

ARBITRATION AWARD

BETWEEN:

NEWFOUNDLAND AND LABRADOR ASSOCIATION
OF PUBLIC AND PRIVATE EMPLOYEES
(hereinafter called the "Union")

AND:

GOVERNMENT OF NEWFOUNDLAND AND LABRADOR,
DEPARTMENT OF TRANSPORTATION AND WORKS -
MARINE SERVICES (as represented by Public Service Secretariat)
(hereinafter called the "Employer")

GRIEVANCE: Group Grievances - June 22, June 29 and July 3, 2009

COUNSEL: For the Union

Elaine Price

For the Employer

Don Saturley

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on September 30 and October 1, 2009. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. There were no preliminary objections going to jurisdiction to hear the grievance.
3. The grievance procedure was properly followed or any requirements waived.
4. The Arbitrator would remain seized of the matter in the event there is a question of interpretation or compensation arising from the Award.
5. Any applicable time limits for the filing of the Award were waived.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement, Marine Services Division between Her Majesty the Queen in Right of Newfoundland and Labrador, represented by Treasury Board and Newfoundland and Labrador Association of Public and Private Employees, signed February 13, 2009, expires March 31, 2012
- Consent 2 - Grievance Form dated June 22, 2009
- Consent 3 - Grievance Form dated June 29, 2009
- Consent 4 - Grievance Form dated July 3, 2009
- Consent 5 - Bell Island-Portugal Cove Ferry Service M/V Flanders, M/V Beaumont Hamel yearly schedule
- Consent 6 - Bell Island-Portugal Cove Ferry Service - Temporary Schedule for duration of M/V Flanders refit, M/V Beaumont Hamel and M/V Nonia
- Consent 7 - Letter dated June 15, 2009 from Captain B.A. Hammett, Marine Manager to Beaumont Hamel and Nonia
- Consent 8 - E-mail dated July 7, 2009 and letter dated July 7, 2009 re Moto Cross, Sunday, July 12, 2009

- Consent 9 - Letter dated July 15, 2009 from Captain B.A. Hammett to Beaumont Hamel and Nonia re Bell Island Day, Sunday, 19 July, and Accordion Idol Weekend, 25 and 26 July
- Consent 10 - Email dated August 1, 2009 and letter dated August 1, 2009 from Captain B.A. Hammett to Beaumont Hamel and Nonia re 48 hour notice of schedule change
- HD - 1 News release dated April 26, 2002 re year round two vessel ferry service for Bell Island

Nature of the Grievance

The Union filed three group grievances alleging that the Employer scheduled additional trips on the ferry service for Bell Island outside of the established daily sailing schedule and failed to compensate employees for call back at the overtime rate of pay. The Employer denied the grievance for the reason that it had established a new daily sailing schedule and the overtime rate did not apply.

Collective Agreement

The relevant Articles of the Collective Agreement are as follows:

Article 1 Purpose of Agreement

1.01 The purpose of this Agreement is to maintain harmonious and mutually beneficial relationships between the Employer, the employees and the Association, to set forth certain terms and conditions of employment relating to remuneration, hours of work, safety, employee benefits and general working conditions affecting employees covered by this Agreement.

...

Article 2 Definitions

*2.01 For the purpose of this Agreement:

...

(p) "overtime" means work performed by an employee in excess of the established daily sailing schedule at the request of the permanent head.

...

Article 4 Management Rights

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

...

Article 9 Arbitration

...

9.16 An arbitration board may not alter, modify or amend any provisions to this Agreement but shall have the power to dispose of a grievance by any arrangement which it deems just and equitable.

...

Article 10 Hours of Work

10.01 (a) The hours of work for employees shall be in accordance with the established daily sailing schedule.

(b) The scheduled work day shall commence one half (1/2) hour before the printed schedule and end fifteen (15) minutes after the printed schedule.

(c) The shift rotation for the Marine Services, except Bell Island run, shall be fourteen (14) days on and fourteen (14) days off. Bell Island shall be seven (7) days on and seven (7) days off.

...

10.03 The Employer will endeavour to provide at least forty-eight (48) hours notice to the Union of anticipated unscheduled changes in the established daily sailing schedule in each affected service.

Article 11 Callback

11.01 (a) An employee who is called back to work after he has completed his normal daily schedule and has left his place of work, shall be compensated for a minimum of three (3) hours at the applicable overtime rate referred to in Clause 12.04.

(b) (i) Where the callback in 11.01(a) exceeds the three (3) hour minimum, the employee will receive additional compensation at the overtime rate for each additional hour worked in excess of the three hour minimum referred to in 11.01(a).

- (ii) Any additional trips which are scheduled outside of the established sailing schedule will be considered a call back. This provision does not apply to the Bell Island 10:30 p.m. trip where the current practise will continue.

11.02 An employee who is called back to work and completes the work in less than the minimum three (3) hours and is subsequently recalled within the three (3) hour minimum, receives only the benefit of the three (3) hour minimum the employee will be compensated for the actual time worked at the rate referred to in 11.01(b).

11.03 When an employee is recalled to work under the conditions in Clause 11.01(a), he shall be paid the cost of transportation to and from his place of work at the appropriate mileage rate to a maximum of twelve dollars (\$12.00) for each callback.

Article 12 Overtime

12.01 (a) This Article shall apply to all employees covered by this Collective Agreement.

(b) All overtime shall be authorized by the Permanent Head or his designated representative.

12.02 (a) Subject to the provisions of 11.01, 11.02, 12.03 and 12.04, overtime rates of pay will not apply in situations where employees are required to perform overtime duties in connection with the extending or prolonging of the established daily sailing schedule.

(b) Overtime rates will apply only in situations where extra trips are necessary beyond the established daily sailing schedule. No overtime compensation will be applicable for extra trips that occur during the established daily sailing schedule.

*12.03 In consideration of the hours worked by employees in excess of the hours contained in the established sailing schedule for their respective service and being available for call back to work for the duration of their weekly/biweekly shifts, employees will receive in lieu of any overtime pay the sum of:

Effective Date	Rate
2008 04 01	\$2 484 per annum
2009 04 01	\$2 583 per annum
2010 04 01	\$2 686 per annum
2011 04 01	\$2 794 per annum

12.04 Where an employee is required by the Employer to work on his scheduled day of rest, he will receive time and one half (1 ½) hours at the regular hourly rate for all time worked. The regular hourly rate is determined by dividing the employee's annual salary by 2,080.

...

L#8 Hours of Work

Notwithstanding the bonus provision for the hours of work and the requirement for employees to be available for call back as contained in Article 12, Clause 12.03, the parties to this Agreement agree that due to the abnormal nature of the hours of work of Marine Services employees, the following principles of remuneration are agreed to for payroll purposes:

1. Employees shall be paid at straight time rates for all hours worked in accordance with the established daily sailing schedule. The straight time rate is calculated, as per Clause 12.04, by dividing the employee's annual salary, per Schedule "A", by 2080 hours.
2. Employees will be paid on the basis of a twelve (12) hour day. Following from this:
 - a 14 day shift is 168 hours
 - a 7 day shift is 84 hours
 - annual hours are 2,184 hours
3. Where the actual hours worked in accordance with the established daily sailing schedule are above 2,184 on an annual basis, the employee will be compensated for such hours on a lump sum on the last pay period of the fiscal year.

Example:

The sailing schedule for the Little Bay Islands service calls for an employee to work 2,314 hours per year. An employee who works the full year would be paid on a bi-weekly basis for 12 hours per day - 168 hours per shift for a total of 2,184 hours. However, on the last pay period of each fiscal year he would be entitled to compensation for the extra 130 hours (2,314-2,184) at straight time rates.

Evidence

The witnesses called by the Union were Derek Spurrell, engine room attendant, Jim Whelan, chief engineer and Howard Dodge, second engineer. The witness called by the Employer was Captain Ben Hammett, marine manager, Eastern Region.

The Government of Newfoundland and Labrador, Department of Transportation and Works, Marine Services Division, operates a ferry service between Portugal Cove and Bell Island. There are usually two vessels operating year round, the M/V Flanders and the M/V Beaumont Hamel. Prior to 2002, there was a single vessel service year round, and a two vessel service in the summer season.

There is an established daily sailing schedule for each vessel, within the meaning of the Collective Agreement. The schedule is posted on the Provincial Ferry Service website. The yearly schedule states, in part, as follows:

Bell Island-Portugal Cove Ferry Service
M/V 'Flanders'(F) - MV "Beaumont Hamel" (BH)
Yearly Schedule

<u>Vessel</u>	<u>Depart Bell Island</u>	<u>Day</u>	<u>Depart Portugal Cove</u>	<u>Vessel</u>
F	5:55 am	Monday to Friday	6:20 am	F
F	6:50 am	Monday to Saturday	7:20 am	F
BH	7:20 am	Monday to Friday	7:50 am	BH
F	7:50 am	Daily	8:20 am	F
BH	8:20 am	Monday to Friday	08:50 am	BH
F	8:50 am	Daily	9:20 am*	F
F	9:50 am	Daily	10:40 am	F
F	11:20 am*	Daily	12:00 noon	F
BH	12:00 noon	Daily	12:40 pm	BH
...
F	6:10 pm	Daily	6:50 pm	F
BH	6:50 pm	Daily	7:30 pm	BH
BH	8:10 pm	Daily	8:45 pm	BH
BH	10:35 pm	Daily	11:10 pm	BH
BH	11:40 pm	Friday & Saturday Only	12:10 am	BH

Captain Ben Hammett testified that on June 8, 2009, the M/V Flanders was removed from service and sent for refit to the dockyard in St. John's. To maintain the two vessel ferry service, the M/V Nonia, known as a "swing vessel", was placed on the Bell Island service. The Flanders was considered the primary vessel because it was larger than the other two vessels. When the Flanders was out of service, the Beaumont Hamel was assigned to the Flanders schedule and the Nonia was assigned to the Beaumont Hamel schedule. Captain Hammett sent a letter dated June 15, 2009 to the Beaumont Hamel and Nonia crew, which stated as follows:

Date: 15th June 2009 @15:35 L.M.T.

Subject: 48 notice of schedule change

Please adopt the attached schedule from tomorrow morning 16th June 2009. Kindly accept this notice as your 48 hour notice as per your respective Collective Agreements.

The attached schedule is for the duration of the "Flanders" refit only.

Regards,
B.A. Hammett

The letter stated that the schedule for the Bell Island ferry service for the duration of the "Flanders" refit was stated in the letter. The schedule (the "temporary schedule") was also posted on the Government web site where it stated, in part, as follows:

Bell Island - Portugal Cove Ferry Service
Temporary Schedule for duration of M/V Flanders' refit
M/V "Beaumont Hamel" (BH) - M/V 'Nonia' (N)

<u>Vessel</u>	<u>Depart Bell Island</u>	<u>Day</u>	<u>Depart Portugal Cove</u>	<u>Vessel</u>
BH	5:55 am	Monday to Friday	6:20 am	BH
N	6:20 am	Monday to Friday	6:50 am	N
BH	6:50 am	Monday to Saturday	7:20 am	BH
N	7:20 am	Monday to Friday	7:50 am	N
BH	7:50 am	Daily	8:20 am	BH
N	8:20 am	Monday to Friday	8:50 am	N
BH	8:50 am	Daily	9:20 am*	BH

BH	9:50 am	Daily	10:40 am	BH
N	10:40 am*	Tuesday	11:20 am	N
BH	11:20 am	Daily	12:00 noon	BH
N	12:00 noon	Daily	12:40 pm	N
...
BH	6:10 pm	Daily	6:50 pm	BH
N	6:50 pm	Daily	7:30 pm	N
BH	7:30 pm	Daily	8:10 pm	BH
N	10:35 pm	Daily	11:10 pm	N
N	11:40 pm	Saturday Only	12:10 pm	

On the yearly schedule for the Beaumont Hamel, the first sailing departs from Bell Island at 7:20 a.m. On the temporary schedule, the first sailing of the Nonia, which replaced the Beaumont Hamel, departs from Bell Island at 6:20 a.m. The sailing at 6:20 a.m. was an addition to the yearly schedule. For the Nonia schedule, (the former Beaumont Hamel schedule), there was no change to the last sailing of the day, which remained scheduled at 11:10 p.m. daily and 12:10 a.m. Saturday only.

On the yearly schedule for the Flanders, the first sailing departs Bell Island at 5:55 a.m. The first sailing was not changed on the temporary schedule. The last sailing of the day was changed. On the yearly schedule, the last sailing of the Flanders was at 6:50 p.m. from Portugal Cove. Under the temporary schedule, the last sailing of the Beaumont Hamel (which replaced the Flanders) departed from Portugal Cove at 8:10 p.m. The issue in these grievances concerns the additional morning sailing by the Nonia (replacing the Beaumont Hamel) and the additional evening sailing by the Beaumont Hamel (replacing the Flanders).

Captain Hammett testified that the changes to the schedule were made to serve the travelling public, having regard to the smaller capacity of the replacement vessels. For example, the Beaumont Hamel did not have sufficient capacity to meet the demand for the 6:50 a.m. departure. The changes were put in effect for the duration of the Flanders refit. The Employer did not consult the Union about the change to the schedule. Captain Hammett said that he gave a 48 hour notice to the crew on the vessels on June 15, 2009. He testified that the usual practice was to place the Beaumont Hamel on the Flanders' schedule, when the Flanders was out of service for refit. He said the Employer has the right to change the established daily sailing schedule under its management rights in Article 4.01 of the Collective Agreement. He testified that the circumstances of the case justified changing the established daily sailing schedule. He said the established daily schedule may be changed on a

seasonal basis, or to adjust for ice conditions. For example, the St. Brendan's ferry has a seasonal schedule, and operates four round trips in the Summer and three round trips in the Winter. The first and last sailing of the day of the St. Brendan's ferry is the same in Summer and Winter, but there is an additional trip between the first and last sailings during the Summer. The schedule is based on feedback from the community. There is no seasonal schedule for Bell Island. The yearly schedule for Bell Island operates year round except when one vessel is out of service for refit.

Captain Hammett testified that the Flanders returned to service from refit on August 1, 2009. He gave a written 48 hour notice to the crew of the return to the yearly schedule. For a brief period, after the Flanders returned, the Nonia replaced the Beaumont Hamel while the Beaumont Hamel was on refit. The Nonia was then assigned to a different ferry service.

Documents were entered showing changes to the Bell Island schedule for single events in anticipation of heavy traffic. For example, a letter was sent on July 15, 2009 from Captain Hammett to the Beaumont Hamel and Nonia crew stating that the Nonia's first sailing would depart from Bell Island at 9:20 a.m. on Sunday, July 19, Saturday, July 25, and Sunday, July 26, when there were special events on Bell Island. The first scheduled sailing of the day on Saturdays and Sundays for the Nonia was 12:00 noon. The letter stated that early and extra trips would be recognized at the Collective Agreement rates. Derek Spurrell, engine room attendant on the Nonia, testified that, on these occasions, he received three hours call back pay at overtime rates.

Derek Spurrell testified that after the Nonia took over the schedule of the Beaumont Hamel, they were told the first sailing would depart at 6:20 a.m. which was one hour prior to the normal scheduled first sailing at 7:20 a.m. He signed the grievance form claiming three hours callback for the additional sailings scheduled outside the established daily sailing schedule. He said he was compensated for the additional work at straight time. Mr. Spurrell also said that seasonal adjustments to ferry schedules are predetermined and are part of the established daily schedule.

Jim Whelan is chief engineer on the Beaumont Hamel. To his knowledge, the established daily sailing schedule for Bell Island has been in effect for about 10 years. He works a rotation of seven days on and seven days off. He is paid for 112.5 hours per week straight time, based on the sailing schedule, which includes one half hour before the first sailing and 15 minutes after the last sailing. He testified that when a sailing is added outside the scheduled hours he should receive three hours minimum callback. When the Flanders was out of service on refit, and the Beaumont Hamel was

assigned to the Flanders schedule, there was an additional sailing at the end of the day, which returned from Portugal Cove to Bell Island at 8:10 p.m. On the yearly schedule, the last sailing from Portugal Cove departed at 6:50 p.m. Mr. Whelan said he was grieving the compensation paid for the 8:20 p.m. sailing from Portugal Cove. He claimed that he should be paid a minimum three hours callback pay at overtime rates and not straight time. Although he is scheduled to work 112.5 hours per week, he is actually paid for 84 hours each pay day, and the additional hours are banked. He is paid on the basis of a 12 hour day, 84 hours per week, 2,184 hours per year, in accordance with Letter #8 attached to the Collective Agreement. Mr. Whelan said he worked the extra trip for the duration of the period the Beaumont Hamel replaced the Flanders. He said that the notice sent to employees dated June 15, 2009 does not state that the Employer has established a new daily sailing schedule. He said the Employer could change the established daily sailing schedule if it was done properly within the confines of the Collective Agreement.

Howard Dodge is the second engineer on the M/V Flanders. He has worked on the Bell Island ferry service since 1982. He started with a private company, and continued after the Government of Newfoundland and Labrador commenced operating the service in about 1988. He did not recall any seasonal variation in the schedule since at least 2000. He is paid for 96.75 hours per week straight time on the Flanders. He said the established daily sailing schedule sets the start and finish times. He believed that the Employer could add sailings or additional hours of work between the start and finish times of the daily schedule, but if a trip is added outside the established schedule, then the employee should receive a three hour callback minimum. During the refit of the Flanders, he continued to work the same daily scheduled hours of work on the vessel. He is familiar with the Collective Agreement, having served on the Union negotiating team for the last six rounds of bargaining. He testified that Article 10.03 refers to a 48 hour notice of an unscheduled change, and is not meant to be used by the Employer to change the daily schedule. He objected to the Employer changing the established daily schedule because it had the effect of changing employee compensation. He said there was a mechanism to make changes to the schedule under Article 1.01. He said that on one prior occasion, he was contacted by the Minister of Transportation and asked if the Union members on the Bell Island ferry would allow an extra trip in the early morning. He said the crew consented to the change, after improvements to benefits to the crew were explained at a Union meeting. As a result, the 5:55 a.m. departure from Bell Island was added to the schedule.

Union Submission

The Union submitted that the established daily sailing schedule for the Flanders and Beaumont Hamel was the schedule in effect prior to June 15, 2009. After the Flanders was taken out of service, the employees received notice of a schedule change. The temporary schedule added a sailing from Portugal Cove at 8:10 p.m. on the Flanders schedule, and a sailing from Bell Island at 6:20 a.m. on the Beaumont Hamel schedule. There were additional schedule changes made in July and August to add early and late trips as a result of special events occurring on Bell Island. The additional trips for special events were recognized and paid at the appropriate Collective Agreement rate. The Union was not grieving the assignment of the Beaumont Hamel to the Flanders' schedule or the right of the Employer to implement additional sailings between the start and finish times of the established schedules. The Employer has the management right under Article 4.01 to schedule service. However, changing the schedule of service does not have the effect of changing the established daily sailing schedule, within the meaning of the Collective Agreement. Article 4.01 does not permit the Employer to change the established daily sailing schedule and avoid paying overtime for additional early or late trips. The Employer's management right to change the daily schedule is specifically abridged by Articles 2, 10, 11, 12 and others. The Employer violated these Articles when it scheduled the additional sailings outside the established daily sailing schedule and failed to pay overtime rates. The established schedule remains constant under Article 10.01(a). The Employer may give 48 hours notice under Article 10.03, in the event of an unscheduled change or additional trips. Article 10.03 does not give the Employer the right to change the daily schedule. If the Employer adds sailings outside the daily schedule, then Article 11.01(b)(ii) applies, and the Employer must pay overtime rates. The overtime rate is established under Article 12.04. The Union agreed that overtime rates do not apply when scheduled trips are extended. Employees are paid a lump sum annually to compensate for overtime work in these circumstances. On a prior occasion, the established daily sailing schedule for the Bell Island-Portugal Cove ferry was changed with the consent of the Union. It was not necessary that the schedule be printed in the Collective Agreement. The Union referred to arbitral authority. In a prior arbitration award between the parties in 2004, it was decided that the employer could not use its scheduling right to unilaterally change the hours of work as set out in the established daily sailing schedule. The current Collective Agreement language is the same as the language considered in the 2004 award. Prior awards between the same parties should be followed, especially where the parties have negotiated a new Collective Agreement and

have not made substantive changes to the language interpreted in the prior award. The Union requested that the grievances be allowed and that the employees be paid the overtime rate for the extra hours as a call back in accordance with the Collective Agreement.

Employer Submission

The Employer submitted that when the Flanders was taken out of service for refit in early June, 2009, the replacement vessels had less capacity for vehicles and passengers. The Employer needed more capacity at peak times and it was necessary to establish a new daily sailing schedule. Some sailings were deleted and others added, resulting in the new schedule. The Employer did not need to seek agreement from the Union to establish the new schedule. The schedule responded to the demand for service. The crew members assigned to the previous Beaumont Hamel schedule had 16 hours 50 minutes of work per day, while the same crew when assigned to the Flanders schedule, had 14 hours 15 minutes of work per day. Article 12 addressed the payment of overtime. Overtime was not payable for work performed within the hours of the daily sailing schedule. Management rights included scheduling service. Union witnesses agreed that the Employer had the right to set the schedule to meet the demands of the travelling public. Under Article 4.01, the Employer has the unfettered right to change the schedule. The new daily sailing schedule was in effect from June 15 to August 1, 2009. The new sailings at 6:20 a.m. and 8:10 p.m. were within the hours of the schedule. The onus was on the Union to prove a violation of the Collective Agreement. The Employer referred to arbitral authority. The arbitration awards referred to by the Union did not address the issues raised in this case. The 2004 award held that the Employer was required to pay as per the established daily sailing schedule, and did not address the issue of changing the schedule. The Employer complied with the Collective Agreement. The Employer requested that the grievances be denied.

Considerations

The Union filed three group grievances alleging violation of the Collective Agreement. The Union submitted that the Employer added extra trips outside the established daily sailing schedule and did not pay compensation at overtime rates. The issues are: (1) whether the Employer has the unilateral right to change the established daily sailing schedule; and (2) whether the affected employees are entitled to compensation at overtime rates under the Collective Agreement.

There are no significant disputes of fact in this case. The Bell Island-Portugal Cove ferry service has operated year round as a two vessel service for several years. Prior to June, 2009, there was an established daily sailing schedule for the M/V Flanders and the M/V Beaumont Hamel. In early June, 2009, the Flanders was taken out of service for refit. The Beaumont Hamel was assigned to the Flanders' schedule and the swing vessel, the M/V Nonia, was assigned to the Beaumont Hamel schedule. The Employer decided that, as a result of the reduced vessel capacity, it was necessary to alter the schedule to meet public demand. Effective June 16, 2009, the Employer added an early morning sailing departing Bell Island at 6:20 a.m. from Monday to Friday. This changed the Beaumont Hamel schedule, now serviced by the Nonia. Under the previous schedule, the first sailing by the Beaumont Hamel was at 7:20 a.m. The Employer also added a late evening sailing departing Portugal Cove at 8:10 p.m. This changed the Flanders schedule, now serviced by the Beaumont Hamel. Under the previous schedule, the last sailing by the Flanders was at 6:50 p.m. The parties dispute whether these additional sailings are outside the established daily sailing schedule, or included within a new established daily sailing schedule.

The Flanders returned to service on August 1, 2009. At that time the schedule reverted to the "yearly schedule" that was in effect prior to June 16, 2009. Therefore, the dispute concerns the period from June 16 to August 1, 2009.

There is no issue with respect to the assignment of a vessel to operate the daily sailing schedule of another vessel. In this case the Beaumont Hamel was assigned to operate on the Flanders' schedule, and the Nonia was assigned to operate on the Beaumont Hamel schedule. Also there is no issue with respect to the hours of work of the crew on the Flanders while the vessel was out of service for refit.

Article 10.01 (a) states "the hours of work for employees shall be in accordance with the established daily sailing schedule". The payment of overtime rates is addressed in Article 12.02 (b) which states overtime rates "will apply only in situations where extra trips are necessary beyond the established daily sailing schedule". Therefore in the event that the early sailing at 6:20 a.m., and the late sailing at 8:10 p.m., were "beyond the established daily sailing schedule", then the overtime rate of pay would apply.

There is reference to the established daily sailing schedule in Article 11, headed "Callback". Article 11.01 (a) states that when an employee is called back to work, after completing his normal daily schedule, and has left his place of work, then compensation shall be for a minimum of three hours

at the applicable overtime rate. Article 12.04 states that the overtime rate is 1 ½ times the regular rate. Article 11.01 (b)(ii) states that “any additional trips which are scheduled outside of the established sailing schedule will be considered a call back”. Therefore trips outside the established daily sailing schedule shall be compensated for a minimum of three hours at the applicable overtime rate. It follows that, in the event the early and late trips added to the schedule during the Flanders’ refit are outside the established daily sailing schedule, then compensation shall be at the rate of time and one half for a minimum of three hours.

The Employer did not consult with the Union before changing the schedule. Captain Ben Hammett, Marine Manager for the Eastern Region, sent a letter to the crew on June 15, 2009 with the new schedule for the duration of the Flanders’ refit. The new schedule started the next day. The action by the Employer was intended to implement a new established daily sailing schedule. The issue is whether or not the Employer is prohibited by the Collective Agreement from unilaterally changing the established daily sailing schedule in these circumstances. In the event that the Employer acted in compliance with the Collective Agreement, and changed the established daily sailing schedule, then it would follow that the early and late sailings were not outside the established daily sailing schedule. In that event, overtime rates would not be payable for hours worked on the early and late sailings.

I have considered the arbitration awards submitted, including prior awards between the same parties. One of the awards between the parties was *Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board on behalf of the Department of Transport and Works and Newfoundland Association of Public and Private Employees*, unreported, October 12, 2004 (Scott) (the “2004 Award”). On the facts of that case, the M/V Flanders was taken out of service and placed in drydock. The grievance concerned the period when the vessel was in drydock and was not actually sailing. The Employer attempted to introduce a new shift schedule, which had the effect that the hours of work per day were reduced from the scheduled hours of work. The Union objected, on the basis that a reduction of hours was not permitted by the collective agreement. The issue in that case was whether the collective agreement prevented the employer from changing the schedule and reducing the hours of work. Arbitrator Scott found that the right of the Employer to schedule service, pursuant to its management rights in Article 4.01, did not authorize the Employer to change the established daily sailing schedule. He found that management rights were abridged by specific

articles of the collective agreement. The 2004 Award interpreted collective agreement language in a prior agreement that is the same as the language before me in this case. The 2004 Award stated the following, at pages 50 to 52:

With respect, I do not find the Employer's position persuasive on this point. The Collective Agreement contains a clear Hours of Work provision that fetters the Employer's management rights. Nor is the Agreement "silent" simply because it does not specifically mention some normal aspect of the industrial practice. It is extremely improbable, in my view, that the authors of this Collective Agreement could have simply failed to address their minds to the question of how hours of work and other benefits are determined for those frequent normal periods when vessels are not actually "sailing".

...

Thus, I find that the Association's interpretation is the superior. I reach this finding based on my reading of the logic of the Collective Agreement taken as a whole. Clearly the phrase "established daily sailing schedule" denotes something distinct from that denoted by the phrase "scheduling of service" in Article 4.01. I am bound to construct the Agreement in a way that takes appropriate account of such differences in phrasing and, to the extent possible, gives the language its natural and plain meaning without absurdity.

It is clear that confusion has arisen as a result of the Agreement's use of "the established daily sailing schedule" as benchmark for determining of hours of work. The Employer maintains, with justification and without challenge from the Association, that it retains the right to schedule service under the Agreement's Management Rights Clause (4.10). However, the view that the Employer can rely upon this retained "scheduling" right to change unilaterally the hours of work by simply changing "the established daily sailing schedule" is not sustained by the Agreement.

If taken to its extreme, such an interpretation would result in the absurdity of rendering much of Article 10, and other articles, meaningless. Such unilateral Employer authority to modify the hours of work is obviously not intended by this Agreement, since Article 10 expressly prescribes how hours of work are determined.

The Collective Agreement ties hours of work and other remuneration and benefits not to "scheduling of service", but to the "established daily sailing schedule". Where changes to the established daily sailing schedule impinge collaterally (in respect, for instance, of overtime, shift differential or other benefits) or directly on issues relating to "Hours of Work", the Agreement requires (at Article 10.03) that the Employer take certain steps both to notify the Union, and (at Article 1.01) to respect the express purpose of the Collective Agreement the "purpose" of which is, in part, "to set forth

certain terms and conditions of employment relating to remuneration, hours of work. . .” in accordance with Articles 10.01(a) and (b).

I find, therefore, that the Union’s interpretation as set out in its first alternative argument is to be preferred to the Employer’s. The Employer’s right to change the established daily sailing schedule is fettered by the express provisions of the Agreement.

The Employer’s interpretation of its management rights so as to permit it unfettered right to change the established daily sailing schedule, and thus to change the hours of work, leads, in my view, to a direct conflict with Article 10 and with other articles as noted above. Thus, the Collective Agreement read as a whole does not sustain the Employer’s interpretation.

There was a subsequent award between the same parties based on a similar fact situation. In *Her Majesty the Queen in Right of Newfoundland represented by Treasury Board on behalf of the Department of Transportation and Works and Newfoundland Association of Public and Private Employees*, unreported, May 16, 2006 (Scott) (the “2006 Award”), the facts were that the Employer reduced the hours of work of employees on a vessel in dry dock. The issue was the right of the Employer to reduce the hours of work below the hours of work in the schedule. Arbitrator Scott decided that the hours of work were linked to the schedule. The *2006 Award* stated at page 26 as follows:

Thus, I conclude that in light of the presence in the Agreement of the express linkage of hours of work and the established daily sailing schedule in Article 10.01 (a) and absent a reserved or express right unilaterally to alter the established daily sailing schedule, the Employer has no retained inherent or presumptive right grounded in general arbitral jurisprudence to change hours of work.

The prior arbitration awards are not binding on this Arbitrator, but they have persuasive effect. Arbitrators usually follow prior awards between the same parties, unless there is a convincing reason that the prior award is wrong (Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 2:3220). I have examined the analysis of Arbitrator Scott in both awards and note that it is supported by arbitral authority to the effect that management is not permitted to introduce a new regular schedule of work where the language in the collective agreement provides for a regular schedule (Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 5:3122). Further, the fact that the parties have negotiated a new Collective Agreement following publication of the prior

awards, and did not make any substantive changes to the applicable language, is a compelling reason to follow the prior awards (*NAPE v. Her Majesty the Queen in Right of Newfoundland* (1994) 40 L.A.C. (4th) 372 (Oakley)). There is no convincing reason to find that the prior awards are wrong, and there are compelling reasons to follow the prior awards.

Having regard to the language of the Collective Agreement and the arbitral authorities, I find that the Employer does not have, within its management rights, the unfettered right to change the established daily sailing schedule, in particular, to add early or late sailings outside the established start and finish times on the schedule. The Employer's right to change the established daily sailing schedule is subject to Article 10, Hours of Work, Article 11, Callback, and Article 12, Overtime. If the Employer had a unilateral right to change the established daily sailing schedule, then effect could not be given to these Articles. The Employer has the right to schedule service within its management rights in Article 4.01, and may add sailings to meet public demand. However, Article 4.01 does not give the Employer the unilateral right to change the established daily sailing schedule. The Collective Agreement does not permit the Employer, under these circumstances, to implement a new daily sailing schedule during the refit of the Flanders. The established daily sailing schedule did not change. The affected employees are entitled to compensation at overtime rates, in accordance with the call back provisions of the Collective Agreement, for early and late sailings outside the established daily sailing schedule.

Decision

The grievances are allowed. The Employer did not have the unilateral right to change the established daily sailing schedule, within the meaning of the Collective Agreement, during the refit of the Flanders. The established daily sailing schedule did not change. The affected employees are entitled to compensation at overtime rates, according to the callback provisions, for early and late sailings outside the established daily sailing schedule.

DATED this 25th day of November, 2009.

James C. Oakley
Arbitrator