

ARBITRATION AWARD
(Preliminary Award)

BETWEEN:

CANADIAN MERCHANT SERVICE GUILD
(hereinafter called the “Guild”)

AND:

HER MAJESTY THE QUEEN IN RIGHT OF
NEWFOUNDLAND AND LABRADOR (Department of
Transportation and Works, Marine Services)
(hereinafter called the “Employer”)

GRIEVOR: Kevin Greene

COUNSEL: For the Guild
Mark D. Murray

For the Employer
Don Saturley

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on June 30, 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 following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.

The Grievor, Captain Kevin Greene, was dismissed from his employment by letter dated June 2, 2009. The letter referred to an incident that occurred on March 25, 2009, when he was the Master manoeuvring a Provincial Government ferry, the MV Sound of Islay. The Union grieved the dismissal, and raised a preliminary objection that the disciplinary penalty was not imposed within the time limit in the Collective Agreement. The parties requested that the Arbitrator issue an award on the preliminary objection before proceeding to hear the merits of the grievance. The parties also agreed that the Arbitrator had jurisdiction over three grievances, the dismissal grievance dated June 3, 2009, the grievance of the Grievor's suspension with pay, dated May 20, 2009, and the grievance alleging failure to provide written notification stating reasons for suspension, dated May 27, 2009.

The following exhibits were entered at the hearing:

- Consent 1 - Certification Order issued by the Newfoundland and Labrador Labour Relations Board dated September 24, 1999
- Consent 2 - Ferry Service Collective Agreement between Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board and The Canadian Merchant Service Guild date of signing March 6, 2009, expires June 30, 2012
- Consent 3 - Letter dated June 2, 2009 from Robert Smart, Deputy Minister, Department of Transportation and Works to Captain Kevin Greene
- Consent 4 - Letter dated May 20, 2009 from Captain Kevin Greene to Captain B.A. Hammett
- Consent 5 - Letter dated May 27, 2009 from Captain Kevin Greene to Captain B.A. Hammett

- Consent 6 - Letter dated June 3, 2009 from Captain Kevin Greene to Lisa Ward, Acting Manager, Employee Relations
- VA - 1 Emails from Vivian Arenillas to Employer representatives granting extension of time limits for investigation, dated April 9, May 21, June 5, and June 16, 2008

Collective Agreement

The relevant articles of the Collective Agreement are as follows:

Article 22 Discipline

- 22.01 Any Ferry Captain suspended or dismissed shall within seven (7) calendar days of the suspension or dismissal be provided with a written notification which shall state the reason(s) for the suspension or dismissal.
- 22.02 All suspensions, dismissals and other disciplinary action shall be subject to the grievance procedure, as outlined in Article 8, if the employee so desires.
- 22.03 The Employer shall notify an employee, in writing, of any dissatisfaction concerning his work within seven (7) calendar days of the event of the complaint. This notification shall include particulars of work performance which led to such dissatisfaction. If this procedure is not followed, such expression of dissatisfaction shall not become a part of his record for use against him at any time. This Clause shall apply in respect to any expression of dissatisfaction relating to his work or otherwise which may be detrimental to an employee's advancement or standing with the Employer.
- 22.04 Any Ferry Captain required to attend a disciplinary meeting is entitled, at his request, to have Guild representation.

Evidence

The witness called by the Employer was Captain Ben Hammett, Marine Manager. The witness called by the Union was Vivian Arenillas, Labour Relations Officer.

The Grievor, Captain Kevin Greene, was employed as a Ferry Captain by the Marine Services Branch of the Department of Transportation and Works, Government of Newfoundland and Labrador. He has about 12 years of service. He is a member of the Canadian Merchant Service Guild, which is the certified bargaining agent for a bargaining unit of Masters employed on ferries

operated by the Government of Newfoundland and Labrador. At the relevant time he was the Master of the Provincial ferry MV Sound of Islay, which was providing a ferry service between Burnside and St. Brendan's.

The Grievor was dismissed from employment by letter dated June 2, 2009 which stated as follows:

Dear Captain Greene:

This letter is a follow-up to a meeting held on May 28, 2009, attended by you, Mr. Ben Hammett, Marine Manager, Mr. Ron Hyde, Marine Manager, Ms. Vivian Arenillas, Guild representative, and Ms. Lisa Ward, Manager of Employee Relations.

At this meeting, the discussion surrounded an incident that had occurred on March 25, 2009. On that date, while you were manoeuvring the MV Sound of Islay from the government wharf in Burnside, the vessel came in contact with a private wharf. At the meeting, you claimed that you were not aware of hitting the private wharf; however, after reviewing photos of the wharf and the position of the boat, you did agree that it was possible. You admitted that during the manoeuvre, you lost control of the vessel but you did not think the vessel was close enough to the private wharf to hit it.

Captain Greene, your actions and behaviour surrounding this incident are unacceptable. As Captain, you are ultimately responsible for the safety of the passengers and crew. Your failure to appropriately assess the situation, navigate the vessel properly and maintain control of the ship are serious breaches of trust placed in you by the Department and will not be tolerated.

A review of your personnel file shows that you were suspended without pay on September 26, 2008, for your actions surrounding a similar incident while you were the Captain of MV Sound of Islay.

As a result of your actions and because you have been disciplined for a similar incident within the last two years, your employment is terminated immediately. Any monies owed to you will be forwarded to the address noted above. I would also bring to your attention the Employee Assistance Program. This confidential service may be of assistance to you and is available by calling 1-888-891-2999.

Sincerely,

Robert Smart
Deputy Minister

Captain Ben Hammett is the Marine Manager for the Eastern Region of the Marine Branch, Department of Transportation and Works. He testified about the events that led to the letter of dismissal dated June 2, 2009. On or about April 16, 2009, he received a call from Ford Oldford, the owner of a private wharf at Burnside. Mr. Oldford complained that the Provincial Government ferry had struck his wharf and caused damage. He wanted the wharf replaced. At that time, the owner was uncertain as to when the damage was caused to the wharf, but Captain Hammett later determined that the date of the alleged incident was March 25, 2009.

Captain Hammett started an investigation for the purpose of considering whether discipline ought to be imposed in relation to the incident. He travelled to Burnside to take photographs of the private wharf. He made inquiries about workers doing construction work on the Government wharf at Burnside on the date of the incident. He spoke to a witness, Alex Ford. He made contact with a bridge engineer employed by the Department. He interviewed the Chief Mate on the MV Sound of Islay. He met with the Grievor, Captain Greene, on April 28, 2009 on the MV Sound of Islay. At that time the MV Sound of Islay was operating on another ferry route in Green Bay. Vivian Arenillas, the Guild's Labour Relations Officer, attended the meeting by teleconference. Ms. Arenillas testified that she was called on a Sunday about attending the meeting on the following Tuesday, but she was unable to attend in person.

Captain Hammett testified that he completed the initial investigation and prepared his first report about the incident on April 30, 2009. He concluded that there was "some sort of soft contact" with the private wharf. He did not recommend any discipline of the Grievor. There was no report placed on the Grievor's file at that time. He told the Grievor that the investigation revealed nothing. He directed the Grievor to "report everything back, however slight", and he cautioned the Grievor to be "super careful".

Captain Hammett testified that he received a call from Mr. Oldford, the wharf owner, on May 6, 2009. Mr. Oldford asked him if they had missed something. Captain Hammett testified that he discussed the matter with his supervisor, the Assistant Deputy Minister, Paul Alexander. He then requested that a diver or engineer look at the private wharf. He received information on May 19, 2009 of which he was not previously aware. The new information consisted of photographs showing the private wharf before and after the incident. He said this information could have been available earlier if he had known where to get the information. He completed a second report on May 19, 2009. On that date the Grievor was suspended with pay pending investigation. Captain Hammett

informed the Grievor of the suspension by telephone. Captain Hammett then interviewed the Chief Mate a second time. He interviewed the Grievor a second time on May 28, 2009. Ms. Arenillas, Labour Relations Officer, attended at the interview on May 28th. Captain Hammett completed a third report, dated May 30, 2009, and submitted the report to the Assistant Deputy Minister.

There were three newspaper articles published about the complaint by the private wharf owner, an article in the Telegram on May 16th, an article in the Telegram and Western Star on May 23rd, and an editorial in the Telegram on May 28th. Captain Hammett testified that the newspaper articles did not play any role in the decisions made by the Employer about the Grievor. Captain Hammett testified that it was not clear that there was any dissatisfaction with the Grievor's work until the investigation was concluded. He said there was no dissatisfaction proven at the time the Grievor was suspended with pay on May 19th. To his knowledge, there was no request made to the Union for an extension of time to complete an investigation.

Vivian Arenillas testified that on prior occasions, upon request by the Employer, the Guild had agreed to extend the time limit for the Employer to decide about imposition of discipline. She referred to four occasions in 2008 when the Employer had requested extensions of time and the Guild had granted the request. There was no request for an extension of time in this case.

Guild Submission

The Guild submitted that the Employer did not impose discipline within the seven (7) calendar day time limit in Article 22.03 and the dismissal was null and void. The time limit in Article 22.03 was mandatory and not directory. Article 22.03 states that notification "shall" be given. The parties chose to use the word "shall", not the word "may", indicating a mandatory time limit. The word "shall" was used seven times in Article 22. The parties had used the word "may" in several other articles of the Collective Agreement. If the time limit is not met, there is a penalty provision stating that the expression of dissatisfaction shall not become part of the Grievor's record. The parties had a reasonable expectation that issues of this nature would be resolved expeditiously. The Guild referred to arbitral case authorities indicating that a time limit is mandatory where the word "shall" was used, and there was a penalty provision. The Guild referred to the arbitration award in *NAPE v. Newfoundland and Labrador (Department of Human Resources, Labour and Employment)* (2005) 137 L.A.C. (4th) 266 (Oakley) where the employer was found to have imposed discipline outside the time limit and the dismissal was null and void. Under Article 22.03, time starts to run from the

“event of the complaint”. The event of the complaint was the date of the alleged incident on March 25, 2009, and a total of 69 days had passed between that date and the date of dismissal on June 2, 2009. Alternatively, if the event of the complaint was the date the complaint was made by the private wharf owner, then the date was April 6, 2009, which was 47 days prior to the date of dismissal. Article 22.03 did not refer to the date of “discovery” of the event, or the date of completion of an investigation, which distinguished the Collective Agreement language from other collective agreements. The Guild requested that the Arbitrator not follow the decision and rationale stated in the award submitted by the Employer in *St. John’s Health Care Corporation, represented by Newfoundland and Labrador Health Boards Association and NAPE (Denine)*, unreported, April 30, 2002 (Alcock), upheld *NAPE v. Newfoundland and Labrador (Treasury Board)* [2002] N.J. No. 233 (NLSCTD). In that case the arbitrator found that the time limit does not start to run against the employer until the employer has reasonable grounds to believe there is cause for discipline. Even if that position was accepted, then the time limit would start to run following the first interview of the Grievor on April 28, 2009, or, at the latest, on April 30, 2009, after the Employer completed the first investigation report, and informed the Grievor that, as a result of the investigation, there was no issue of discipline. In the further alternative, if the Employer required additional photographs to complete its investigation, then the time limit would start to run when the photographs were received on May 19, 2009, which was still more than 7 days before the date of the discipline. The Guild also distinguished the award submitted by the Employer in *Her Majesty the Queen in Right of Newfoundland v. NAPE (Byrne)*, unreported, June 12, 2001 (Fagan). The Employer made no request for an extension of time limits in this case, although the Employer had previously requested an extension of time limits in other cases and the Guild had granted the requests. The Guild requested that the preliminary objection be upheld and the Grievor be reinstated in employment.

Employer Submission

The Employer submitted that the time limit starts to run under Article 22.03 when the Employer has knowledge of facts which, if true, would establish the employee’s culpability. The events occurred within the time limits of Article 22.03. The Employer has the right and the obligation to conduct a thorough and complete investigation. Article 22.03 refers to dissatisfaction concerning the employee’s work. The Employer did not have a dissatisfaction or a complaint concerning the Grievor’s work until May 29, 2009, upon completion of the investigation. On that date Captain Hammett recommended that the Grievor be dismissed. The dismissal was imposed within seven days of that date. There was no complaint at any earlier date, such as May 19, 2009, when the

Grievor was suspended with pay, on April 30, 2009, when the preliminary report revealed nothing unsatisfactory regarding the incident. The Employer referred to arbitration and court decisions to support its position. In *St. John's Health Care Corporation, represented by Newfoundland and Labrador Health Boards Association and NAPE (Denine)*, unreported, April 30, 2002 (Alcock), upheld in *NAPE v. Newfoundland and Labrador (Treasury Board)* [2002] N.J. No. 233 (NLSCTD), it was observed that an employer should not be required by a time limit article to discipline first and investigate later. The time limit started to run when an employer determined there was just cause for discipline. On review, the Court found that the arbitration award was based on a rational analysis. The Employer also referred to the arbitration award in *Her Majesty the Queen in Right of Newfoundland and Labrador, represented by Treasury Board and NAPE (Byrne)*, unreported, June 12, 2001 (Fagan), quashed by decision of the Supreme Court of Newfoundland and Labrador Trial Division (*NAPE v. Newfoundland (Treasury Board)* [2002] N.J. No. 129) and upheld by decision of the Newfoundland and Labrador Court of Appeal (*NAPE v. Newfoundland (Treasury Board)* [2003] N.J. No. 166). In that case, the dismissal of an employee 2 ½ months after the start of an investigation did not violate the time limit. The Employer submitted there was no violation of the time limit and requested that the preliminary objection be denied and the matter proceed to a hearing on the merits of the dismissal.

Considerations

The parties dispute whether or not the Employer dismissed the Grievor within the time limit in Article 22.03 of the Collective Agreement. The issues to be considered are: (1) Is the time limit in Article 22.03 mandatory or directory? (2) What is the interpretation of Article 22.03 with respect to when the seven (7) calendar day time limit starts to run? (3) On the facts of this case, when did the time limit start to run? (4) Did the Employer comply with the time limit?

The Guild submits that the consequence of the Employer failing to notify the Grievor of dissatisfaction within the seven (7) day time limit in Article 22.03, is that the dismissal is null and void. The Guild submits that the time limit is mandatory and not directory. When considering whether a time limit is mandatory or directory, the Arbitrator will have regard to the language used by the parties. Article 22.03 uses the word "shall" in several places. Under Article 22.03 the Employer "shall notify an employee" of a dissatisfaction concerning his work. The notice to the employee "shall" include particulars of the performance which led to the dissatisfaction. Article 22.03 also states that if the procedure is not followed, then the expression of dissatisfaction "shall

not” become part of the record. The Article also states that it “shall” apply to any expression of dissatisfaction which may be detrimental to the employee’s advancement or standing. The use of the word “shall” is one indicator that the time limit is mandatory and not directory. However, the use of the word “shall” by itself is not determinative of this issue. Article 22.03 also provides for a penalty, or consequence, that will follow where the time limit is not met. When determining whether a time limit is mandatory, arbitrators will often examine the language to determine whether or not the parties have stated the consequence of failing to meet the time limit. Where the parties have stated a consequence or penalty, then the time limit is more likely to be found to be mandatory (see *Air Canada v. IAM* (1979) 22 L.A.C. (2d) 298 (Shime) and *Brown & Beatty, Canadian Labour Arbitration*, 4th edition, at paragraph 2:3128). The language used in Article 22.03 provides for a penalty, namely that the “expression of dissatisfaction shall not become a part of his record for use against him at any time”.

The effect of the failure to comply with a mandatory time limit was considered in *NAPE v. Newfoundland and Labrador (Department of Human Resources, Labour and Employment)* (2005) 137 L.A.C. (4th) 266 (Oakley) (the “NAPE” case). In that case, the relevant article was Article 42.03, which required notice to an employee of any dissatisfaction concerning an employee’s work within five (5) working days of the “occurrence or discovery of the incident giving rise to the complaint”. The article contained language identical to the current Article 22.03, in that it stated “if this procedure is not followed, such expression of dissatisfaction shall not become a part of his/her record for use against him/her at any time”. As the arbitrator in that case, I addressed the consequence of the failure of the employer to comply with the time limit, at paragraph 27, as follows:

Violation of the five (5) day time limit in Article 42.03 has the effect that the expression of dissatisfaction may not become a part of the record “for use against him/her at any time”. The parties have agreed that violation of the time limit means that the penalty does not exist on the disciplinary record, or in effect, the disciplinary penalty is null and void. There is established arbitral principle that a violation of a mandatory time limit for the imposition of discipline has the effect of invalidating the discipline or rendering the discipline null and void (*Re CIP Containers Limited and International Chemical Workers, Local 229* (1973) 2 L.A.C. (2d) 308 (H.D. Brown), *Re Calgary Public Library and CUPE, Local 1169* (1978) 19 L.A.C. (2d) 230 (Mason), *Re Inmont Canada Ltd. and E.C.W.U., Local 25* (1981) 30 L.A.C. (2d) 436 (H.D. Brown), *Re St. Joseph’s Hospital (Brantford) and O.N.A.* (1987) 28 L.A.C. (3d) 408 (P.C. Picher), *Re Northwestern General Hospital and O.N.A.* (1992) 30 L.A.C. (4th) 95 (Starkman), *Re Delta Chelsea Hotel and Hotel Employees Restaurant Employees Union, Local 75* (2002) 111 L.A.C. (4th) 22 (Surdykowski)).

Having regard to the language of Article 22.03, and the arbitral authorities, I find that the time limit in Article 22.03 is mandatory, and that failure to comply with the time limit will render the disciplinary penalty null and void.

When does the time limit start to run under Article 22.03? Article 22.03 states that the notice of dissatisfaction shall be given within seven (7) days of the “event of the complaint”. The Guild submits that the event of the complaint is the date of the alleged incident involving the manoeuvring of the ferry, which is outside the time limit. The Employer submits that the event of the complaint is the date on which the Employer received the final investigation report and made a decision to impose a disciplinary penalty, which is within the time limit. The parties also made submissions in the alternative, with the alternative dates also supporting the finding sought by each party on the preliminary objection.

When interpreting Article 22.03, the Arbitrator will have regard to the principles of interpretation applied by arbitrators. The principles of interpretation are discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, in particular, that the object of construction is to determine the intention of the parties from the express provisions of the collective agreement (paragraph 4:2100), that the language should be viewed in its normal or ordinary sense (paragraph 4:2110), and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150). The Arbitrator will also consider prior arbitration awards, and judicial review decisions addressing the issue of delay in the imposition of discipline.

Arbitrators have discussed the rationale for having a time limit for the imposition of discipline. It is established by arbitral principle, that, even if a collective agreement does not state a specific time limit, an employer is required to impose discipline within a reasonably expeditious time (Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 7:2120). In the *NAPE* case, I referred to a useful discussion of the reasons to avoid undue delay in the imposition of discipline, in *University of Ottawa v. IUOE, Local 796-B* (1994) 42 L.A.C. (4th) 300 (Bendel) (the “*University of Ottawa*” case). These reasons include (1) that an undue delay has the effect that an employer will be deemed to have condoned the employee’s offence, (2) that delay violates the procedural fairness to which a grievor is entitled, (3) that delay will prejudice the grievor’s opportunity to defend himself or herself because the passage of time will affect the memory of witnesses or the availability of evidence, and (4) that delay offends general arbitral principle. In addition to these reasons, it is also considered unfair to an employee that the employer would be allowed to “save up” incidents which

the employer felt warranted discipline, and to penalize the grievor on a later date for the accumulated incidents.

Arbitrators have also found that the duty to impose discipline without undue delay, does not mean that employers are required to impose discipline based on mere suspicion. It is generally accepted that time starts to run from the moment the employer has knowledge of facts which, if true, would establish the employee's culpability (Brown & Beatty, *Canadian Labour Arbitration*, 4th edition, paragraph 7:2120). On the facts of the *University of Ottawa* case, the arbitrator found that once the employer had knowledge of facts which, if true, would have justified the imposition of discipline, it was not entitled to delay imposing discipline until four months later, on the basis of a desire to "bolster its case against the grievor". In the *University of Ottawa* case, the arbitrator considered the decision in *Re Canada Post Corp. and CUPW (Seifried - 602-87-02556)* (1989) 3 L.A.C. (4th) 444 (Weatherill) (the "*Canada Post*" case). In the *Canada Post* case, the arbitrator stated that the employer does not usually have grounds for discipline until it has had time to complete an investigation into the circumstances surrounding the alleged misconduct. Accordingly, the time starts to run once the employer has knowledge of the facts that appear to justify discipline. At that point, the employer is not entitled to delay making a decision about whether to impose discipline. In the *Canada Post* case, the arbitrator did not accept the reason given by the employer for the delay, namely, that the corporation's legal and labour relations staff were occupied with other matters arising out of a strike. I have also considered the discussion in *Canada Post Corp. v. CUPW* (2001) 206 D.L.R. (4th) 603 (O.C.A), where the Ontario Court of Appeal, on judicial review, upheld an arbitration award finding that the employer did not impose discipline within the time limit.

The question of whether an employer is entitled to complete an investigation, before the time limit starts to run, was considered in *St. John's Health Care Corporation, represented by the Newfoundland and Labrador Health Board Association and NAPE (Denine)*, unreported, April 30, 2002 (Alcock) (the "*Denine*" case). The time limit provision under consideration in the *Denine* case provided for notice of discharge or suspension "within seven calendar days of the employer being made aware of the event giving rise to such discharge or suspension". The arbitrator stated that the employer is entitled to investigate before imposing a disciplinary penalty. The employer should not be required to "jump the gun" by imposing discipline where just cause is not reasonably apparent. The Employer is entitled to conduct an investigation and determine if there is a reasonable indication that the conduct is culpable. The arbitrator stated, at page 20, as follows:

Once it is in possession of information that strongly suggests wrongdoing on an employee's part, the Employer would be required to discipline within the established time limits. It would not be permitted to use the continuation of the investigation as an excuse for delaying disciplinary action. All that Article 13.01(b) requires is that the Employer notify the employee in writing of his/her discharge.

The arbitrator in the *Denine* case also stated that it may not be necessary for an investigation to be fully completed, in order for a decision to be made on whether there is just cause for discipline. Upon making a decision about just cause, the employer is free to continue its investigation. On the facts of the *Denine* case, the arbitrator found that when the employer was first informed that double payments were made to the grievor, it did not have sufficient information to conclude there was just cause for discipline. The employer was entitled to interview the grievor to determine whether the grievor had used the payments. The time limit did not start to run until the employer obtained the additional information. The arbitrator decided, in a preliminary award, that the discipline was not imposed outside the time limit. In a subsequent arbitration award on the merits of the discipline, the discharge of the grievor was upheld (*St. John's Health Care Corp. v. NAPE (Denine)* [2004] NLLAA No. 39). On judicial review, the decisions in both the preliminary award and final award were upheld, *NAPE v. Newfoundland and Labrador (Treasury Board)* [2002] N.J. No. 233. The Newfoundland and Labrador Supreme Court Trial Division made reference to various unreported arbitration awards that expressed the view that an employer cannot be "aware" of an event, for which it may have cause to impose discipline, until the completion of an investigation. The Court stated, at paragraph 24, as follows:

I approach, then, this judicial review as I would any other involving analysis of whether or not a Board of Arbitration made any patently unreasonable findings either in fact or law. Determination of the event giving rise to the discharge herein involves findings of fact on the part of those hearing the grievance. As noted by the majority, in some instances, the event, a single occurrence, will clearly give rise to disciplinary action while in others, only upon investigation will it be known as to whether or not conduct ascertained in the first instance requires further action.

The Employer also referred to the award in *Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board and NAPE (Byrne)*, unreported, June 12, 2001 (Fagan) (the "Byrne" case), and subsequent Court decisions on judicial review. The award was upheld in the Supreme Court of Newfoundland and Labrador Court of Appeal. The case concerned a probationary

employee dismissed under a collective agreement article stating that probationary employees may be dismissed for incompetence or unsuitability without recourse to the grievance procedure. The union argued that discipline was not imposed within the time limit in the collective agreement. The arbitration board upheld the grievance and reinstated the grievor for the reason that the employer did not prove the allegation it made against the grievor. The arbitration board also made a finding that the employer did not violate the time limit. The relevant collective agreement article provided for a five day notice for discipline or for notice of an investigation, according to the board, and the notice of investigation was issued within the five day time limit. The collective agreement language in that case was different from the present collective agreement language. It provided for notice of dissatisfaction within five working days “of the occurrence or the discovery of the incident giving rise to the complaint”, and also stated “management shall also notify an employee in writing of any investigation which may reveal unsatisfactory performance on the part of the employee”. The arbitration board held that the time limit was met by giving notice of an investigation. There is no similar provision in the current Collective Agreement. Also, the finding by the arbitration board on the time limit issue was a finding that the board did not need to make, once it decided to allow the grievance based on the merits of the case. There was no discussion in the award with respect to how to determine when the time limit starts to run for the giving of notice of dissatisfaction. For these reasons, the *Byrne* case does not assist the arbitrator to interpret Article 22.03 of the Collective Agreement.

The Guild referred to the award in the *NAPE* case, where the employer was found not to have complied with the time limit. However, on the facts of that case, the letter of dismissal, alleging unacceptable work performance, was issued almost three years after the grievor’s last day of work. The arbitration board found that the occurrence or discovery of the incident necessarily occurred on or before the grievor’s last day of work, in the absence of any evidence to the contrary. Thus, the arbitration board in the *NAPE* case did not need to address the issue now before the Arbitrator.

The Arbitrator finds persuasive the reasoning in the *Denine* case, which is also supported by the arbitral jurisprudence as discussed in the *University of Ottawa* case and other cases. The parties would not have intended that the Employer impose discipline based upon mere suspicion or allegation, before completing any investigation, without language to that effect in the Collective Agreement. Under the Collective Agreement, the Employer is required to have just cause for the imposition of discipline. It is therefore reasonable, and consistent with arbitral principle, to interpret the time limit article in the Collective Agreement to mean that the time starts to run from the date

that the Employer has information, which if true, would provide cause for discipline. According to these principles, once the Employer is in possession of such information, then it is required to act within the applicable time limit to impose discipline and cannot delay the making of its decision.

It is necessary to give effect to the language agreed by the parties in Article 22.03 of the Collective Agreement when considering, the applicability of arbitral authority based on different collective agreement language. There is no express language used in Article 22.03 that refers to the Employer being “aware” of the event or the Employer making a “discovery” of the event. Article 22.03 refers to “the event of the complaint”. The Guild submits that the event of the complaint is the date of the alleged incident, regardless of when the Employer was made aware of the incident. On the facts of this case, the alleged incident was not brought to the attention of the Employer within five days of the date of the incident, because the private wharf owner did not make any allegation to the Employer until about three weeks after the date of the incident. It is not likely that the parties intended that the Employer could miss a time limit in relation to an incident of which the Employer was unaware. How could there be an obligation on the Employer in such circumstances? It is also necessary to give consideration to the meaning of “complaint”. The Guild submits that there is a “complaint” when there is an allegation. The Guild submits that in this case there was a complaint when a member of the public alleged damage to the wharf. However, the allegation by itself does not establish any culpability. Upon receiving the allegation, the Employer had insufficient information to conclude that damage was caused by a Provincial Government ferry, that the Grievor was operating the ferry, or that the Grievor was culpable in any way. The parties could not have intended that the Employer impose discipline without conducting an investigation to determine these facts. It is more likely that the intention of the parties was that the “complaint” in Article 22.03 refers to the complaint by the Employer against the employee. The date of the “event of the complaint” is the date when the Employer has sufficient information to decide whether or not there is cause for discipline.

When did the time limit start to run on the facts of this case? As stated, the “event of the complaint” does not mean the date of the alleged incident, or the date of the allegation by the private wharf owner alleging that damage was caused to his wharf. The event of the complaint is the date upon which the Employer received sufficient information to determine whether or not there was cause for discipline. The date may be determined based on the facts of the case.

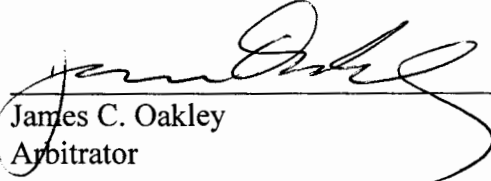
It is necessary to examine the facts to see when the Employer had sufficient information to justify a complaint. Captain Ben Hammett, Marine Manager, conducted an investigation for the Employer. He determined that, at the time of the alleged damage to the private wharf, the Master of the MV Sound of Islay was the Grievor. He obtained photographs, spoke to a witness, interviewed the Chief Mate on the MV Sound of Islay and interviewed the Grievor. The initial investigation was completed on April 30, 2009. Captain Hammett reached a conclusion about contact with the wharf. Captain Hammett spoke to the Grievor, told him that the investigation revealed nothing, and directed him to report everything and to be careful. At that time, the Employer had completed an investigation, and had received information upon which it could make a decision as to whether or not to impose discipline. The Grievor was told the result of the investigation and there was no discipline imposed. Following a subsequent call from the private wharf owner, Captain Hammett then conducted a further investigation. Captain Hammett obtained additional photographs that he said he could have obtained earlier. He conducted further interviews of the Chief Mate and of the Grievor. He completed another investigation report that led to discipline. However, as of April 30, 2009, the Employer had sufficient information to make a decision about discipline. Therefore, the event of the complaint was the date upon which the initial investigation was completed, which was on April 30, 2009.

Was discipline imposed within the time limit? The time limit started to run on April 30, 2009. The disciplinary penalty of dismissal was imposed on June 2, 2009, which was more than seven (7) calendar days after the event of the complaint. The discipline was imposed outside the time limit. Under Article 22.03, any expression of dissatisfaction against the Grievor shall not be part of the record against him. Therefore, the disciplinary penalty is null and void.

Decision

The preliminary objection by the Guild is allowed. The disciplinary penalty is null and void. The Grievor shall be reinstated with full compensation.

DATED this 14th day of July, 2009.


James C. Oakley
Arbitrator