

Lay off  
Management Rights  
Past Practice

**FINDINGS AND AWARD  
IN A DISPUTE**

**BETWEEN: THE CANADIAN MERCHANT SERVICE GUILD**

(hereinafter called the "Union")

**AND: HER MAJESTY THE QUEEN, in Right of Newfoundland and  
Labrador, represented herein by the Treasury Board**

(hereinafter called the "Employer")

**GRIEVORS: CAPT. MIKE PHILPOTT & CAPT. KEVIN GREENE  
FOR THE UNION: MARK MURRAY, LL.B.  
FOR THE EMPLOYER: DON SATURLEY  
BEFORE: W. JOHN CLARKE, C. Arb., C. Med.**

**PRELIMINARY MATTERS**

The hearing of this matter took place at St. John's on March 19 and April 17, 2009 at which time the parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to the jurisdiction of the arbitrator to hear the grievance.
3. The grievance procedure had been properly followed or requirements had been waived.
4. The arbitrator would remain seized of the matter in the event the parties could not agree on the interpretation of the award or in the event there is a question of compensation arising from the award.
5. Witnesses were permitted to remain throughout the hearing.
6. The time limits for the filing of the award were waived.
7. There were no persons who were not parties to the proceedings who were entitled to notice of the hearing.

The following exhibits were entered by consent and identified as follows:

C#1 Grievance of Captain Mike Philpott dated November 20, 2007;  
C#2 Grievance of Captain Kevin Greene dated November 16, 2007;



- C#3 Collective Agreement between the parties expiring June 30, 2004;
- C#4 Certification Order of the Labour Relations Board dated September 24, 1999, certifying the union as bargaining agent of certain employees of the employer;
- C #5 Marine Operations Policy Manual dated September 1997.

The following persons testified under oath and entered exhibits identified as follows:

For the Union:

Ben Hammett who entered the following exhibits:

- BH#1 Summary of Services Available for various ferries;
- BH#2 Notice of Layoff dated November 16, 2007 to Captain Kevin Greene (two copies);
- BH#3 Notice of Layoff dated December 20, 2004 to Ray Blake with notation marked in pen "Letter Rescinded";
- BH#4 Notice of Layoff to Mr. Ray Blake dated January 5, 2005
- BH#5 Letter from the employer to Mr. Ray Blake dated May 5, 2003;
- BH#6 Letter from the employer to Ray Blake dated February 7, 2003;
- BH#7 Letter from employer to Capt. Ray Blake dated February 25, 1999;
- BH#8 Letter from the employer to Mr. Raymond Blake dated November 4, 1998;
- BH#9 Letter from Mr. Raymond Blake to the employer dated November 12, 1998;
- BH#10 Letter from the employer to Mr. Raymond Blake dated January 13, 1998;
- BH#11 Letter from the employer to Mr. Kevin Greene dated November 4, 1998;
- BH#12 Letter from the employer to Capt. Kevin Greene dated February 23, 1999;
- BH#13 Letter to Capt. Kevin Greene from the employer dated January 7, 2000;
- BH#14 Letter to Mr. Kevin Greene from the employer dated February 7, 2003;
- BH#15 Letter to Mr. Kevin Greene from the employer dated March 5, 2003;
- BH#16 Letter to Mr. Kevin Greene from the employer dated December 20, 2004;
- BH#17 Letter to Kevin Greene from the employer dated January 5, 2005;
- BH#18 Letter to Kevin Greene from the employer dated May 14, 2007;
- BH#19 Letter to Kevin Greene from the employer dated May 14, 2007;
- BH#20 Notice of layoff to Capt. Kevin Greene dated November 9, 2007;
- BH#21 Notice of layoff to Capt. Kevin Greene dated November 16, 2007;
- BH#22 Notice of layoff to Capt. Mike Philpott dated November 9, 2007.

For the Employer:

Walter Pumphrey

**THE FACTS**

On September 25, 1999 the union was certified by the Labour Relations Board to be the bargaining agent for a unit of employees of the employer comprising all masters employed by the

employer on ferries operated within the Province of Newfoundland. The grievors are both members of that union.

In May 2007 the M.V. Sound of Islay, a ferry vessel operated by the employer, went into the dock at Clarenville for an extensive refit that lasted until January 2008. On November 16, 2007 the grievor, Capt. Mike Philpott, received a notice of layoff. That notice reads as follows:

"Kindly accept this 30 days notice as your layoff notice as per your Ferry Captains Collective Agreement. From your position on the M.V. Sound of Islay.

Your notice period commences on the 16th November 2007.

Your employment therefore terminates on the 15th December 2007, unless you are otherwise notified.

You are advised of your rights, with regard to your options under your Collective Agreement applicable to your positions." (sic.)

This notice has a hand written notation inscribed upon it which reads: "Previous Notice is Rescinded". The letter and the note are both signed by Capt. B. A. Hammett. A previous notice had been sent to Capt. Philpott dated November 9, 2007 and advising that his notice period began November 9, 2007 and his employment therefore terminates on December 8, 2007.

On November 16, 2007 the grievor, Capt. Kevin Greene, received a notice of layoff. That notice reads as follows:

"Kindly accept this 10 days notice as your layoff notice as per your Ferry Captains Collective Agreement. From your position on the M.V. Sound of Islay.

Your notice period commences on the 16th November 2007.

Your employment therefore terminates on the 25th November 2007, unless you are otherwise notified.

You are advised of your rights, with regard to your options under your Collective Agreement applicable to your positions." (sic.)

A previous notice had been sent to Capt. Greene dated November 9, 2007 which advised him of a 30 day notice of layoff. A hand written inscription on that notice simply pointed out that it was "Wrong. SB 10 day notice - seasonal employee".

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The Employer's records of previous layoffs were sparse. Exhibits in the form of letters exemplifying the layoffs were entered into evidence. Subsequent to the certification order for this bargaining unit, other than the letters which form the bases for these grievances, there were six layoffs recorded in those letters: Capt. Ray Blake had been laid off three times and Capt. Kevin Greene had been laid off three times. Capt. Ray Blake retired and was subsequently replaced by one of the grievors, Capt. Philpott.

The union entered these exhibits through Capt. Ben Hammett who is a Marine manager with the Marine division of the employer and has been employed there since May 2002. He could not recall the actual length of the layoff involved in the subject grievances. Many of the layoffs specified in this correspondence indicated that they had been rescinded either by writing those words on the letter in handwriting or by issuing a subsequent letter specifying that there had been a rescission of the layoff. Capt. Hammett knew very little of the circumstances surrounding the previous layoffs and testified that he had reviewed the files and had simply taken the letters which had the word "layoff" on them. The records had been with the Human Resources department in the Provincial Department of Works.

He was unaware, for the most part, as to whether the layoffs specified in the letters were for refit purposes or otherwise. He also was unaware of whether the layoffs mentioned in the correspondence actually took place or why they had been rescinded. The only layoffs of which he had a clear memory were the subject ones. These actually took place. He was not aware of any other lay-offs of captains during the approximately 25 refits which had occurred since he assumed his current position.

He explained that in the current situation the vessel had been in Clarenville for an extended refit. The vessel came in initially on an emergency basis. The repairs began in May 2007 and the captains were laid off in November 2007. The vessel had sailed from Clarenville to St. John's. In March or April 2008 the boat went back in service from St. John's. Capt. Hammett explained that

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if the vessel were to be moved only a short distance the yard crew could do it. If the move was more than a short distance, the vessel's crew would be recalled. The refit was almost complete in November, 2007 with the exception of one component which could only be sourced in China. The refits normally take from six weeks to two months to complete and during such a short period the captains are not normally laid off. The only reason that the captains were laid off in this situation was because of the long waiting period for the part to arrive from China. The installation of the part was a requirement of Transport Canada. All of the crew had been laid off but it became necessary to bring back the engineer. Both of the grievors were recalled in January and they had not bumped into another position.

Walter Pumphrey, the Director of Operations located at Lewisporte testified as to having visited the worksite in the fall of 2007. There was nobody at the worksite at all. It was raised by him as a concern with Capt. Hammett. He could not say, however, whether this circumstance was a catalyst for the layoff of the grievors. He was aware of Exhibit C#5 which was the Marine Operations Policy Manual but he could not say whether or not this document was on each of the vessels operated by the Department or, specifically, whether it was in place on this vessel.

### **THE GRIEVANCES**

On November 16, 2007, the union filed a grievance on behalf of Capt. Greene against the employer in the following form:

“As per Article 8.03 (b) of the Ferry Captains’ Collective Agreement, this letter shall serve as notice in writing at Step 1 of the grievance procedure of the grievance of Capt. Kevin Greene. Capt. Greene alleges that the ten day notice of layoff received by him, dated November 16, 2007, is a violation of past practice under the Ferry Captains’ Collective Agreement, article 19 and all other relevant articles. Past practice has been not to lay off Ferry Captains in similar circumstances.

Therefore, the grievor requests that the Notice of Layoff have no force or effect and the bargaining unit member is made whole with respect to all employment benefits to which he is entitled under the collective agreement.”

On November 20, 2007, the union filed a grievance on behalf of Capt. Mike Philpott against the employer in the following form:

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"As per Article 8.03 (b) of the Ferry Captains' Collective Agreement, this letter shall serve as notice in writing at step 1 of the grievance procedure of the grievance of Capt. Mike Philpott. Capt. Philpott alleges that the 30 day notice of layoff received by him, dated November 16th, 2007, is a violation of past practice under the Ferry Captains Collective Agreement, Article 19, and all other relevant Articles. Past practice has been not to lay off Ferry Captains in similar circumstances, in that a refit is not a shortage of work.

The grievor requests that the Notice of layoff have no force or effect and that he be made whole with respect to all employment benefits to which he is entitled under the Collective Agreement."

### **THE COLLECTIVE AGREEMENT**

The relevant portions of the collective agreement read as follows:

“

#### **ARTICLE 2 DEFINITIONS**

...

- (c) "grievance" means a dispute arising out of the interpretation, application, administration or alleged violation of the terms of this Collective Agreement.
  
- (j) "lay-off" means the temporary cessation of employment of an employee because of lack of work or the abolition of a post.

...

#### **ARTICLE 4 MANAGEMENT RIGHTS**

- 4.01 All functions, rights, powers, and authority, including the scheduling of the service, which are not specifically abridged, delegated, or modified by this Agreement are recognized by the Guild as being retained by the Employer.

...

#### **ARTICLE 6 GUILD SECURITY**

...

- 6.03 All Ferry Captains shall upon commencing employment be provided with information in writing concerning duties and responsibilities, starting salary and classification, and terms and conditions of employment.

...

#### **ARTICLE 8 GRIEVANCE PROCEDURE**

...

- 8.02(a)"grievance" means a dispute arising out of the interpretation, application,



administration or alleged violation of this Agreement, or from discipline arising from the course of employment. A grievance thus defined must be presented in writing by a Ferry Captain (on his own behalf or on behalf of part or all of the Group), or by the Guild.

...

ARTICLE 19  
TERMINATION OF EMPLOYMENT

...

- 19.03 Except for dismissal for cause, all permanent Ferry Captains shall receive thirty (30) calendar days notice if their services are terminated or if they are laid off. If such notice is not provided, the employee shall receive a sum equal to one month's salary, in lieu of notice. Lay-offs and recalls are to be conducted in accordance with Article 23 - Seniority.
  
- 19.04 Except for dismissal for cause, all seasonal, temporary Ferry Captains shall be given ten (10) calendar days notice if their services are terminated or if they are laid off, provided they have not been hired for a specific purpose or duration. If such notice is not provided, the employee shall be paid for the number of days by which the notice period was reduced.”

THE UNION'S POSITION

The union argues that article 6 of the collective agreement requires the employer to provide the duties and responsibilities expected of these grievors. These duties and responsibilities, it is alleged, are contained in the Marine Operations Policy Manual. The union further argues that Article 12 of the Marine Operations Policy Manual obligates the Captains to be available. The union alleges that the following provisions apply to the subject situation:

“12.1           REFITS

12.1.1         GENERAL

Captains, Engineers and Regional personnel are to keep accurate records of repairs, modifications, additions, etc., required at refit. These items are to be logged in a separate log book. Prior to refit, this list is to be forwarded to the Marine Engineering Superintendent in sufficient time for Coast Guard or Classification approval, budgetary measures or authorization.

Approximately one month prior to refit, the Marine Engineering Superintendent will visit



the vessel and an inspection of all items on the list will be made. Ship's personnel will be required to perform a portion of the refit items whenever time becomes available. Specifications will be drawn up for work which will require contractor or shipyard personnel only. Tenders will then be called for the refit and docking of the vessel.

Prior to refit, a viewing and bidders conference will be held on board the vessel at a designated date and time with personnel from contractors and/or shipyard, Marine Engineering Superintendent, Captain, Mate, Engineers and any Regional personnel required. Captains, Mates, Engineers and Regional personnel will be supplied with a copy of the specifications prior to the viewing for the purposes of additions, deletions or omissions. Copies of the minutes of the bidders conference will be forwarded to those attending the meeting.

#### 12.1.2

. . .  
4. All invoices, packing slips, car receipts, etc. are to be retained by the Captain for delivery to the Marine Engineering Superintendent.

. . .  
7. During refit, the vessel is not to be left unattended. Crew changes will be made at a designated time and the off going crew is to remain with the vessel until the oncoming shift reaches the vessel. Progress report of the refit is to be given to the oncoming Captain/Engineer by the off going Captain/Engineer.

8. All Department personnel are to abide by the rules and regulations of the shipyards performing refits. This will include the wearing of hard hats, steel toed work boots (sic.), safety glasses, etc. Ship's crew are not to perform any work which is entered on the refits. Any and all hot work (welding, burning) is prohibited while the vessel is in contractor's yard.

9. Visitors are not permitted on board the vessel during refit without the permission of the Captain and/or the Marine Engineering Superintendent."

The union alleges that what happened during the period November 2007 to January 2008 is the subject matter of the dispute. The employer's view is that all work was completed in November 2007 and they were awaiting only the arrival of a part from China. This, the union alleges, is not true. It alleges that other work was needed. The requirements of Transport Canada are not the responsibility of the union and the employer should have attended to work that could have been done in November. Union members are expected by the employer to bear the brunt of this inactivity. There has been no evidence to show that Transport Canada had approved all the work and that it was complete. If there is any fault in this situation it should be the employer who pays and not the members of the bargaining unit. During the lay off period from November to January,



approximately 6 weeks, the senior supervisory people were onboard and the employer could easily have kept Captains on. The conditions of employment of the Captains are that they will be kept on during refits. While this condition is not spelled out in the collective agreement, it is spelled out in the Marine Operations Policy Manual. It is therefore incorporated by reference.

The union further argues that the practice of not laying off captains during periods of refit is so entrenched within the organization that it has become an implied condition of employment. It argues that there have been approximately 90 refits and only in the subject one has there been a Captain laid off. There has been therefore a breach of an implied term of the collective agreement and the grievance must succeed.

The union supplied various textual and arbitral decisions to support its position that the grievance be allowed.

### **THE EMPLOYER'S POSITION**

The employer pointed out that much of the evidence presented by the union is pre-certification of the union as the bargaining agent and it also predates the beginning of employment of Capt. Hammett who was the person who gave the testimony. Any testimony given by him is hearsay as he has no knowledge of the events depicted in the correspondence. Any incidents cited by the union prior to their certification as a bargaining unit cannot constitute evidence of past practice as that can only be determined from the actual date of certification.

The collective agreement has no references to crew requirements or Captain requirements in the event of a refit. In fact, the subject of refit is not mentioned in the collective agreement. Article 8.02 (a) defines a grievance as a dispute arising out of the interpretation, application, administration or alleged violation of the collective agreement. As the term "refit" is not defined in the collective agreement there can be no violation as to its application. The proper place to search for an answer to questions dealing with refits is in article 4 which bestows upon management "all functions, rights, powers and authority, including the scheduling of the service,

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which are not specifically abridged, delegated, or modified by this agreement..." The subject of refit has not been abridged, delegated or modified in the collective agreement. Its application is therefore within the discretion of management.

The employer argues further that article 2.01 (j) defines layoff to mean "the temporary cessation of employment of an employee because of lack of work or the abolition of a post." Article 23.04 of the collective agreement then provides the procedure for implementing a layoff and no complaint has been made by the union with the process undertaken by the employer. It is clearly within the right of management to lay off captains for a lack of work. In this case, a part was on a slow boat from China resulting in the suspension of the refit operations and consequent lack of work for the Captains who were laid off accordingly.

There has been presented no evidence of ambiguity within the collective agreement. It is therefore not open to the union to deal with an issue of past practice. Even if they were to argue the issue of past practice, by its own evidence it is clear that the employer has in the past laid off captains and has exerted its collective agreement right to do so.

The employer filed textual and arbitral authorities to support its request that the grievance be denied.

### CONSIDERATIONS

The evidence has been amply set forth above and need not be repeated here. It demonstrates that at some point in November 2007 the bulk of the refit operations on the M.V. Sound of Islay vessel had been completed. It was a requirement of Transport Canada that a certain part had to be installed on the vessel prior to its being permitted to sail again. During the time of the wait for the part, which apparently could only be sourced in China, there was no refit work left to be done nor was there any sailing of the vessel permitted. There was therefore, in the opinion of management, no work for the Captains to perform. This is an opinion which is well within management's right to hold under article 4.01 of the collective agreement.

After such a decision has been made, management is within its rights under Article 2.01 (j) and

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Article 23 to layoff in accordance with the terms of the latter article. As long as it performs the layoff in accordance with the provisions of Article 23 and the situation fits within the definition of "layoff" then no complaint can be made. The union has not alleged a breach of Article 23. The only issue therefore for resolution is whether or not the employer is somehow bound by its past actions to accommodate the Captains in such a situation.

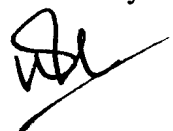
The union has attempted to demonstrate to the arbitrator that there has been a past practice of not laying off captains of vessels when they are on refit. I am not satisfied that this past practice has been established on the evidence. For the most part, the evidence was that of Capt. Hammett who was involved in the layoff forming the basis of these grievances. Capt. Hammett however, has only been in this managerial position since May 2002. The bulk of the evidence which he introduced was gleaned from correspondence of the employer. He was not the author of the majority of the correspondence nor was he familiar with the circumstances under which it was written. He therefore has no firsthand knowledge of what is contained in the majority of the correspondence and has no personal knowledge by which he could supplement the correspondence. As a result, I am unable to accept his evidence as establishing a reliable record of the past practice of this employer with these employees.

Even if I could be assured that the past practice was made out, I am of the opinion that the doctrine of estoppel the union has argued is not applicable in this situation. As noted in Canadian Labour Arbitration, Brown and Beatty, (The Cartwright Group Ltd., 2008) in section 2:2211:

"It is apparent that there are two aspects of the doctrine [of estoppel] as thus stated. There must be a course of conduct in which both parties act or both consent and in which the party who later seeks to set up the estoppel is led to suppose that the strict rights will not be enforced. It follows that the party against whom the estoppel is set up will not be allowed to enforce his strict rights if it would be inequitable to do so. The main situation where it would be inequitable for strict rights to be upheld would be where the party now setting up the estoppel has relied to his detriment."

The section goes on to explain the doctrine further:

"Thus, the essentials of estoppel are: a clear and unequivocal representation, particularly



where the representation occurs in the context of bargaining; which may be made by words or conduct; or in some circumstances it may result from silence or acquiescence; intended to be relied on by the party to whom it was directed; although that intention may be inferred from what reasonably should have been understood; some reliance in the form of some action or inaction; and detriment resulting therefrom."

I am not convinced that there has been a clear and unequivocal representation made in any form by the employer whether expressed or by conduct. At best, there has been demonstrated some evidence of layoff in the past with no context in which to assess that action.

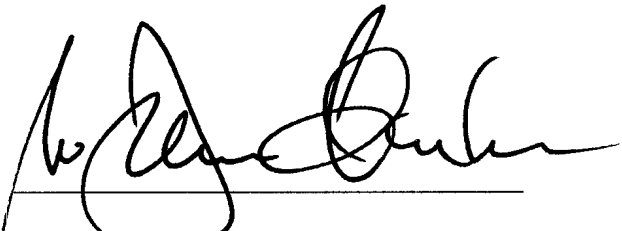
With respect to the union's argument that the employer, through its Marine Operations Policy Manual, has bound itself to keep the Captains aboard in the event of a refit, I cannot accept that argument. The collective agreement is the document by which the parties have expressed their agreement as to their method of operation. If the parties had wished to bind themselves on the process to be employed in the matter of refits they could easily have negotiated and encapsulated it in their collective agreement. As they have not done so, the right to manage the refit operation has gone by default to the employer under its management rights clause. As pointed out in testimony there is a new Marine Operations Policy Manual in the process of being prepared. No consultation with the union was alluded to in the process of revision. It is therefore a discretion which lies with management as to the dictates of operations when refits are underway.

One may be tempted to argue that the policy manual is in itself a representation by management as to how captains will be treated on refit and what their responsibilities will be at that time. There is however, no cogent evidence that would confirm that this process has in fact been followed in the past nor been relied upon by the union or its membership to its detriment.

The grievance is therefore denied.

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DATED at St. John's, Newfoundland and Labrador this 31<sup>st</sup> day of July, 2009.



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W. JOHN CLARKE – SOLE ARBITRATOR