

**ARBITRATION AWARD**

BETWEEN:

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

AND:

OCEANEX INC.  
(hereinafter called the “Employer”)

GRIEVOR: David Dillon

COUNSEL: For the Guild  
Mark D. Murray

For the Employer  
Kenneth A. Templeton, Q.C.

ARBITRATOR: James C. Oakley

The arbitration hearing was held at St. John's on January 15 and March 1, 2010. 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.
5. Another employee, P.K., who was potentially affected by the outcome of the arbitration award, was given notice of the hearing.

The parties agreed to follow a med/arb procedure, under which the Arbitrator would initially serve as mediator to attempt to resolve the dispute, and in the event the dispute was not settled, then the matter would proceed as an arbitration. The dispute was not settled at mediation and proceeded to arbitration. The evidence was presented by consent exhibits, and facts stipulated by the parties. The dispute concerned the interpretation and application of the Collective Agreement.

The Union grieves the Employer's failure to promote the Grievor, David Dillon, from Third Mate to the permanent position of First Mate on October 10, 2008. The Employer promoted another employee, P.K. to the position. The position was on the M/V Oceanex Sanderling, a roll on/roll off cargo vessel operating between St. John's, Halifax and Corner Brook.

The following exhibits were entered at the hearing:

- Consent 1 - Collective Agreement between Oceanex Inc. and the Canadian Merchant Service Guild, January 1, 2007 to December 31, 2011
- Consent 2 - Letter of Grievance dated October 17, 2008 from the Grievor, David Dillon to Captain Belanger
- Consent 3 - Letter dated October 21, 2008 from Aurora Gutiérrez, Director of Human Resources and Labour Relations, Oceanex Inc. to the Grievor
- Consent 4 - Description of M/V Oceanex Sanderling, formerly the ASL Sanderling

- Consent 5 - Description of vessels and cargo services from Oceanex web site
- Consent 6 - Seniority list of employees, January, 2008, January 2009, 1 November, 2005, 1 November, 2002, 1 January, 2001
- Consent 7 - Seniority list dated November 17, 2009
- Consent 8A - Letter dated November 3, 2008 from Vivian Arenillas, Labour Relations Officer, Canadian Merchant Service Guild to Aurora Gutiérrez, Oceanex
- Consent 8B - Letter dated November 6, 2008 from Aurora Gutiérrez, Oceanex to Vivian Arenillas, Canadian Merchant Service Guild
- Consent 8C - Letter dated September 14, 2008 from Vivian Arenillas, Canadian Merchant Service Guild to Aurora Gutiérrez, Oceanex
- Consent 9A - Employment Record of P.K.
- Consent 9B - Employment Record of David Dillon
- Consent 10 - Employment records for P.K.

**Collective Agreement**

The relevant articles of the Collective Agreement are as follows:

Article 2      Recognition

- 2.1      The Company recognizes the Guild as the sole collective bargaining agent for all Mates, Engineers, and Electricians employed on vessels of the RO-RO

Services Division owned, operated, or bareboat chartered by the Company and operating in Canadian Territorial waters as well as foreign going voyages. Such licensed personnel shall hereinafter be referred to as “Officers”, which word shall include the singular as well as the masculine and feminine gender.

...

Article 6      Maintenance of Membership and Employees

...

- 6.9      The Guild agrees to cooperate fully with the Company in obtaining well qualified, reliable, sober Officers to fill such vacancies as they occur. When Officers are requested, the Guild agrees that the Company’s requirements will

be filled as quickly as possible. Where the Guild fails or is unable to fill a request for a replacement Officer acceptable to the Company within twenty-four (24) hours of the receipt of the Company's request, the Company shall be free to hire such Officer through any other available source.

All Officers covered by this Agreement must have a valid M.E.D., medical and STCW'95 endorsement.

The operating requirements of the Company include certification levels as follows:

POSITION	CERTIFICATE
1 <sup>st</sup> Mate	ON1
2 <sup>nd</sup> Mate	ON2
3 <sup>rd</sup> Mate	WKM
2 <sup>nd</sup> Engineer	2 <sup>nd</sup> class motor
3 <sup>rd</sup> Engineer	3 <sup>rd</sup> class motor
Junior Engineer	4 <sup>th</sup> class motor
Electrician	trade with Electronics endorsement

...  
Article 8      Arbitration

8.1 Any Grievance involving the interpretation or alleged violation of this Agreement which has not been settled to the satisfaction of the Company or the Guild through conference or negotiation may be submitted to an Arbitration Board. Matters involving any request for a modification of this Agreement or which are not covered by this Agreement shall not be subject to Arbitration.

...  
8.5 The expenses, fees and cost of the Arbitrator shall be paid by the Party found to be in default upon the Arbitrator's resolution of the Grievance or, if the Arbitrator resolves the Grievance in such a way that neither side is found wholly in the right, then the Arbitrator shall establish the proper split of the expenses, fees, and cost between the two parties in the proportion appropriate to the share of responsibility that each side had in the production of the Grievance.

...  
Article 10      Seniority

10.1 A Seniority list of all Officers shall be prepared by the company showing present classification, date of appointment to this classification, certificate held and date of issue and Company Seniority in the RO-RO Service. A copy

shall be supplied to each Officer concerned and to the Guild. All Officers shall be separated into seven classifications: first mate, second mate, third mate, second engineer, third engineer, junior engineer, and electrician, and as between two Officers.

- (a) within different classifications the Officer in the higher classification is deemed to be the senior Officer.
- (b) within the same classification, the Officer with the greater length of continuous service in the classification is deemed to be the senior Officer, and
- (c) with the same length of service within one classification, the Officer with the greater length of service as an Officer with the Company is deemed to be the senior Officer.

...

10.3 Seniority lists shall be revised annually on the anniversary date of the signing of this Agreement. The Seniority list shall thereafter be open to correction for a period of ninety (90) days upon proof of error being submitted by the Officer concerned or his official representative. Once seniority has been established for ninety (90) days without protest, it shall thereafter remain unchanged, unless agreed by mutual consent of all parties concerned.

10.4 Subject to section 10.8, seniority of an Officer in any classification shall count from the date of employment in that classification. Seniority shall be maintained and accumulated while an Officer is absent from Employment:

- (a) due to lay off;
- (b) due to sickness, (two (2) years maximum absence);
- (c) pursuant to authorized leave of absence;
- (d) due to Company business; and
- (e) due to Guild business

...

10.6 In the case of demotion, lay-off and recall after lay-off, the most senior Officer with the qualifications indicated in section 6.9 of this Agreement shall be entitled to preference where demonstrated performance, ability and physical fitness are equal.

10.7 An Officer who establishes seniority in a position with a certificate indicated in 6.9 will also establish seniority from the same date in junior positions in the same Department.

- 10.8 Promotions of an Officer to fill a vacancy on a RO-RO vessel shall be subject to the following conditions, providing demonstrated performance, ability, and physical fitness are equal:
- (a) the senior Officer holding the certificate of competency indicated in 6.9 shall be promoted to fill the vacancy;
  - (b) if this Officer refuses the promotion his refusal will result in the reduction of his seniority to a point immediately below that of the Officer who accepts the promotion;
  - (c) in the event of a refusal as per (b), the next senior Officer with the certificate as indicated in 6.9 of this Agreement will be offered the promotion on the same terms;
  - (d) if there is no Officer holding the certificate indicated in 6.9, an Officer with a certificate less than that required in 6.9 of this Agreement may be promoted for a period of twelve months. At the end of the twelve month period, if the Officer has not upgraded his certificate with 6.9, he may be demoted and replaced by any Officer in the classification holding the stipulated certificate. If the Officer is displaced, he shall forfeit any seniority established in the higher rank upon reverting to the lower; and
  - (e) temporary promotion of Officers without the certificate required in 6.9 will not serve to establish seniority in the higher position.
  - (f) It is understood and agreed that priority will be given to Officers that are currently employed by the Company to fill temporary promotions, provided the Officer has the requisite certificates to fill the position.
- 10.9 Should an Officer not be promoted in turn, the authorized Representative of the Officer shall, upon written request, be furnished with the reason thereof in writing.

### **Evidence**

The factual background concerns the employment history of the Grievor, David Dillon, and another employee, P.K. Article 6.9 of the Collective Agreement refers to the positions of First Mate, Second Mate and Third Mate, and the certification levels required for the positions, which are ON1, ON2 and WKM, respectively. The names of the certificates have been changed under the *Marine Personnel Regulations*. The former ON1 Certificate is now First Mate (Master, near coastal). The

former ON2 Certificate is now Watch Keeping Mate (Chief Mate, near coastal), and the WKM Certificate is now Watch Keeping Mate, near coastal. However, as a matter of convenience, and to be consistent with Article 6.9, the Award will refer to the certification levels as ON1, ON2 and WKM. It was agreed by the parties that these certificates are the ones referred to in Article 10.8 (e) of the Collective Agreement, which states “temporary promotion of officers without the certificate required in 6.9 will not serve to establish seniority in the higher position”. P.K. acquired the ON1 Certificate on July 19, 2007. David Dillon acquired the ON1 Certificate on September 30, 2008.

The employment history of David Dillon is that his date of hire and date of permanence were both August 24, 2001. He was placed in the Third Mate position effective from August 25, 2001. He was first placed in a Second Mate position effective from December 30, 2002. He was appointed to a First Mate position effective from June 22 to July 20, 2007, from October 4 to October 10, 2008, from November 7 to December 5, 2008 and from February 28, 2009 up to the date of the hearing. The Grievor’s first appointment as First Mate after he had the required ON1 Certificate was the appointment from October 4 to October 10, 2008, a total of 6 days.

P.K.’s date of hire was after the Grievor. The various employment records, seniority lists, and submissions from the parties show different dates of hire for P.K., varying between January 7, 2003 and March 21, 2006. For the purpose of the Award, I will use March 20, 2006 as P.K.’s date of hire. The relevant fact is that David Dillon had greater length of service with the Company. According to P.K.’s Company Record of Employment, he started in the position of Deck Cadet, was placed in a position of Third Mate on March 20, 2006, and was first placed in the position of Second Mate on July 10, 2006. He was placed in positions of First Mate from November 17 to December 7, 2007, from January 11 to January 18, 2008, and from June 23 to August 15, 2008. As of October 10, 2008, he had accumulated a total of 98 days in the position of First Mate, on a temporary basis, after he had the required ON1 Certificate.

P.K.’s last temporary assignment to First Mate was to replace an employee absent on medical leave. The person on medical leave subsequently retired and the permanent position became vacant on October 10, 2008. It is the appointment to this permanent position that is the subject of the grievance.

On October 10, 2008, at the time of the vacancy for the permanent position of First Mate, P.K. had accumulated 98 days service in a temporary position of First Mate, following his attaining the ON1

Certificate. At that time the Grievor had accumulated 6 days service in a temporary position of First Mate following his attaining the ON1 Certificate.

The Grievor did not have an ON1 Certificate on May 23, 2008, the date that P.K. was appointed to a temporary First Mate position. The parties agree that the Employer correctly applied the Collective Agreement when it placed P.K. in the temporary position of First Mate on May 23, 2008, on the basis that P.K. had the required ON1 Certificate and the Grievor did not have the certificate.

Various seniority lists were entered as exhibits at the hearing. Prior to October 10, 2008, the last seniority list posted in the vessel M/V Sanderling, was dated November 1, 2005. The list shows that the Grievor was a Third Mate, that he had an ON2 Certificate, that his hiring and permanence dates were August 24, 2001 and that he had four years service. A seniority list dated January, 2008, that was not posted on the vessel, showed permanent employees on the M/V Sanderling. The list stated that P.K. had 1.22 and the Grievor had 6.35 seniority, but did not state employee classification. A recent seniority list, dated November 17, 2009, was entered as an exhibit. The list shows P.K. is senior to David Dillon under the classification of First Mate. The list shows date of appointment to the classification, certificate held and date of hire. The Union disputes the accuracy of the November, 2009 seniority list and has filed a grievance. That grievance was not before the Arbitrator in this proceeding.

### **Union Submission**

The Union submitted that the Grievor, David Dillon, had more seniority than P.K., and was entitled to be promoted to the First Mate position on October 10, 2008. At that time, both the Grievor and P.K. held the ON1 Certificate, as required by Article 6.9. The Grievor was entitled to the promotion under Article 10.8 (a) and Article 10.1. The Grievor and P.K. were both Officers, and both occupied the classification of Third Mate. The Grievor had the greater length of service in the classification of Third Mate. The temporary appointments of P.K. to the First Mate position did not count to establish seniority for P.K. in that classification. The reference to "classification" in Article 10.1 (d) meant permanent classification. When assigned to the relief position of First Mate from May to August, 2008, P.K. could not be classified as a First Mate because the position was filled by a permanent employee who was absent on medical leave. P.K. completed his last temporary assignment to First Mate on August 14, 2008, and then he reverted to his Third Mate classification. In the employment records of P.K., there was reference to a permanent promotion on October 10,

2008, but if P.K. was already promoted by temporary assignment, then he could not be promoted again. Temporary appointment to a position had never before counted to establish seniority in that classification. Temporary appointments were not shown on the seniority list. The seniority list dated January, 2005 was the most recent seniority list posted on the vessel before the dispute arose in October, 2008. The seniority list dated January, 2008, which was not posted on the vessel, showed that the Grievor had more seniority than P.K. and did not show classification seniority. The Union referred to *Re Dominion Stores and Retail, Commercial and Industrial Union, Local 206* (1983) 9 L.A.C. (3d) 47 (Saltman) (the “*Dominion Stores*” case), where a promotion was interpreted to mean a permanent promotion and not a temporary assignment. The Union referred to a prior award to indicate the past practice of the parties. In *Canadian Merchant Service Guild and ASL Atlantic Searoute Limited*, August 28, 1992 (Outhouse) (the “*ASL Atlantic*” case), the employer was the predecessor of Oceanex, the current employer, and the collective agreement had similar language. The award had the same effect as a prior award between the same parties. The arbitrator concluded that no seniority was established for persons in temporary relief positions. Because the grievor’s service in a temporary position did not count for the purpose of establishing classification seniority, it was necessary for the arbitrator to decide the case for other reasons. To count a temporary assignment as a promotion, could lead to absurd results. For example, if a senior employee was getting married on the day the relief work was offered and if a junior employee took the assignment, the senior employee could be permanently affected in his place on the seniority list. The Union referred to hypothetical situations to illustrate its position. The redress requested by the Union was to award seniority to the Grievor in the First Mate classification effective from October 10, 2008. The result would make the Grievor senior to P.K., but would not change P.K.’s seniority date in the classification. The Union also requested that compensation be paid to the Grievor for the period of time when he should have held the First Mate position in place of P.K. With respect to an award of costs of the arbitration under Article 8.5, the Union submitted that it should be awarded costs if successful in the grievance. Alternatively, if the Union was not successful, then costs should be apportioned, because the Union reasonably relied on the past practice indicated in the prior arbitration award, and the posted seniority list. The Employer had not complied with its obligation to revise the seniority list annually.

### **Employer Submission**

The Employer submitted that there was no issue with the Grievor’s competence or ability to perform the position of First Mate. By law the Employer is required to fill positions with persons holding

the requisite certificates. In May, 2008, the Grievor did not have the ON1 Certificate, and it was proper to appoint P.K. to the First Mate position. When the permanent First Mate position was filled on October 10, 2008, P.K. had 98 days service as First Mate with the required certificate and the Grievor had 6 days service as First Mate with the required certificate. The Grievor had additional service as First Mate without the ON1 Certificate, but that service did not count to establish seniority in the higher classification by operation of Article 10.8 (e). The implied effect of Article 10.8 (e) is that temporary promotion counts for classification seniority when the employee has the requisite certificate. P.K. acquired seniority from his start date in the temporary position by operation of Article 10.4 and the Collective Agreement as a whole. The word “permanent” is not used in the Collective Agreement and therefore the meaning of promotions is not limited to permanent promotions. On October 10, 2008, P.K. was the senior employee under Article 10.1 (b). Both P.K. and the Grievor were in the First Mate classification and P.K. had the greater length of continuous service in that classification. P.K. was the senior Officer holding the required certificate under Article 10.8 (a). The Employer’s position was supported by Article 10.5, which helps to define continuous service. The effect of the Employer’s interpretation of the Collective Agreement is to encourage employees to upgrade their certificates, so that they may accrue seniority in temporary positions. The parties have recognized the importance of advancement to a higher classification, by Article 10.8 (b), which provides that a refusal of a promotion will result in a reduction of seniority to the level below the Officer accepting the promotion. The seniority list distributed in November, 2009 complies with Article 10.1. Prior seniority lists did not show classification and date of appointment to the classification. The Employer referred to case authority stating that seniority rights are not vested rights of employees, but are rights established through collective bargaining. Seniority has meaning only in relation to the terms of the Collective Agreement (*Hemond v. Cooperative Federee du Quebec* [1989] 2 S.C.R. 962). The Employer submitted that the *Dominion Stores* case was based on an interpretation of collective agreement language that was different from the language in the current Collective Agreement. A different company with different management was the party to the prior award in *ASL Atlantic*. There was different collective agreement language. It was not established that Oceanex was a successor to ASL Atlantic Searoute. The *ASL Atlantic* award indicates that the parties gave direction to the arbitrator to disregard the article in the collective agreement that recognized accrual of seniority in a temporary position. The arbitrator indicated that the collective agreement allowed for accrual of seniority for a temporary assignment, but the parties chose not to apply it. The Employer requested that costs be awarded under Article 8.5 to the Employer as the successful party. The Employer requested that the grievance be denied.

### **Considerations**

The Union grieves that the Grievor, David Dillon, was entitled to be promoted to the permanent position of First Mate effective October 10, 2008. The Employer placed another employee, P.K., in the position. The parties dispute whether David Dillon or P.K. had greater seniority. The issue concerns the interpretation and application of the Collective Agreement, in particular, the seniority provisions in Article 10.

The Grievor had greater length of service with the Company than P.K. His date of hire was August 24, 2001 compared to P.K.'s date of hire of March 20, 2006. P.K. acquired the ON1 Certificate on July 19, 2007, prior to the Grievor acquiring the ON1 Certificate on September 30, 2008. The ON1 Certificate is the certification level required for the First Mate position. This is confirmed as an operating requirement of the Company in Article 6.9. The Grievor had periods of temporary service in a First Mate position, prior to having the requisite ON1 Certificate. The parties agree that service without the certificate does not establish seniority in the First Mate position by operation of Article 10.8 (e). Article 10.8 (e) states "temporary promotion of Officers without the certificate required in 6.9 will not serve to establish seniority in the higher position". As of October 10, 2008, the Grievor had 6 days service as a First Mate in a temporary position after he acquired the ON1 Certificate, and P.K. had 98 days service as a First Mate in a temporary position after he acquired the ON1 Certificate.

The Arbitrator will consider (1) whether service in the temporary position of First Mate serves to establish seniority in that classification; and (2) whether the Grievor or P.K. had greater seniority on October 10, 2008.

When interpreting the Collective Agreement, the Arbitrator will have regard to the principles of interpretation of collective agreements. The Arbitrator refers to the principles of interpretation 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), that it should be presumed that all the words used were intended to have some meaning (paragraph 4:2120) and that the language is to be interpreted within the context of the collective agreement as a whole (paragraph 4:2150) and the industrial relations practices of the parties (paragraph 4:2300).

When interpreting issues of seniority, I have considered the importance of seniority, as described in the often quoted passage from *Tung-Sol of Canada Ltd.* (1964) 15 L.A.C. 161 (Reville) at 162 as follows:

Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement.

I have also considered that seniority is a collective bargaining concept, which is to be applied according to the language agreed by the parties in the Collective Agreement (*Hemond v. Cooperative Federee du Quebec* [1989] 2 F.C.R. 962).

The language used by the parties in Article 10 will be considered in the context of Article 10 as a whole. Article 10 sets out how the parties define seniority, and how seniority is to be applied. Article 10.1 provides for seniority based on length of service as an Officer with the Company, and seniority based on length of continuous service in a classification.

The promotion of an Officer to fill a vacancy is addressed in Article 10.8. Article 10.8 (a) states that the senior Officer holding the required Certificate of Competency shall be promoted to fill the vacancy, providing demonstrated performance, ability and physical fitness are equal. To apply Article 10.8 (a) it is necessary to determine which Officer is the senior Officer, by reference to other sections of Article 10. Article 10.1 refers to the seniority list and addresses the order of seniority. Article 10.1 states that the seniority list shall show present classification and date of appointment to the classification. Article 10.1 sets out a method to rank the order of seniority as between two Officers. There are three criteria to consider. The first criteria is relative classification, with the Officer in the higher classification deemed the senior Officer. For example, an Officer classified as a First Mate is senior to an Officer classified as a Third Mate. The second criteria is that within the same classification, the Officer with the greater length of continuous service in the classification is

deemed the senior Officer. The third criteria is length of service as an Officer with the Company, to be applied when comparing two Officers in the same classification who have the same length of service in the classification. Thus the parties have recognized the importance of length of service in a classification as well as length of service with the Company for the purpose of establishing relative seniority.

Article 10.1 (b) states “within the same classification, the Officer with the greater length of continuous service in that classification is deemed to be the senior Officer”. What is the meaning of length of continuous service in the classification? Article 10.4 addresses when continuous service commences. Article 10.4 states “seniority of an Officer in any classification shall count from the date of employment in that classification”. Article 10.4 also addresses how seniority is maintained and accumulated during an absence from employment. The reference to “date of employment in the classification” in Article 10.4 does not specify whether the employment is in a permanent or temporary position. Article 10 does not exclude temporary employment in a classification from counting for the purpose of accumulation of seniority in a classification, except for the circumstance of temporary promotion where the Officer does not have the required certificate. Article 10.8 (e) states that “temporary promotion of an Officer without the required certificate will not serve to establish seniority in the higher position”. There is no other exception stated in Article 10. The statement in Article 10.8 (e), that temporary promotion of an Officer without the certificate does not establish seniority, implies that temporary promotion of an Officer with the required certificate does serve to establish seniority in the higher position. This is consistent with the interpretation of Article 10.4 that counting seniority from date of employment in the classification, applies to both temporary and permanent employment. Therefore, length of continuous service in a classification, within the meaning of Article 10.1 (b), includes both temporary and permanent service, with the exception of temporary service without the required certificate.

Does “promotion” in Article 10.8 include a temporary promotion? Article 10.8 (e) refers to temporary promotion without a required certificate. If “promotion” in Article 10.8 applied to permanent promotion only, and excluded all temporary promotions, then there would be no need to exclude temporary promotion in a particular circumstance. Also, Article 10.8 (f) extends priority to Officers currently employed to fill “temporary promotions”. Article 10.8 (f) is consistent with the interpretation that Article 10.8 applies to both permanent and temporary promotions. The Union submitted that accruing classification seniority for a temporary assignment could lead to the absurd result that an employee on leave and unavailable to accept a temporary assignment could be

permanently disadvantaged in his placement on the seniority list. The parties have expressly addressed the issue of an Officer refusing a promotion in Article 10.8 (b), which states that an Officer refusing a promotion will have seniority reduced to a point below that of the Officer accepting the promotion. Article 10.8 (b) applies to an Officer who refuses a promotion. The situation raised by the Union does not necessarily follow from an interpretation of Article 10.8 that a promotion includes a temporary promotion. Having reviewed Article 10.8 and Article 10 as a whole, I find that “promotion” in Article 10.8 includes a temporary promotion, except where excluded by Article 10.8 (e).

The Union referred to the *Dominion Stores* case, to support its position that a promotion means a permanent promotion not a temporary promotion. However, the *Dominion Stores* decision is based on the language of the collective agreement negotiated by the parties in that case, which is different from the language in the Collective Agreement in this case. Whether or not a promotion includes a temporary promotion is a matter that will depend on the language of the collective agreement in each case.

The Union also relies on the arbitration award between *Canadian Merchant Service Guild v. ASL Atlantic Searoute Ltd.*, August 28, 1992 (Outhouse) (the “*ASL Atlantic*” case). It has not been agreed by the Employer that ASL Atlantic is a predecessor to the current employer, Oceanex Inc. ASL Atlantic Searoute had a similar roll on/roll off vessel operation, and had a similar collective agreement with the Union. However, in the absence of agreement or proof of successorship, the *ASL Atlantic* award does not have the same effect as a prior award between the same parties. However, the award may be considered to determine if it has any persuasive effect. In *ASL Atlantic*, the arbitrator’s decision was based upon a representation made by the employer to the grievor that when he returned from leave, he would be appointed to the first available vacancy for First Mate. The company hired another person as First Mate when the grievor was absent on leave, and ranked that person ahead of the grievor in seniority. The arbitrator found that the failure to rank the grievor in priority was a violation of the representation made to the grievor. Had the arbitrator counted prior service by the grievor in a temporary position of First Mate, then the grievor would have been ranked first in seniority in the First Mate classification on that basis, and it would have been unnecessary for the arbitrator to consider the issue of the employer’s representation. However, the arbitrator stated in the award that the parties agreed that a temporary promotion would not be counted as service in the classification. The arbitrator did not need to decide the effect of a temporary promotion on seniority, as a result of the direction given to the arbitrator by the parties. The

arbitrator did not need to interpret what the collective agreement said about a temporary promotion. Since the arbitrator did not decide the issue of the effect of temporary promotions, the *ASL Atlantic* case is not an authority for the interpretation proposed by the Union in this case.

Did the parties follow a practice that temporary promotion would not count as service in the higher classification? The *ASL Atlantic* award does not establish a past practice by the Employer, since it is not agreed or proven that ASL Atlantic Searoute is a predecessor to Oceanex Inc. The seniority lists prior to November, 2009 did not show date of appointment to the classification, but that fact by itself is not sufficient to establish a past practice. In the absence of satisfactory proof of a past practice, it is unnecessary to consider the effect of any past practice on the matter in dispute.

How does the Arbitrator's interpretation of Article 10 apply to the current fact situation? P.K. accumulated continuous service in the classification of First Mate when serving in the temporary position with the required certificate for a total of 98 days. The Grievor also accumulated continuous service with the required certificate in the classification of First Mate for a total of 6 days. On October 10, 2008, the position most recently held by both the Grievor and P.K. was the position of First Mate. At that time the "present classification", within the meaning of Article 10.1, for both the Grievor and P.K. was First Mate. As stated above, there are three criteria to apply under Article 10.1 to determine relative seniority. The first criteria is relative classification. Since both the Grievor and P.K. were First Mates, they were in the same classification under the first criteria. They were equal in seniority under the first criteria. It is necessary to consider the second criteria. Under the second criteria, relative seniority is established by the greater length of continuous service in the First Mate classification. P.K. was the Officer with the greater length of continuous service as First Mate when compared to the Grievor. Therefore, he was the senior Officer under Article 10.1 (b). Since relative seniority is established under Article 10.1 (b), it is unnecessary to consider the third criteria of length of service as an Officer with the Company under Article 10.1 (c). Under Article 10.8, as the senior Officer, P.K. was entitled to the promotion in priority to the Grievor.

The Employer did not violate the Collective Agreement when it appointed P.K. to the First Mate position on October 10, 2008. Therefore the grievance will be denied.

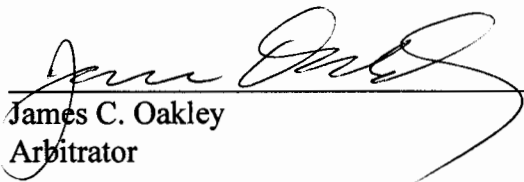
With respect to the costs of the arbitration hearing, Article 8.5 states that the fees and costs of the Arbitrator shall be paid by the party found to be in default on the Arbitrator's resolution of the grievance. Article 8.5 also states that if the Arbitrator resolves the grievance in such a way that

neither side is found wholly in the right, then the Arbitrator shall establish the proper split of the expenses, fees and costs between the two parties in the proportion appropriate to the share of responsibility that each side had in the production of the grievance. In this regard, I note that both parties agreed to a procedure that included a mediation followed by an arbitration. I also note that the award is based on Article 10.1, and a review of the employment records. Article 10.1 provides for the Employer to prepare a seniority list showing information including classification and date of appointment to the classification. The Employer had not complied with Article 10.1 up to the date of the filing of the grievance, because it had not prepared the seniority list annually as required by Article 10.1. Under these circumstances, it is appropriate that there be a split of the fees and costs of the arbitration hearing, and that the fees and costs be apportioned one half to each party.

**Decision**

The grievance is denied. The fees and expenses of the arbitration hearing shall be split and apportioned one half to the Employer and one half to the Union.

**DATED** this 18<sup>th</sup> day of May, 2010.

  
James C. Oakley  
Arbitrator