated July 11th, concerning this matter.*

[44] Later that day, Mr. Yeung responded as follows to the grievor: "Alym, Job shadowing is required for maintaining consistency among Port Wardens."

[45] The grievor explained that seven marine safety inspectors responded that they were interested in after-hours standby cargo service duties and therefore were trained as port wardens. They were provided opportunities for job shadowing or on-the-job training during normal office hours.

[46] The grievor made a point of specifying that although he had to carry out job shadowing to familiarize himself with certain procedures, he did not need training, unlike others, such as two engineers on the list who were unfamiliar with deck operations. However, Mr. Yeung specified that everyone on the list had to be trained in how things were done.

[47] The grievor specified that the job shadowing or training was done over 3 to 4 months. He completed it and was placed on the standby list on April 29, 2013. He

added that the previous manager, Mr. Ghoshal, had required job shadowing or training of 12 months, which the grievor considered abnormal.

[48] The grievor filed in evidence the report of his completed training hours for each type of cargo inspected (timber, concentrate, and grain). In each report, Mr. Yeung added the date of the interview he conducted with the grievor and the result (satisfactory or unsatisfactory). For each type of cargo inspected, the grievor met the requirements of the training and interview, and he received a satisfactory result.

[49] The new list of those qualified for standby duty had 11 names. While the new schedule was released on April 29, 2013, the grievor's first standby opportunity was on June 12, 2013, for a week.

[50] Eight names were on the Port Warden Standby List when management decided to abolish the Second Standby List on July 10, 2012. That list remained staffed with those eight until some who had expressed interest in December 2012 were added on April 29, 2013.

[51] The grievor explained that for about 11 months, i.e., between July 10, 2012, and June 12, 2013, he was not allowed to perform any standby duties. He gave an overview of the additional income he did not receive during that time. In sum, he estimated that it was close to at least $5000 per 2-month period. He stated that because there were 8 people on the roster, each of them acted as a PW1 (port warden number 1), then a PW2 (port warden number 2), and then a PW3 (port warden number 3) once every 2 months. He estimated that based on his calculations, the average income of a PW1 during this standby period was $4000. That of a PW2 was between $1000 and $1800, and that of a PM3 was $750. Therefore, he estimated that in total, he lost more than $5000 in salary for each 2-month period.

[52] In addition to the salary he lost, the grievor expressed that it was unfair not to give the members of the former Compliance and Enforcement unit the chance to perform standby duties after the two units were merged.

[53] The grievor requested the following corrective action in his grievance: "permitted to perform port warden duties - after hour's [*sic*] roster. To be paid retro-active [*sic*] salary lost from being denied this opportunity." Since he has been added to the standby list from the time he filed his grievance, the remedy he now seeks is

retroactive compensation for the 11 months in which he was unable to provide standby services.

[54] During the grievor's cross-examination, the employer brought to his attention that his "Certificate of Designation, Authorization, Appointment to Exercise Powers and Perform Duties and Functions", delivered by the Minister of Transport, states that he is certified to perform the following inspections: (a) hulls, (b) machinery, (c) equipment, and (d) those respecting the protection of the marine environment for the purpose of Part 9 of the *Canada Shipping Act, 2001* (S.C. 2001, c. 26) (entitled, "Pollution Prevention - Department of Transport"). However, the employer asked him whether category (e), "Inspections of Cargo", is specified, to which he replied that it is not.

[55] The employer also asked the grievor whether his calculations of the amount he had lost per two-month period were based on his current or his 2012 salary. He replied that he had used his current salary. He recognized that his salary in 2012 was to some extent lower than his current salary.

[56] The parties requested that if I grant the grievance, I give them an opportunity to agree to the amount of lost wages.

[57] Mr. Yeung explained that in July 2012, he was the manager of the Compliance and Enforcement unit. He explained that all employees working in the units of the Port of Vancouver, including Technical Services, Inspection Services, Cargo Services, and Compliance and Enforcement are referred to as marine safety inspectors (or marine safety officers). He pointed out that there are four disciplines: nautical, machinery, naval architecture, and electrical.

[58] He also described the nature of the work that marine safety inspectors performed in the Compliance and Enforcement unit. They worked in port state control programs, marine examinations, pollution control, and regulatory vessel traffic services.

[59] Mr. Yeung also provided a description of the work performed by the Cargo Services unit. Primarily, port wardens inspect three types of cargoes: grain, concentrate, and timber on deck. Cargo Services' mandate also includes dangerous goods in marine mode, occupational safety and health, and coal cargoes. Two different

types of inspections are carried out under the *Cargo, Fumigation and Tackle Regulations* (SOR/2007-128). Specifically, port wardens, on behalf of the minister, conduct inspections and issue Readiness to Load and Fitness to Proceed certificates in accordance with those regulations.

[60] Mr. Yeung explained why these inspections and the issuance of these two certificates are important. They are important because of environmental and health hazards. For example, a grain cargo loaded asymmetrically or irregularly could cause the ship carrying it to tip over and sink. Also, a load of concentrate, such as zinc, is extremely heavy, and if the load were uneven, the cargo could break up. Similarly, in the case of a cargo of timber on deck, the timber must be securely tightened; otherwise, with the wind and water, it could shift, and the ship could overturn. That is why TC regulates inspections of cargo shipments.

[61] Mr. Yeung explained that the term “port warden” originated in the former *Canada Shipping Act* (R.S.C., 1985, c. S-9), which was repealed in 2001 and replaced by the *Canada Shipping Act, 2001*. The 2001 Act refers to marine safety inspectors. They receive a certificate from the Minister of Transport once they are authorized to exercise certain powers that the Act confers on the minister.

[62] Mr. Yeung added that the certificates issued to marine safety inspectors specify the areas in which they may carry out inspections, which could include hull, machinery, equipment, cargo, etc., inspections. When inspections are carried out on cargo ships, marine safety inspectors are designated as port wardens. So, all port wardens are marine safety inspectors but not all marine safety inspectors are port wardens; it depends on whether they are certified to inspect cargo ships.

[63] He added that the duties of port state control officers also differ from those of port wardens. He explained that once an inspector completes one year of work at TC, the inspector can be trained to become a port state control officer. He explained the role of that officer. “Port State Control” is an inspection program under which foreign vessels entering a sovereign state’s waters are boarded and inspected to ensure compliance with major international maritime conventions. Countries with common waters group under a memorandum of understanding (MOU).

[64] Canada is a member of the Paris MOU on Port State Control, which is the official document in which the different participating maritime authorities, including Canada,

agree to implement a harmonized Port State Control system. Some areas covered by the MOU include the safety of life at sea, marine pollution, and training standards for seafarers. Canada is also a member of the Tokyo MOU.

[65] Thus, port state control officers inspect foreign vessels in port for compliance with international conventions. Mr. Yeung clarified that those officers and port wardens have different work and training; they are two different positions. The officers evaluate compliance with international conventions, while the wardens evaluate compliance with the *Canada Shipping Act, 2001* and the *Cargo, Fumigation and Tackle Regulations*.

[66] With respect to how the employer designated port wardens for standby duty in the past, Mr. Yeung indicated that Mr. Ghoshal allowed only marine safety inspectors working in the nautical field to be designated on the Port Warden Standby List to carry out cargo inspections. All other marine safety inspectors could be designated on the Second Standby List to deal with all other emergencies.

[67] Mr. Yeung tendered in evidence an email entitled, “Next Steps: Budget 2012”, which was sent to all TC employees on April 4, 2012. In it, management discussed the Economic Action Plan 2012 and explained that TC had established a three-year plan to achieve the objective of reducing its spending base by 10.7%.

[68] Another email, entitled, “Budget 2012 Update - Impacts on Transport Canada”, which was sent to all employees on April 12, 2012, provided more detailed information on the departmental expenditure review and the impacts on TC. The changes identified as upcoming included the following: “Streamlining Select Duty Officer standby services and procedures and transforming service delivery”.

[69] Mr. Yeung also explained the real savings achieved by removing the Second Standby List. By providing details about the average salary paid to inspectors and the number of hours paid to them, as they had to be in readiness for duty mode, in this case 844 hours, he calculated that TC saved $30 000 per year. He clarified that for every 8 hours of standby, an employee received 1 hour of pay. Each day, over the 24-hour period, there were 2 periods of 8 hours of standby, which was equivalent to 2 hours of pay. Weekend hours also had to be taken into account. In sum, he estimated that 844 hours of availability were paid per year. Thus, the abolishment of the Second

Standby List was an important cost-saving measure and was consistent with other regions across Canada that all had a single standby system.

[70] Mr. Yeung also explained that because of the budget cuts in 2012, the Compliance, Enforcement and Cargo Services unit was created from the merger. Also because of the cuts, Mr. Yeung's position was affected in 2012. On June 27, 2012, he received a letter stating, "I regret to advise you that there will be an impact upon the continuance of existing positions due to the fusion at the managerial level of Compliance and Enforcement and Cargo Services, Marine Branch in Vancouver, BC." Pursuant to a Selection for Retention or Lay-off (SERLO) process held at that time, he was appointed as a manager of the new Compliance, Enforcement and Cargo Services unit.

[71] On the day he took office, Mr. Yeung held a meeting with all his subordinates and informed them that the training of port wardens would begin the following day.

[72] Mr. Yeung explained that Mr. Ghoshal had been responsible for the adoption and application of the Manual's procedures, which came into force in 1996 and were amended in 1999. He explained that at that time, there was no unified procedure for all the regions of Canada. Each manager developed the procedure to follow to designate employees on standby lists. The Manual's guidelines were intended to provide consistency in designating qualified employees to carry out port warden standby surveyor duties and other standby surveyor duties.

[73] Mr. Yeung was invited to clarify whether in July 2012, the grievor met the four criteria set out in section 6(a) of the Manual under "Minimum Requirements for Standby" and section (a), port warden standby. First, Mr. Yeung clarified that the grievor met criterion 1, "Appropriately qualified nautical marine surveyor". Second, Mr. Yeung stated that the grievor also met criterion 2, "Significant experience and knowledge in cargo work, marine practices and seamanship, etc."

[74] However, Mr. Yeung clarified that the grievor did not meet the third and fourth criteria. With respect to the third criterion, "Complete on the job training", the grievor had not completed the pre-designation training. And then, with respect to the fourth criterion, "Accepted by the Manager - Cargo Services as competent in carrying out the duties", the grievor had not been assessed and found qualified by the manager, Mr.

Ghoshal, as he had not completed the pre-designation training. So, in July 2012, the grievor did not meet all four criteria.

[75] Mr. Yeung added that the last criterion is important because once an inspector is designated to carry out the work, he or she represents the Government of Canada, not just TC, which is why the manager must be satisfied that the inspector is competent to perform the work. It is imperative that the work be done properly.

[76] When Mr. Yeung was appointed the manager of the new team in December 2012, he established a new way of designating employees for standby. He gave evidence of his instructions prepared on December 17, 2012, January 10, 2013, and April 29, 2013. The instructions of January 10 and April 29 included the following statement:

> *To qualify as a Standby Duty Marine Safety Inspector Cargos Services (Port Warden), an Inspector should, as a minimum, be appointed as a Marine Safety Inspector and cleared by TME* [Manager, Compliance, Enforcement and Cargo Services] *to carry out Cargo Services (Port Warden) duties.*

[77] Mr. Yeung presented the documents tracking the hours of job shadowing that the inspectors completed in training. For each type of cargo ship, whether timber deck, concentrate, or grain, an internal control system had been put in place, and apprentices had to self-declare that they had completed each listed job-shadowing tasks or exercises. Timber on deck cargoes had 15 tasks or exercises, while concentrate cargoes had 14, and grain cargoes, 19.

[78] For example, the "Timber Deck Cargo Self-declaration" form included the following tasks, topics, or exercises to be studied or completed:

1. *Attended in-house Timber Deck Cargo Workshop / One-on-one Peer Coaching*
2. *Canada Shipping Act, 2001, section 11 - Inspections by Marine Safety Inspectors and others, and section 211 - Inspections*
3. *Cargo, Fumigation and Tackle Regulations, particularly Part 1 Division 4 - Timber Deck Cargo*
4. *SOLAS Chapter VI Carriage of cargos , Part A - General Provisions*
5. *SOLAS Chapter XII Additional Safety Measures for bulk carriers*
6. *Code of Safe Practice for ships carrying Timber Deck Cargos, 1991/2011*

7. *CSS Code (Code of Safe Practice for cargo stowage and securing)*
8. *Cargo Securing Manual*
9. *–Certificate of Preliminary Inspection (Preliminary Cert.)*
   - *Certificate of Readiness to Load (Readiness Cert.)*
   - *Certificate of Fitness to Proceed to Sea (Fitness Cert.)*
   - *Marine Safety Notice (SI-07)*
10. *Ship Safety Bulletins*
    - *15/1991 - Entry Into enclosed spaces*
11. *Witnessed one Rolling Period Test and familiarized with Calculation of Stability for vessels loading Timber Deck Cargos including stress calculations*
12. *Timber Deck Cargo Inspection Checklist* [see Exhibit C-2 — aide-memoire based on regulations requirements]
13. *Cargo Services Fee Calculations*
14. *Job Shadowing of Readiness Inspection (Date, Vessel Name, MSI)*
    - *1* [To be filled in]
    - *2* [To be filled in]
    - *3* [To be filed in]
15. *Job Shadowing of Fitness Inspection (Date, Vessel Name, MSI)*
    - *1* [To be filled in]
    - *2* [To be filled in]
    - *3* [To be filled in]

[79] Mr. Yeung explained that once an apprentice has become familiarized with all the mandates granted by law to the minister or any delegates, has received all the necessary coaching, has completed all the required inspections (a minimum of 24), and finally has self-declared the completion of all the program's activities, Mr. Yeung interviews the apprentice to ensure the apprentice's qualifications in all aspects of the activities. Once that is ensured, Mr. Yeung advises the appropriate manager at headquarters that the apprentice has been properly trained and evaluated and that a designation to inspect cargos may be issued. At that point, the apprentice is allowed to inspect cargos.

[80] Mr. Yeung explained that the inspector could then start inspecting cargo ships even without receiving the official version of the designation. He introduced the form that is sent to headquarters when an inspector is deemed qualified to conduct

inspections under s. 11 of the *Canada Shipping Act, 2001*. It specifies whether the designation allows for hull inspections, machinery inspections, equipment inspections, pollution prevention inspections under Part 8 of that Act, marine environment protection inspections under Part 9 of that Act, and cargo inspections. He explained that to carry out cargo inspections, it is essential that an inspector be designated as qualified to carry them out, so the appropriate box must be checked on the form.

[81] Mr. Yeung explained why preparing the certificate is important. In the case of legal action against the Crown, it must show that the inspector was properly trained and designated to conduct the inspection at issue. In addition, before undertaking an inspection, each inspector must show identification that demonstrates that he or she is authorized to conduct it.

[82] Mr. Yeung was asked to clarify whether port state control officers should be familiar with all the topics and tasks listed in the Timber Deck Cargo Self-declaration form, for example. He replied that those officers are familiar with some of the topics and tasks but not all of them. For example, in their work, the officers address the topics or tasks mentioned in items 4, 5, 7, 8, and 10 of the form but not necessarily the others. Only the port wardens address the other topics or tasks in their day-to-day work.

[83] Mr. Yeung's certificate of designation was filed in evidence to demonstrate the extent of the delegated authority. For example, in his case, the certificate states the following:

> *CERTIFICATE OF DESIGNATION, AUTHORIZATION, APPOINTMENT TO EXERCISE POWERS AND PERFORM DUTIES AND FUNCTIONS*
>
> *To For (John) Yeung*
>
> *Canada Shipping Act 2001*
>
> *Pursuant to Section 11 of the Canada Shipping Act, 2001, the Minister of Transport Infrastructure and Communities hereby authorizes To For (John) Yeung, Marine Safety Inspector, to perform The Minister's duties and functions, exercise the Minister's powers and carry-out [sic] inspections under Section 211 of that Act with respect to:*
>
> *(a) Inspections of Hulls*
>
> *(b) Inspections of Machinery*
>
> *(c) Inspections of Equipment*

> *(c.1) Inspections respecting pollution prevention for the purpose of Part 8*
>
> *(d) Inspections respecting the Protection of the Marine Environment for the purpose of Part 9 (Pollution Prevention-Department of Transport)*
>
> *(e) Inspections of Cargo*
>
> *To For (John) Yeung, Marine Safety Inspector, can exercise the functions of a Port State Control Officer for the purposes of the Paris and Tokyo Memorandums of Understanding on Port State Control.*
>
> …
>
> *The Minister of Transport, Infrastructure and Communities, pursuant to section 11 of the Canada Shipping Act, 2001, hereby authorizes*
>
> *To For Yeung*
>
> *being a Marine Safety Inspector, to exercise any powers and perform any duties and functions of the Minister, including the exercise of quasi-judicial powers and the administration of examinations, in relation to the issuance and renewal of the following Certificates of Competency and Endorsements under the Marine Personnel Regulations:*
>
> *Master Mariner*
>
> *Master, Near Coastal*
>
> *Master 3000 Gross Tonnage, Near Coastal*
>
> *Master 500 Gross Tonnage, Near Coastal*
>
> …

[84] Mr. Yeung explained that being authorized to administer examinations in relation to the issuance of certificates does not necessarily make the examiner a port warden. To be designated as one, it is imperative that the certificate state so under category (e), “Inspections of Cargo”. Mr. Yeung also confirmed that although an assessor is authorized to administer examinations to apprentices and ask questions about cargoes, the assessor does not have the same understanding of the subject matter as does a port warden who has been trained in all aspects of the program.

[85] Mr. Yeung specified why job shadowing is very important and necessary before a designation is granted. On one hand, it allows inspectors to gain knowledge, and on the other hand, it ensures consistency in the inspections that the port wardens carry out.

[86] Mr. Yeung explained that when he arrived in his position in December 2012, his first priority was to train new port wardens. It took a few months for the apprentices to complete their training because not all types of cargo come in to port every day, and the apprentices had to be trained in all types of inspections. For example, grain shipments are inspected every day, but concentrate and timber on deck are inspected about twice a month.

[87] Thus, Mr. Yeung confirmed that from December 2012 to April 2013, when the grievor was added to the standby list, or June 2013, when his standby turn came up, like everyone on the Second Standby List, he lost the opportunity to receive standby calls but did not lose the inspection work, i.e., the necessary inspections.

[88] He explained that the difference was that before the Second Standby List was abolished, marine safety inspectors in the Compliance and Enforcement unit received the calls when the matters fell within that unit. After the list was abolished, the port wardens received all the calls. The wardens would then either take over the work to be done if authorized or call the person in charge to handle it. When it concerned Compliance and Enforcement unit duties, the wardens would call Mr. Yeung, who in turn would delegate the work to an inspector in his unit.

[89] Finally, Mr. Yeung confirmed that as of December 2012, he was not aware of any operational reason that names could not be added to the Port Warden Standby List. He explained that once he became responsible for the list, he decided that if an inspector in the team was qualified and wanted standby, he would give the inspector that opportunity.

IV. Issues

[90] Did the employer breach clause 30.02 of the collective agreement?

V. Analysis

[91] The grievance concerns the interpretation and application of clause 30.02. Article 30 reads as follows:

> *ARTICLE 30*
>
> *STANDBY*
>
> *30.01 Where the Employer requires an employee to be available on standby during off-duty hours, such employee shall be*

> *compensated at the rate of one-half (1/2) hour for each four (4) hour period or part thereof for which the employee has been designated as being on standby duty.*
>
> *30.02 An employee designated by letter or by list for standby duty shall be available during his or her period of standby at a known telephone number and be available to return for work as quickly as possible if called. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.*
>
> *30.03 No standby payment shall be granted if an employee is unable to report for work when required.*
>
> *30.04 An employee on standby who is required to report for work shall be compensated in accordance with clause 29.01.*
>
> *30.05 Other than when required by the Employer to use a vehicle of the Employer for transportation to a work location other than the employee's normal place of work, time spent by the employee reporting to work or returning to his or her residence shall not constitute time worked.*
>
> *30.06*
>
> *(a) Payments referred to in clauses 30.01 and 30.04 shall be compensated in cash except where, upon request of an employee and with the approval of the Employer, or at the request of the Employer and the concurrence of the employee, the payment may be compensated in equivalent leave with pay.*
>
> *(b) Compensatory leave with pay not used by the end of a twelve (12) month period, to be determined by the Employer, will be paid for in cash at the employee's hourly rate of pay as calculated from the classification prescribed in the certificate of appointment of his or her substantive position at the end of the twelve (12) month period.*

1. The bargaining agent's position

[92] The bargaining agent's position is that the decision to deny the grievor the opportunity to be placed on the standby list was arbitrary and contrary to clause 30.02 of the collective agreement.

[93] At clause 30.02, the applicable collective agreement stipulates, "In designating employees for standby duty, the Employer will endeavour to provide for the equitable distribution of standby duties." The bargaining agent submitted that this clause has been interpreted to also apply to employer decisions about the opportunity to work on a standby list.

[94] The bargaining agent submitted that management has broad discretion to manage the workplace. However, as noted in Brown and Beatty, *Canadian Labour*

Arbitration, at paragraph 4:2326, it must exercise its decision making reasonably or fairly and in good faith. The following should be considered:

> *… Once it is determined that the grievance is arbitrable, however, the next question is whether there is an express requirement that management must exercise its decision-making [sic]* ***reasonably or fairly,*** *or in accordance with some other standard… The Supreme Court recently recognized a general organizing principle of* ***good faith*** *in contractual performance and, as a manifestation of that principle, a duty to act honestly in the performance of all contractual obligations….*
>
> [Emphasis added]

[95] The grievor submitted that in the past, the Board interpreted a clause identical to clause 30.02, in *Scanlon v. Canada Revenue Agency*, 2009 PSLRB 42. In that case, the employer had removed the two grievors' names from the standby duty list in an effort to save costs. They were classified at the CS-02 group and level. However, the employer had decided to retain on the list only CS-01 employees. The list was used during off-hours and weekends to identify employees assigned to be available to answer questions posed to the information technology help desk.

[96] As a result, in *Scanlon*, the grievors received far less overtime than they had in the past. The remedy portion of the grievances requested that the grievors' names be restored to the standby list. Clause 11.02 of the collective agreement in that case, which addressed standby duty specifically, was identical to the present clause 30.02 and included the following sentence: "In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties." The adjudicator held that the employer had the right to select employees for the standby list. Yet, its right to select them from the list for standby duty was fettered by the collective agreement provision that required it to endeavour to provide for the equitable distribution of standby duties.

[97] The adjudicator held that the collective agreement had not addressed the issue of the employer's right to remove names from the list. He held that therefore, removing names from the list was an issue of management rights and discretion, which must be exercised reasonably and for a business purpose. He found that the decision as to the group of employees the employer drew on for the standby list was discretionary and subject to the reasonableness standard. He further found that the decision to remove the grievors from the list was based on genuine economic

pressures and was not unreasonable or based on an illegitimate business purpose. He denied the grievances.

[98] The bargaining agent's position was that the employer's reason for denying the grievor's request to be added to the list, which was that there were enough names on it at that time, was not rationally connected to any legitimate business interest since a few months later, under a new manager, the list was expanded. The only change in circumstance, in the bargaining agent's opinion, was the change of manager making the decision.

[99] It further maintained that Mr. Ghoshal's decision was arbitrary. According to the collective agreement, when designating employees for standby, the employer shall endeavour to provide for an equitable distribution of standby duties. In this case, Mr. Ghoshal made no effort to do that. While it is understood that he could not add an employee not yet authorized to inspect cargo ships to the list before the employee obtained training or coaching, he had to make an effort to provide for an equitable distribution, to comply with the text of the collective agreement, which he did not do.

[100] The adjudicator in *Scanlon* found that a positive obligation exists to endeavour to provide for an equitable distribution of standby duties, which must be done in good faith. However, according to the evidence on file, although the grievor asked to be added to the list, his request was refused for the operational reason that the list already contained a sufficient number of names. Mr. Yeung was asked whether there were any other reasons for refusing to consider the grievor's request at the time. He replied that he was not aware of any, other than because obviously, as the grievor had not yet been designated to inspect cargo ships, he could not be directly added to the list. Yet, according to the bargaining agent, there is no evidence that Mr. Ghoshal denied the grievor's request for that reason.

[101] The bargaining agent added that as Mr. Yeung confirmed, the grievor already met the first two criteria in the Manual that had to be met to be added to the Port Warden Standby List. Only the third and fourth criteria remained to be met. The third criterion is to receive the necessary training or coaching. It is now known that adequate training or coaching could be completed in less than four months. In fact, in that time, the new apprentices, including the grievor, were trained after Mr. Yeung began in the managerial position; i.e., the grievor was trained or coached between December 2012 and April 2013.

[102] Then, for the fourth criterion, which was the manager's acceptance of the person as being competent in carrying out the duties, once the grievor had received job shadowing, Mr. Ghoshal could have accepted him as competent. Keep in mind that the grievor carried out a very similar job as a marine safety inspector and as a port state control officer. He explained that many of the duties of a port state control officer and a port warden overlap.

[103] As the grievor explained, he was ready to familiarize himself with port wardens' procedures in July 2012. However, Mr. Ghoshal did not allow it.

[104] The bargaining agent added that while the fourth criterion gives a manager the discretion to accept a person as competent and that this is a valid criterion given the risks associated with incidents at sea, it does not give the manager carte blanche to disregard the collective agreement and to choose whom to add to the list. The manager's obligation is to make an effort to provide an equitable distribution of standby duties, which he did not do. Instead, he decided that he had a sufficient number of staff on the list and that he had no need to add anyone to it.

[105] The bargaining agent added that while it had the burden of proof of demonstrating the contravention of the collective agreement clause, the employer had to provide proof of the reasonableness of Mr. Ghoshal's decision. Mr. Ghoshal simply did not address or consider the possibility of providing the training to the grievor. Moreover, Mr. Ghoshal was not invited to testify, so the Board does not know the underlying reasons of his refusal to consider the grievor's request.

[106] The bargaining agent pointed to the fact that as the grievor explained, before Mr. Yeung's arrival, the right to be added to the list was reserved to a limited circle of people, a fact that Mr. Yeung did not deny. Consequently, upon his arrival, Mr. Yeung saw it as pressing to change that practice. He even made it a priority.

[107] Moreover, the bargaining agent pointed out that adding people to the list did not involve any additional cost to the employer, only a wider distribution of paid standby hours to those interested in working them.

[108] Finally, the bargaining agent noted that the substantive issue was resolved in the course of the grievance process. Thanks to the arrival of Mr. Yeung and his efforts to distribute standby hours equitably, the grievor was trained and added to the list in

April 2013. The only unresolved issue is the compensation for the hours for which he did not have the opportunity to be on standby because of Mr. Ghoshal's decision to limit standby to a select group.

[109] Therefore, the bargaining agent requested that the grievance be upheld and that the grievor be awarded compensation for the time he was denied the standby opportunity. Finally, it asked that if the grievance is granted, I leave it to the parties to agree to the appropriate compensation, in the circumstances.

2. The employer's position

[110] The employer's position is that it did not violate any collective agreement provisions. Budget cuts in 2012 forced it to cut spending. The Second Standby List was abolished on July 10, 2012, to save money.

[111] Another consequence of those cuts was the December 2012 merger and Mr. Yeung's appointment as the manager. On the day he took up his position, he invited employees interested in providing standby services outside normal working hours to give him their names.

[112] The employer submitted that it did not breach any collective agreement provision, which can be demonstrated by considering the applicable interpretation principles.

[113] First, it referred me to *Chafe v. Treasury Board (Department of Fisheries and Oceans)*, 2010 PSLRB 112, which states as follows at paragraphs 50 and 51:

> *[50] I start with the trite but true observation that my authority as an adjudicator is limited to and by the express terms and conditions of the collective agreement. I can only interpret and apply the collective agreement. I cannot modify terms or conditions that are clear. Nor can I make new ones. The fact that a particular provision may seem unfair is not a reason for me to ignore it if the provision is otherwise clear:* Public Service Staff Relations Act*, S.C. 2003, c. 22 (the "*PSLRA*"), s. 229;* Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper Ltd.*, 2002 NBCA 30 at para 10 and 11.*
>
> *[51] Second, I am obligated to determine the true intent of the parties when they entered into the collective agreement. To do that I must use the ordinary meaning of the words used by the parties. I must also take into account the rest of the collective agreement, for it is the overall agreement that forms the context in which the*

> *words used are to be interpreted:* Irving Pulp & Paper, *para 10 and 11; and* Cooper and Wamboldt v. Canada Revenue Agency, *2009 PSLRB 160 at para 32 and 34.*

[114] The employer brought to my attention s. 229 of the *FPSLRA*, which reads as follows: "An adjudicator's or the Board's decision may not have the effect of requiring the amendment of a collective agreement or an arbitral award."

[115] The employer also brought to my attention the following statement in Brown and Beatty at paragraph 4:2120: "Another related general guide to interpretation is that in construing a collective agreement, it should be presumed that all of the words used were intended to have some meaning …".

[116] It brought to my attention paragraph 24 of *Beese v. Treasury Board (Canadian Grain Commission)*, 2012 PSLRB 99, which states, "To understand the entire context of the collective agreement, one provision cannot be understood without understanding its connection to the whole agreement. What is written in one provision is often qualified or modified elsewhere." Thus, the employer asked that I also consider article 6 and clause 28.03 of the collective agreement.

[117] Article 6 reads as follows: "Except to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the public service."

[118] In turn, clause 28.03 reads as follows:

> *28.03 Subject to the operational requirements of the service, the Employer shall make every reasonable effort:*
>
> *a. to allocate overtime work on an equitable basis amongst readily available, qualified employees;*
>
> *and*
>
> *b. to give employees who are required to work overtime adequate advance notice of the requirement.*

[119] The employer argued that it makes sense to fairly distribute overtime, like standby duties, but that it is not logical to expect someone to be designated for standby duties if the person is not qualified to carry out the work.

[120] The employer insisted that the grievor did not meet the Manual's third and fourth criteria, which set out the requirements to be placed on the Port Warden Standby List. Mr. Yeung explained this situation in detail. The grievor had not received

the necessary training set out in the third criterion and had not been designated qualified under the fourth criterion by the manager responsible for designations. The employer insisted that marine safety inspectors' duties differ between units. The tasks that the marine safety inspectors of the Compliance and Enforcement unit performed were not the same as those performed by such inspectors in other units, including Cargo Services.

[121] The employer added that both the grievor and Mr. Yeung confirmed that a port state control officer and a port warden do not have the same duties. Mr. Yeung clarified that they require different knowledge and training. Specifically, port state control officers evaluate compliance with international conventions, while port wardens evaluate compliance with the *Canada Shipping Act, 2001* and the *Cargo, Fumigation and Tackle Regulations*. So they do not have the same mandate.

[122] The employer asked me to review *Gasbarro v. Treasury Board (Canadian Transportation Accident Investigation and Safety Board)*, 2007 PSLRB 87. At paragraph 93, the adjudicator noted that "[s]tandby pay compensates the employee for modifying his or her conduct while away from the workplace to ensure his or her ability to return to work and for the inconveniences and disruptions that this may entail." The adjudicator then noted at paragraph 106, "That is to say, being unavailable when there is a call to respond while on standby duty is a bar to standby compensation under article 30."

[123] The employer submitted that not being qualified to inspect cargos is also a bar to being on the Port Warden Standby List and to receiving standby compensation under article 30.

[124] The employer noted that a formal certificate is issued to a marine safety inspector when the inspector is qualified to inspect cargos or to carry out other inspections under s. 211 of the *Canada Shipping Act, 2001*. Section 11(3) of that Act provides the following, specifically:

> ***11 (3)*** *The Minister of Transport must furnish every marine safety inspector with a certificate of designation authorizing the inspector to carry out inspections under section 211 or to exercise any power or perform any duty or function of the Minister under this Act, including any quasi-judicial powers.*

[125] The employer insisted that to be authorized to inspect cargos, it was imperative that the grievor be presented with a certificate that validated category (e), "Inspections of Cargo". Yet, the evidence showed that the certificate he held did not include that authorization.

[126] The employer brought to my attention the objectives of the *Canada Shipping Act, 2001*, which are set out in s. 6, of which paragraphs (a) to (c) are relevant and read as follows:

> ***6*** *The objectives of this Act are to*
>
> ***(a)*** *protect the health and well-being of individuals, including the crews of vessels, who participate in marine transportation and commerce;*
>
> ***(b)*** *promote safety in marine transportation and recreational boating;*
>
> ***(c)*** *protect the marine environment from damage due to navigation and shipping activities ….*
>
> [Emphasis in the original]

[127] The employer reminded me that Mr. Yeung described the dangers associated with cargoes and possible incidents at sea. In all situations, cargo inspections must be carried out in accordance with the applicable rules.

[128] The employer brought *Scanlon* to my attention. It argued that the reasoning followed by the adjudicator in that case applies in this case. It specifically brought to my attention paragraphs 31 to 33 of that decision, which read as follows:

> ***31*** *Turning to the specific interpretation of clause 11.02 of the collective agreement, I note the last sentence, "In designating employees for standby duty the employer will endeavour to provide for the equitable distribution of standby duties." This is somewhat indirect language, but it is nonetheless clear that the employer has the contractual right to designate or select employees for the standby list. However, that right is fettered by the requirement that the employer "… will endeavour to provide for the equitable distribution of standby duties. [emphasis added]". The word "endeavour" is defined as meaning "to exert physical and intellectual strength toward the attainment of an object. A systematic or continuous effort" (*Black's Law Dictionary, *Fifth Edition (1979), at page 473). A similar meaning is "an undertaking or effort directed to attain an object" or "an earnest or strenuous attempt" (*The Canadian Oxford Dictionary, *Oxford University Press (1998), at page 460).*

> ***32*** *An important element in these definitions is the idea of "attempt" or "toward attainment." I say this because clause 11.02 does not require the employer to provide for the equitable distribution of standby duties. Rather, in order to satisfy this provision, the employer must exert a significant effort to attain the object of equitable distribution of standby duties. Further, there may be reasons that prevent the employer from attaining this objective. However, as long as those reasons are not arbitrary (i.e. they are rationally connected to a legitimate business objective), discriminatory or made in bad faith, and significant effort was made to overcome the reasons not to distribute standby duties equitably, there may still be compliance with clause 11.02. Turning to the reference to "equitable distribution" of standby duties this is obviously intended to distribute the benefit of the time-and-one-half rate while on standby equitably among employees. Therefore, the employer must also apply the opportunity for employees to work on the standby list equitably.*
>
> ***33*** *Applying this analysis to the grievances before me, clause 11.02 cannot be read to require the employer to designate employees for standby duty on an equitable basis in any circumstance. Specifically, it is undisputed that the grievors are qualified and have the experience to work at the standby Help Desk but, as a matter of interpretation of this contractual provision, this does not mean that the employer must assign them that work on an equitable basis.*

[129] The employer argued that as long as its decision was reasonable and allowed it to achieve its objectives of real and measurable savings, the decision must be characterized as not arbitrary and fair, which in and of itself leads to the conclusion that the employer did not breach clause 30.02 of the collective agreement.

[130] The employer also highlighted that the adjudicator in *Scanlon* denied the grievances. It insisted that that decision does not support the bargaining agent's position. On the contrary, it states only that the employer must make an effort to distribute standby hours equitably but does not say the factors it must consider when making that effort.

[131] It stated that in this case, Mr. Ghoshal denied the grievor's request as the grievor was not qualified to perform port warden duties. It added that clearly, clause 30.02 of the collective agreement does not require that the employer designate an unqualified person for standby.

[132] The employer also submitted that its decision was a reasonable exercise of its managerial rights and that it must effectively discharge its management responsibilities. As noted, article 6 of the collective agreement specifically states,

"Except to the extent provided herein, this Agreement in no way restricts the authority of those charged with managerial responsibilities in the public service." The employer added that in addition, ss. 7(1)(c) and (d) of the *Financial Administration Act* (R.S.C., 1985, c. F-11; *FAA*) provide as follows:

> ***7 (1)*** *The Treasury Board may act for the Queen's Privy Council for Canada on all matters relating to*
>
> *…*
>
> ***(c)*** *financial management, including estimates, expenditures, financial commitments, accounts, fees or charges for the provision of services or the use of facilities, rentals, licences, leases, revenues from the disposition of property, and procedures by which departments manage, record and account for revenues received or receivable from any source whatever;*
>
> ***(d)*** *the review of annual and longer term expenditure plans and programs of departments, and the determination of priorities with respect thereto ….*

[133] Similarly, the employer submitted that s. 11.1 of the *FAA* sets out the Treasury Board's powers, which include, as set out in s. 11.1(1)(a), the power to "… determine the human resources requirements of the public service and provide for the allocation and effective utilization of human resources in the public service …".

[134] Next, the employer referred me to *Professional Institute of the Public Service of Canada v. Treasury Board (Department of Human Resources and Skills Development)*, 2014 PSLRB 18 at para. 48, which states, "In exercising these functions, including contracting out services, the employer may do anything that is not specifically or by inference prohibited by statute or the collective agreement." The employer submitted that the collective agreement does not prohibit an employer abolishing a standby list to save money.

[135] The employer stated that following the adoption of the Economic Action Plan 2012, which the Government of Canada used to return to a balanced budget, it established a plan to significantly reduce its spending base and to generate savings of $61.8 million. The action plan came under the Treasury Board's authority, as it is mandated to guide the sound management of resources in government, with a focus on results and value for money.

[136] As a result, TC had to abolish the Second Standby List. Mr. Yeung estimated that the savings from this initiative was in the range of $30 000 per year. The employer

insisted that these savings were required. Its decision to abolish the list was made for valid economic reasons and was not arbitrary or unreasonable. The economic pressures at the relevant times were a valid operational requirement.

[137] The employer argued that in *Scanlon*, in which the employer estimated savings in the range of $7000 per year, the adjudicator noted that it was not for him to try to figure out the details of the employer's budgetary situation; his role was to determine whether management's rights had been reasonably exercised. At paragraph 50, the adjudicator concluded that the employer's decision to remove the employees from the standby list was made for valid economic reasons and was not arbitrary or unreasonable. He concluded that at the relevant times, economic pressures were a valid operational requirement.

[138] The employer pointed out that the result is the same in this case. As in *Scanlon*, its decision to modify its practices, i.e., to keep just one standby list, to save money, was made for valid economic reasons and was not arbitrary or unreasonable. The economic pressures at the relevant times were valid operational requirements.

[139] The employer pointed out that the adjudicator in *Scanlon* stated as follows at paragraphs 48 and 50:

> *[48] … Of course, it is not my role to investigate and decide whether the employer's level of service is adequate or not; my role is to decide whether the employer's decision to remove the grievors from the standby Help Desk was a reasonable exercise of management rights or otherwise consistent with the collective agreement.…*
>
> *…*
>
> *[50] … On the evidence before me, I conclude that the employer's decision to remove the grievors from the standby Help Desk was made for valid economic reasons and it was not arbitrary or otherwise unreasonable. Further, considering clause 9.03(b), the economic pressures at the material times were a valid operational requirement. Briefly put, the grievors have not proven to the required standard that their removal from the standby Help Desk was unreasonable or based on illegitimate business reasons.*

[140] Similarly, in this case, the employer argued that its decision to abolish the Second Standby List was made for valid economic reasons and that Mr. Ghoshal's decision to deny the grievor's request to be added to the Port Warden Standby List was not arbitrary or otherwise unreasonable. The grievor was simply not qualified to inspect cargos.

[141] The employer added that the adjudicator's reasoning in *Zelisko v. Treasury Board (Citizenship and Immigration Canada)*, 2003 PSSRB 67 at para. 160, is applicable to this case. In that case, the employer had changed the removals policy. It required new qualifications and decided that only enforcement officers would perform removals. The grievors were no longer eligible to perform removals once the policy change became effective, and they grieved. The adjudicator concluded that the employer's changes to its procedures that clarified the separate duties of different employees in no way exceeded its rights. I note that that decision was based on an interpretation of clause 28.05(a) of the Program and Administration Services group collective agreement, which required the employer to make every reasonable effort to equitably distribute overtime work among readily available, qualified employees.

[142] The employer added that s. 7 of the *FPSLRA* specifically provides the following:

> ***7*** *Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board or a separate agency to determine the organization of those portions of the federal public administration for which it represents Her Majesty in right of Canada as employer or to assign duties to and to classify positions and persons employed in those portions of the federal public administration.*

[143] The employer also added that s. 6 of the *FPSLRA* provides as follows: "Nothing in this Act is to be construed as affecting the right or authority of the Treasury Board under paragraph 7(1)(b) of the *Financial Administration Act*."

[144] In addition, the employer noted that marine safety inspectors are exempt as public servants from any legal liability in the event of an incident. However, s. 268.1 of the *Canada Shipping Act, 2001* provides that the state is not relieved of the civil liability, whether in tort or extracontractual, which it is required to assume. In the circumstances, it cannot allow an unauthorized employee to inspect cargo ships.

[145] The employer also referred me to the following decisions, which address the method of measuring equitability: *Attorney General of Canada v. Bucholtz*, 2011 FC 1259 at para. 52, and *Barbour v. Treasury Board (Department of Transport)*, 2018 FPSLREB 80 at paras. 120, 123, and 127.

[146] In essence, the employer argued that in *Bucholtz*, the Federal Court set out the framework to be followed when a provision like clause 28.03 of the collective agreement is at issue. It concerns the equitable distribution of overtime to employees.

The employer argued that the second criterion established by the Federal Court required the grievor to provide evidence on the hours he was allocated and the hours allocated to similarly situated employees over the same period. The point is to compare the hours allocated to everyone, to measure equitability over a reasonable period. Once the grievor's allocated hours are compared to those of the other employees, the adjudicator must determine if any factors can explain any discrepancy between their hours, such as differing availability or leave, etc.

[147] The employer argued that as in *Barbour*, the grievor did not provide evidence as to the number of standby hours allocated to other employees. Thus, as in *Barbour*, I should dismiss his grievance on that basis.

[148] As well, the employer added that clause 30.02 does not impose a timeline on it to attempt to equitably distribute standby hours. In the circumstances, it meets the objective of the clause if its decision is neither arbitrary, discriminatory, nor made in bad faith. In this case, it stated that it was able to offer training to the grievor starting in December 2012. It added that it is important to remember the context of the era and the budget cuts, as well as the SERLO that was done to fill the position that Mr. Yeung obtained. Nevertheless, the grievor was trained as early as December 2012 and was placed on the standby list in April 2013.

[149] The employer also argued that the grievor had the burden to prove the grounds for the entitlement to standby pay within the terms of the collective agreement, on a balance of probabilities. See *Gasbarro*, at para. 97.

[150] The employer objected to the bargaining agent's argument that the employer is required to prove the reasonableness of its decision. It referred me to paragraph 49 of *Scanlon*, which reads as follows:

> *[49] As a final matter, the grievors and the bargaining agent have been consistent in their criticism of the process used by the employer leading to the decision to remove the grievors from the standby Help Desk list. They rely on a previous decision that found, in similar circumstances, that the employer "must explain and prove that it acted in a reasonable and non-arbitrary manner"* (Cardinal and Leclerc v. Treasury Board (Public Works and Government Services Canada) *2001 PSSRB 133, at para 43). Other than this statement* ***I am not aware of a legal requirement that an employer must not only act reasonably but also provide an explanation and "prove" to employees that they acted reasonably.*** *Ultimately, as a legal matter, an employer is required*

> *to prove the reasonableness of its decision to an adjudicator and not the employees at the worksite. An explanation to employees about the reasons for a change may be important for the morale of a workplace, but it is not something that involves the Board.*
>
> [Emphasis added]

[151] The employer insisted on only one burden of proof in this case, which was that of the grievor to demonstrate the collective agreement breach. For its part, the employer has the discretion to offer an explanation. For example, in *McCallum v. Canada Revenue Agency*, 2011 PSLRB 73, the adjudicator confirmed this at paragraph 157 as follows:

> *[157] The grievor raised a number of concerns, which together suggest that the assignment of overtime was inequitable. I note that, here, there is no burden of proof on the employer, contrary to what was the case in* Cardinal and Leclerc. *However, the grievor's evidence is sufficient to require an answer or a reasonable explanation from the employer, as she gave clear and cogent evidence of the following:*
>
> *…*
>
> *In the absence of a reasonable and credible explanation from the employer, the grievor's testimony was sufficient to prove that the grievor received less standby than other team members and, on a balance of probabilities, that standby weeks were distributed inequitably. In particular, the unexplained assignment of the Christmas 2006 double-stat-holiday standby week to the other senior team member appears inequitable on its face since he had already been assigned the Easter double-stat-holiday standby week that year.*

[152] The employer noted that the bargaining agent argued that Mr. Ghoshal did not provide any substantive reason to support his decision to refuse to include the grievor on the Port Warden Standby List. The employer added that the hearing was a *de novo* hearing (which means starting over, afresh) and that accordingly, the Board must interpret the applicable collective agreement provisions on the basis of the evidence it received. However, the employer noted that the bargaining agent did not subpoena Mr. Ghoshal to testify even though it had the burden of proof. The employer insisted that it did not have to call Mr. Ghoshal to testify as it had no such burden. Thus, it submitted that I should find the lack of evidence to support Mr. Ghoshal's decision detrimental to the bargaining agent's case and that as a result, it did not meet its burden of proof.

[153] Furthermore, the employer argued that it did not breach the collective agreement but that even if it did, there is no basis for granting a remedy to the grievor

for lost standby hours since as he was not qualified, he could not be and was not on the standby list. As a result, he was not disrupted during the period from July 10, 2012, to June 12, 2013, when he had his first standby shift. The employer reminded me that as mentioned in *Gasbarro*, at para. 93, "[s]tandby pay compensates the employee for modifying his or her conduct while away from the workplace … and for the inconveniences and disruptions that [returning to work] may entail."

[154] Furthermore, the employer added that no compensation for overtime can be paid to the grievor for carrying out port warden tasks since he was not qualified to perform cargo inspection work. In addition, it highlighted that when a port warden received a call during standby hours that an inspection under the mandate of the marine safety inspectors of the Compliance and Enforcement Unit was to be carried out, the port warden would inform the manager of that unit, who would contact an inspector on the team to carry out the inspection. As a result, the grievor did not lose any overtime; he simply did not receive standby calls.

[155] The employer also added that I should keep in mind that article 34 of the collective agreement governs travelling time, which it added is compensated only in the circumstances and to the extent provided for in that article. In this case, it submitted that the grievor did not claim that it had breached that article.

[156] Furthermore, the employer argued that it did not breach clause 30.02 of the collective agreement but that if I were to reach a different conclusion, I must bear in mind that in any event, the grievor could not have been added to the Port Warden Standby List until his training was completed. And the evidence showed that the training was possible only to the extent and at the rate at which vessels arrived at port for inspections. Again, this training is mandatory under the *Canada Shipping Act, 2001*.

[157] For all these reasons, according to the employer, the grievor did not prove that in accordance with the standard to be applied, the decision not to include him on the Port Warden Standby List was unreasonable or based on illegitimate operational reasons.

3. The bargaining agent's rebuttal

[158] The bargaining agent submitted that the overtime distribution discussed in *Barbour* is not at issue in this case. It did not claim that that distribution was

inequitable. Clause 28.02 and the system underlying overtime distribution are not at issue. At issue is clause 30.02, specifically its last sentence, stating that the designation of employees on the standby list must be equitable.

4. Conclusion

[159] First, recall that clause 30.02 reads as follows:

> *30.02 An employee designated by letter or by list for standby duty shall be available during his or her period of standby at a known telephone number and be available to return for work as quickly as possible if called. In designating employees for standby, the Employer will endeavour to provide for the equitable distribution of standby duties.* [In French: *Lorsqu'il désigne des employé-e-s pour des périodes de disponibilité, l'Employeur s'efforce de prévoir une répartition équitable des fonctions de disponibilité.*]

[160] Thus, the last sentence of the clause states that when designating employees for standby duty, the employer shall endeavour to provide for an equitable distribution of standby duties. That is the issue in this case.

[161] The purpose of the sentence under interpretation is, of course, to equitably distribute the benefit of accumulated standby time among employees. Mr. Yeung explained that for every eight hours of standby, an employee receives one hour's pay. Therefore, someone on standby between 4:00 p.m. and 8:00 a.m. receives two hours' pay even if he or she does not report to work. If he or she does report, he or she receives pay at the rate of time-and-a-half for the overtime work. Standby hours are also paid on weekends.

[162] In *Scanlon*, the adjudicator focused on the word "endeavour" in the clause at issue. He noted at paragraph 31 that that word is defined as follows:

> *[31] … The word "endeavour" is defined as meaning "to exert physical and intellectual strength toward the attainment of an object. A systematic or continuous effort" (*Black's Law Dictionary*, Fifth Edition (1979), at page 473). A similar meaning is "an undertaking or effort directed to attain an object" or "an earnest or strenuous attempt" (*The Canadian Oxford Dictionary*, Oxford University Press (1998), at page 460).*

[163] The adjudicator also noted at paragraph 32 that an important element in these definitions is the idea of "attempt" or "toward attainment". He added that clause 11.02 of the collective agreement at issue in that case, which was identical to clause 30.02 in this case, did not require the employer to provide for an equitable distribution of

standby duties. However, the employer had to make a considerable effort to achieve the objective of the equitable distribution of standby duties.

[164] According to *Scanlon*, some things could prevent the employer from achieving that goal. However, they could not be arbitrary (i.e., not rationally connected to a legitimate operational objective), discriminatory, or in bad faith. But the adjudicator added that if a significant effort were made to overcome barriers to the equitable distribution of standby duties, clause 11.02 of the collective agreement in that case (identical to clause 30.02 in this case) could still be complied with.

[165] According to the reasoning adopted in *Scanlon*, with which I agree, the following question arises: Was a significant effort made to provide for an equitable distribution of standby duties? Similarly, was a significant effort made to overcome barriers to the equitable distribution of standby duties?

[166] On the facts, standby was always distributed equitably among the port wardens in Cargo Services on the Port Warden Standby List. The same was true for the marine safety inspectors in the Compliance and Enforcement unit before July 10, 2012, when the Second Standby List was abolished. Before that date, the benefit of compensation for paid standby time was available to both groups of listed employees. Each employee on each list enjoyed the benefit of compensation for being on standby.

[167] However, in 2012, the employer faced significant budget pressures. This situation led to a number of decisions being made that were aimed at saving money. Management decided to eliminate the Second Standby List. It is not disputed that a valid economic issue was behind that decision. The budget constraints of 2012 were very real.

[168] Once the Second Standby List was abolished, only those port wardens on the Port Warden Standby List received a portion of standby periods. During their standby times, they performed the required inspections within their jurisdiction. As a result, they received standby pay and overtime pay for the work they performed. For example, all cargo inspections are within their jurisdiction. When inspections were outside their jurisdiction, for example if two vessels collided, the port warden on standby who received the call would contact the appropriate program manager to deal with the situation, who in turn would call a qualified inspector to make the required inspection. The inspector would receive overtime pay for that work.

[169] After the Second Standby List was abolished, the grievor asked Mr. Ghoshal to be added to the Port Warden Standby List. In his request, the grievor stated the following:

> *It's clearly understood that the interim decision made yesterday was to announce that there would be a single standby system, no decision was made to exclude a MSI* [Marine Safety Inspector] *from joining that single standby system. Concerning training, I can provide proof of my experience as cargo surveyor for two years before joining TC, and to my 11. 5 years of work experience as certified "Health and Safety Officer" in Ontario, handling both OHS Act, and Canada Labour Code Part II safety matters. Historically, training of new MSI's across the department to perform cargo service duties (except in Vancouver office), takes not more than 2:3 moths [sic], after which, new inspectors have been conducting cargo service duties as required.*

[170] However, Mr. Ghoshal refused the request, for the following reason:

> …
>
> *… As a follow-up to our conversation on the subject, please note that* ***based on the operational requirements of the unit, we have sufficient number of staff on the standby list****. At this time, I do not have a need to include other individuals on the list, therefore I will have to deny the request. Please feel free to contact me any time if you require additional information or if you have any questions.*
>
> [Emphasis added]

[171] Mr. Ghoshal did not respond that he had refused the grievor's request because of an economic issue. Nor did he indicate that he ruled out the possibility of adding the grievor to the Port Warden Standby List on the basis that he was not on the port warden team. He denied the grievor's request on the grounds that based on the unit's operational needs, he had sufficient staff on standby. As a result, he wrote that he did not need to add new people to the list.

[172] The employer argued that it properly exercised its management rights and that it had the discretion to decide whether a standby list should be abolished. In addition, its view was that the choice of employees for its standby list was discretionary.

[173] As noted in *Scanlon*, which refers to Brown and Beatty, at paragraph 4:2300, the arbitral jurisprudence requires that that discretion be exercised reasonably and for an operational purpose. The adjudicator noted the following at paragraph 36:

> *[36] … Implicit in this standard of reasonableness is that my inquiry, as an adjudicator of the grievances in this case, is not into the correctness of the employer's decision. There may be more than one result that is a reasonable exercise of management rights and the fact that I might have made a different decision is not the test.*

[174] As noted in *Scanlon*, an implicit aspect of the reasonableness standard is that my review, which I conduct in my capacity as the adjudicator hearing the grievance before me, will not be on the merits of the employer's decision. More than one outcome could arise from the reasonable exercise of management rights, and the fact that I could arrive at a different decision is not the test to apply in this case.

[175] In this case, I agree with the employer that it was not obliged to grant the grievor's request to be added to the Port Warden Standby List. But the question is whether it could refuse his request in the circumstances considered in this case and for Mr. Ghoshal's reason. Therefore, for the purposes of the analysis, the issue is whether Mr. Ghoshal's decision to refuse the grievor's request was reasonable because it was made with a legitimate operational objective or was unreasonable because it was made in the absence of such an objective.

[176] I am aware that the contractual provision in question is limited to describing how employees are designated for standby duty or are added to the standby list. Specifically, the clause includes the phrase, "In designating employees for standby …".

[177] As a fact, it is undeniable that as of his request, the grievor was not yet authorized to carry out cargo inspections. Therefore, he could not have been automatically added to the Port Warden Standby List even had Mr. Ghoshal wished to add new people to it. It is true that employees must have the necessary qualifications to be on the list.

[178] Nonetheless, I find that Mr. Ghoshal was obligated to make an effort to provide an equitable distribution of standby duties, pursuant to clause 30.02, which he did not do. He did not make an effort to address and possibly overcome the situation, which prevented a fair distribution of standby duties. The grievor was not included in the group receiving standby assignments because a list already existed.

[179] I note that the grievor was not allowed to inspect cargoes. However, the evidence showed that a few months of training or coaching and the recognition of his competence were the only things he lacked with respect to being authorized to carry

out cargo inspections. I would like to add that he has many years of experience in the inspection field and that he is an administrator of examinations in relation to the issuance and renewal of certain certificates of competency and endorsements under the *Marine Personnel Regulations* (SOR/2007-115). No evidence was presented that the additional training he required to be fully qualified could not have been provided to him.

[180] I further note that according to the evidence on the record, Mr. Ghoshal's decision to deny the grievor's request to be added to the standby list was not based on the economic pressures at the time, albeit they were real in 2012. In addition, according to that evidence, his decision was not based on the ground that the grievor was not authorized to inspect cargo at that time. As he wrote to the grievor, his decision was made on the basis that given the unit's operational needs, he had sufficient standby staff and did not need to add anyone else to the relevant list. Thus, in effect, he responded negatively to the grievor's request so that he could continue to spread the benefit of accumulated standby hours among only those employees already on the list. He did not explain why adding someone to the list, after the appropriate training was completed, was not possible. Clearly, his response was in the spirit of, "No thank you. I have already formed a group. Distribution is reserved only for those in this group."

[181] I cannot characterize this decision as reasonable or as meeting a legitimate operational objective, not when a contractual clause provides that the employer must endeavour to provide for an equitable distribution of standby duties.

[182] I want to make it clear that the employer's decision to refuse to add someone to the list, the grievor in this case, did not save it money. The standby duties had to be distributed, and whether it was among eight or nine people, the amount to be distributed remained the same. The only difference between a list of eight rather than nine people is that each person on the list receives a larger share of the duties when fewer people are on it.

[183] I accept that the grievor was available but not yet qualified to conduct cargo inspections at the time he made his request. His certificate did not yet indicate that he was mandated to inspect cargo ships. But this fact is not enough to decide the issue. The requirement is that the employer "will endeavour" to provide for an equitable distribution of standby duties.

[184] I acknowledge that following the merger in December 2012 and Mr. Yeung's appointment, he immediately invited employees interested in being designated to perform standby duties to provide him with their names.

[185] As the bargaining agent pointed out, the only change that occurred between July and December 2012 was the change of manager. The new one decided to expand the standby list. The two managers did not have the same interpretation of clause 30.02.

[186] The employer presented the Federal Court's case of *Bucholtz*, which sets out the framework to follow when a provision like clause 28.03 of the collective agreement is at issue. It then argued that as in *Barbour*, which applies that framework, the grievor did not provide evidence as to the number of standby hours allocated to the other employees. Thus, as in *Barbour*, I should dismiss his grievance on that basis. I do not agree. Clause 28.03 addresses overtime. Clause 30.02 addresses standby duties. The grievor did not have to provide evidence as to the number of standby hours allocated to the other employees to demonstrate a breach of clause 30.02. He had to provide evidence that the decision not to include him on the Port Warden Standby List was unreasonable or based on illegitimate operational reasons.

[187] In addition, while it is true that clause 30.02 does not impose a timeline on the employer to attempt to equitably distribute standby hours, I note that in this case, Mr. Ghoshal categorically and definitively refused the grievor's request on August 3, 2012, and that he did not provide the reasons that prevented him from achieving the goal of trying to provide for the equitable distribution of standby duties. Had it not been for Mr. Yeung's appointment to the manager position, there is no reason to believe that the grievor's request would have been reconsidered later on.

[188] It is true that the Manual's fourth criterion gives a manager the discretion to decide whether a marine safety inspector is competent to inspect cargos, which is a valid criterion given the risks associated with incidents at sea. However, I agree with the bargaining agent that it does not give the manager carte blanche to disregard the collective agreement and choose whom to add to or exclude from the list. The manager's obligation is to make an effort to provide for an equitable distribution of standby.

[189] I agree that there is only one burden of proof in this case, which is that of the grievor to demonstrate the collective agreement breach. But I also note that as in

McCallum, if a grievor can prove that a decision was inequitable, then the employer must provide a reasonable and credible explanation for it.

[190] Precisely, in *McCallum*, the grievor was a member of the information technology after-hours support team. The members of that team received standby assignments and were entitled to standby pay in addition to overtime pay when they responded to service calls. The grievor in that case grieved the employer's distribution of overtime. The clause at issue provided that "… the Employer shall make every reasonable effort … to offer overtime work on an equitable basis among readily available qualified employees." The adjudicator found that since the grievor proved that the distribution of overtime was inequitable, the employer had an onus to provide a reasonable and credible explanation for it. He found that the employer's evidence was not credible and that overtime opportunities offered to another employee should have been offered to the grievor. He allowed the grievance and ordered that the grievor be paid the standby and overtime hours that had been paid to that other employee.

[191] Moreover, I do not agree with the employer that the lack of additional evidence to support Mr. Ghoshal's decision is detrimental to the bargaining agent and that as a result, it did not meet its burden of proof. There is evidence as to why Mr. Ghoshal refused the grievor's request. He did so, as he wrote, "… based on the operational requirements of the unit …". He specifically wrote, "… we have sufficient number of staff on the standby list. At this time, I do not have a need to include other individuals on the list …".

[192] Therefore, it is necessary to determine whether the employer provided a reasonable and credible explanation for its refusal to add the grievor to the Port Warden Standby List. What exactly were the unit's operational requirements? They are not known. Mr. Ghoshal did not write them down. Left to decide is whether the employer provided a reasonable and credible explanation for its decision.

[193] In my view, it did not. In sum, by denying the grievor's request to be designated for standby duty periods for the reasons he stated, Mr. Ghoshal did not make an effort to provide for an equitable distribution of standby duties, as he was required to under clause 30.02. Therefore, I find that in accordance with the standard to be applied, the grievor proved that the employer's decision was not a reasonable exercise of management rights and that it was not consistent with the collective agreement.

[194] The parties requested that if I grant the grievance, I give them an opportunity to agree to the amount of the lost wages. I recognize that the employer could not have added the grievor's name to the list while he was not authorized to inspect cargo ships. In the circumstances, I find that he should be compensated for the period during which he was not given the opportunity to be on standby, taking into consideration that approximately four months of training would have been required for him to be trained and for the unit manager to recognize him as competent.

[195] I note that the evidence established that once an inspector is recognized as competent and the appropriate form has been sent to headquarters, the inspector is authorized to begin inspections. I also note that compensation should not include travel time or overtime.

[196] For all of the above reasons, the Board makes the following order:

(The Order appears on the next page)

VI. Order

[197] The grievance is allowed.

[198] I declare that the employer breached clause 30.02 of the collective agreement.

[199] The grievor is to be compensated for the period during which he was not given the opportunity to be on standby, taking into consideration that approximately four months of training would have been required for him to be trained and for the unit manager to recognize him as competent.

[200] The parties are invited to enter into discussions with a view to reaching agreement on the appropriate compensation.

[201] I would normally grant the parties 90 days to attempt to determine the appropriate compensation. Given that normal working conditions are severely compromised by the current global pandemic, a 90-day window is not realistic. I will remain seized of this matter for 180 days from the date of this decision with respect to all questions related to the remedy.

June 11, 2020.

Nathalie Daigle,
a panel of the Federal Public Sector
Labour Relations and Employment Board