

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), represented by Public Service Secretariat
(hereinafter called the "Employer")

GRIEVANCE: Group grievances re overtime

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 October 6 and 7, 2010. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. Nine grievances would be heard in the same arbitration proceeding. There were no preliminary objections going to jurisdiction to hear the grievances. However, the Employer submitted that some of the grievances were not filed within the time limits in the grievance procedure in the Collective Agreement. The parties agreed that the issue of time limits could be heard together with the hearing of the merits of the grievances.
3. The Arbitrator would remain seized of the matter for ninety (90) days following publication of the Award in the event there is a question of interpretation or compensation arising from the Award.
4. The parties agreed to waive the time limits for the filing of the award.

The following exhibits were entered at the hearing:

- Consent 1 - Marine Services Collective Agreement between Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board, and Newfoundland and Labrador Association of Public and Private Employees, expires March 31, 2008
- Consent 2 - Marine Services Collective Agreement between Her Majesty the Queen in Right of Newfoundland, represented by Treasury Board, and Newfoundland and Labrador Association of Public and Private Employees, signed February 13, 2009, expires March 31, 2012
- Consent 3 - Grievance of Jim Whelan and Ed Dyer dated April 9, 2007, C-MS-125-07
- Consent 4 - Grievance of Tim Boone dated April 13, 2007, C-MS-127-07
- Consent 5 - Grievance of T. Boone, T. King, R. White, Ron Furlong, H. Kelly dated October 19, 2009, C-MS-398-09
- Consent 6 - Grievance of R. White, H. Kelly and T. Boone dated February 5, 2010, C-MS-419-10
- Consent 7 - Grievance of Bradley Kane dated January 8, 2009, C-MS-362-09
- Consent 8 - Grievance of Melvin Colbourne dated January 9, 2009, C-MS-361-09

Consent 9 - Grievance of Joseph Burke dated January 8, 2009

Consent 10 - Grievance of Donald Wiseman dated January 6, 2009, C-MS-350-09

Consent 11 - Grievance of Donald Wiseman dated December 21, 2009, C-MS-406-09

TB - 1 Travel Time Credit Accumulation & Request for Compensation Forms for Harold Kelly, Ronald White and Timothy Boone

Nature of the Grievance

The Union claims compensation on behalf of the Grievors at the overtime rate for travel time and attendance at training sessions or meetings during off shifts. The Union submitted that compensation is payable to each employee at the rate of time and one half based on the number of hours on the employee’s established daily sailing schedule. The Employer submitted that travel time was not payable under the Collective Agreement in these circumstances.

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.

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Article 2 - Definitions

*2.01 For the purpose of this Agreement

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(c) “day of rest” means a calendar day on which an employee is not ordinarily required to perform the duties of his position other than:

- (i) a designated holiday;
- (ii) a calendar day on which the employee is on leave of absence.

...

(j) “holiday” means the twenty-four (24) hour period commencing at 12:01 a.m. of a calendar day designated as a holiday in this Agreement.

...

(m) “management” means the Deputy Minister or the person or persons authorized to act on his behalf.

...

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

...

*(y) “week” means a period of seven (7) consecutive days beginning at 0001 hours on Wednesday morning and ending at 2400 hours the following Tuesday.

...

Article 3 - Recognition

*3.01 The Employer recognizes the Union as the sole and exclusive bargaining agent for all classes of employees listed in Schedule “A”.

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3.04 No Other Agreements

No employee shall be required or permitted to make a verbal agreement with the employer or his representative which may conflict with the terms of this Agreement.

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Article 8 - Grievance Procedure

8.01 Subject to Clauses 8.03 and 8.07, grievances shall be processed in the following manner:

Step 1

With the exception of dismissal due to unsuitability or incompetence, as assessed by the Employer, of a probationary employee or a part-time or temporary employee with less than six (6) months’ service and subject to Clauses 8.03 and 8.07, an employee who alleges that he/she has a grievance, shall first present the matter to his/her immediate supervisor through his/her Shop Steward within five (5) days of the occurrence or discovery of the incident giving rise to the alleged grievance and an earnest effort shall be made to settle the grievance at this level.

In cases where an employee's immediate supervisor is his/her permanent head, the grievance may be submitted immediately at Step 3.

...

- 8.06 (a) The time limits specified in this Article may be extended, in writing, by mutual agreement of the parties.
- (b) An Arbitrator or Arbitration Board may extend the time limits of any step in the grievance procedure, notwithstanding the expiration of such time limits, where the Arbitrator or Arbitration Board is satisfied that there are reasonable grounds for the extension and that the opposite party will not be substantially prejudiced by the extension.

...

Article 9 - Arbitration

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- 9.02 Notwithstanding any other provisions of this Article, the parties may mutually agree to the substitution of a single arbitrator for an arbitration board, in which event, the foregoing provisions of this Article shall apply equally to a single arbitrator when reference is made to an arbitration board. Furthermore, the parties shall endeavour to utilize a sole arbitrator for the majority of arbitration hearings and reserve the use of arbitration boards for cases where a party feels it is absolutely necessary.

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- 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.

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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.

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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).

...

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:

<u>Effective Date</u>	<u>Rate</u>
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.

12.05 The Employer may, upon the request of an employee, grant time off in lieu of compensation for compensable overtime worked or statutory holiday compensation at a rate specified in Clause 12.04. All time off shall be taken in two (2) week periods (Bell Island - one (1) week), unless the Employer and the employee agree otherwise. Employees who later decide to be paid for leave in lieu of overtime (LLO) shall notify the Employer in writing.

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Article 14 - Holidays

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14.03 Holiday Falling on the Day of Rest

- (a) When a calendar day designated as a holiday under Clause 14.01 coincides with an employee's day of rest, the employee shall receive one (1) days pay at straight time to compensate him for the holiday. The number of hours pay for this day shall correspond with the hours of work for the applicable holiday as contained in the printed schedule of the respective service. Where applicable, the number of hours will include any scheduled overtime in the printed schedule, which hours shall be compensated at time and one half (1 ½).
- (b) When a holiday falls on an employee's day of rest and he is required to work on such a holiday, he shall receive two (2) hours pay for each hour worked on that day in addition to his holiday pay. The employee may request time off in lieu of payment provided that such time off must be granted on the basis of two (2) hours off for each hour worked within two months of incurring the overtime. If such time off cannot be given within two months and at the convenience of the employee, he shall be paid at the applicable rate.

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Article 34 - Travel on Employer's Business

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34.05 (a) For the purpose of this Article, "travel time" means travel on the Employer's business authorized by the permanent head, for an employee by land, sea or air between his headquarters area, as defined by the Collective Agreement, and a location outside his headquarters area and between locations outside his headquarters area, to perform duties assigned to him by the permanent head and during which the employee is required to travel outside his normal scheduled work period.

- (b) “Travel time” and the method of travel shall require the prior approval of the permanent head.
- (c)
 - (i) When the method of travel is set by the permanent head, compensation for “travel time” shall be paid for the length of time between the employee’s departure from any location and his arrival at his place of lodging or work, whichever is applicable, at his authorized destination.
 - (ii) An employee may, with the prior approval of his permanent head, set his own travel arrangements. The compensation payable may not however, in any case, be greater than if the travel arrangements had been set in accordance with Clause 34.05 (c)(i).
- (d) Subject to Clause 34.05 (c), an employee who is required by the permanent head to engage in “travel time” shall be compensated at straight time rates for all “travel time” provided that the maximum amount claimable in any one day does not exceed a regular day’s pay.
- (e) Travel time is to be compensated as follows:
 - (i) For travel by air, sea, rail and other forms of public transportation, the time between the scheduled time of departure and the scheduled time of arrival at a destination plus one-half (1/2) hour.
 - (ii) For travel by personal or government vehicle, the time required to proceed from the employee’s place of residence or work place as applicable, directly to destination, and upon his return directly back to his residence or work place.
 - (iii) This Clause does not apply to employees who are required to move the vessel from one port to another but will be reimbursed in accordance with the applicable provisions of the Collective Agreement.

For the purpose of this sub-clause, travel time compensation will be based on one (1) hour for each seventy-two (72) kilometers to be travelled.
- (f) Notwithstanding any provisions in Clause 34.05, compensation will not be paid:

- (i) to employees whose “travel time” during any three (3) month consecutive period does not exceed fifteen (15) hours; or
 - (ii) for travel in connection with transfers, educational courses, training sessions, conferences, seminars or employment interviews.
- (g) For the purpose of this Article, “headquarters area” means an area within a radius of twenty (20) kilometres from an employee’s headquarters.
- (h) Effective 1990 04 01, the meal allowance shall not be reduced during periods when an employee is on travel status.

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L.#4 Bi-Weekly Record of Attendance

The Employer agrees to provide each Captain with a copy of the Bi-weekly Record of Attendance which shall be made accessible, on board the vessel, to the crew for the purpose of confirming the accuracy of reported overtime hours.

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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.

4. The above notwithstanding, temporary employees will be compensated weekly/bi-weekly on the basis of the hours worked in accordance with the established schedule for their respective service.
5. The Bell Island scheduled 10:30 p.m. trip will not be affected by this Clause, but will be reimbursed as per past practice.

Evidence

The witnesses called by the Union were Jim Whelan, Chief Engineer, Tim Boone, Chief Cook, Bradley Kane, Purser Deckhand, and Don Wiseman, Chief Engineer. The witness called by the Employer was Ben Hammett, Marine Manager.

The evidence with respect to each of the 9 grievances (identified by the grievance form exhibit number) is as follows:

Grievance dated April 9, 2007, Grievors - Jim Whelan and Ed Dyer (C-3)

Jim Whelan is Chief Engineer on the M/V Beaumont Hamel, operating on the Portugal Cove-Bell Island ferry service. His established daily sailing schedule varies from 13.25 to 18 hours per day. Mr. Whelan was required to attend an occupational health and safety course in St. John's on his off shift. He attended the course on March 20, 2007 from about 9:00 a.m. to 4:00 p.m. Mr. Whelan lives in Cape Broyle. His travel time from his residence to the course in St. John's was about 1.5 hours each way. He was paid for mileage and meal expenses. He submitted a claim for 18 hours at 1.5 times his hourly rate, based on his established daily sailing schedule. The claim was not accepted and he was paid for 7 hours at straight time. He filed a grievance on April 9, 2007 when he heard that his claim was not allowed. Mr. Whelan understood that Ed Dyer, the other Grievor

named in this grievance, was not compensated for his travel time to attend the course or paid on the basis of his established daily sailing schedule.

Grievance dated April 13, 2007, Grievor - Tim Boone (C-4)

Tim Boone is Chief Cook on the M/V Hamilton Sound, operating on the Burnside to St. Brendan's ferry service. His established daily sailing schedule is 15.25 hours in the summer and 12.75 hours for the rest of the year. He attended mandatory WHMS safety training in Clarenville on his off shift on March 22, 2007. Mr. Boone lives in Cottrell's Cove, about a 4 hour drive from Clarenville. Before he attended the training he was told by Ben Hammett, Marine Manager, to submit a claim for travel time at 1.5 times his hourly rate. He understood he would be paid for travel time at that rate. He was paid for 12 hours at straight time. He said it was possible that he was paid for 8 hours at time and one half. He said that he worked a total of 15 hours on March 22, 2007, 8 hours travel time and 7 hours to attend the course. Mr. Boone said he would accept payment of 12 hours at the overtime rate of time and one half. He was reimbursed for mileage, meals and course fees. On April 13, 2007 he discovered that he was not paid the overtime claimed and he filed a grievance the same day. The Hamilton Sound was in drydock in Clarenville at the time. Other crew members attended the same training during their on shift and were paid for a 12 hour day.

Grievance dated October 19, 2009, Grievors - T. Boone, T. King, R. White, R. Furlong and H. Kelly (C-5)

Tim Boone testified that he was one of the Grievors claiming for travel time for March 22 and 24, 2009. He attended a 2 day training session on March 23 and 24, 2009 in St. John's. He drove from his residence to St. John's on March 22nd, and returned on March 24th, after the course concluded. His travel time was 6 ½ to 7 hours each way. He also submitted a claim for travel time on March 24th from his residence in Cottrell's Cove to join the M/V Hamilton Sound at Little Bay Islands, a location outside the headquarters area. His claim for travel time to join the vessel was allowed. He was paid for the days he attended the course at 8 hours per day at time and one half. He accepted that amount for those days. Mr. Boone said he was claiming the equivalent of 12 hours pay at straight time for each of March 22, 23 and 24. There were a total of 6 Grievors named in the group grievance. The other Grievors also claimed travel time from their residence to St. John's to attend the course. He understood that one of the Grievors, Ron Furlong, may have been on duty on the vessel at the time. In that event, he should not have been named as one of the Grievors. Mr. Boone

said that after he submitted his travel time claim form, he was told that the Employer would not pay for travel time to attend training sessions. He was aware that Article 34 required a minimum of 15 hours travel time in a 3 month period to be eligible. He was claiming full redress for his travel time. He testified that he submitted the claim form on May 6, 2009, but did not receive the form back, showing that the travel time was denied, until October 16, 2009. He filed the grievance on October 19, 2009.

Grievance dated February 5, 2010, Grievors - R. White, H. Kelly and T. Boone (C-6)

Tim Boone testified that he attended a mandatory radio operator's course at the Marine Institute in St. John's on January 14, 15 and 16, 2010 during his off shifts. R. White and H. Kelly also attended the course. Mr. Boone submitted a claim for travel time of 6 ½ to 7 hours at the overtime rate for travel between his residence and St. John's on January 13 and 17, 2010. He was not paid for travel time. He was paid for the 3 days he attended the course at 8 hours per day at time and one half. He was paid for meals, accommodation and mileage. He claimed payment based on his established daily sailing schedule of 12.75 hours. He was told by the Marine Manager, Ben Hammett, to file the claim. He filed a grievance on February 5, 2010 after he received his time sheets showing that his claim for travel time was not allowed.

Grievance dated January 8, 2009, Grievor - Bradley Kane (C-7)

Bradley Kane testified that he is Purser/Deckhand on the M/V Earl Winsor. His headquarters area is the Farewell-Fogo-Change Islands ferry service. His daily sailing schedule is 13.25 hours from October 15 to May 15. He testified that he attended a mandatory alcohol and drug course in Gander on November 26, 2008. The seminar was 6 hours from 9:00 a.m. to 3:00 p.m. He attended the seminar on his off shift. He was paid 8 hours at time and one half. The Employer paid for the course costs and paid for his mileage and meal expenses. From his home in Badger's Quay to Gander is a 1.5 to 2 hour drive. He was claiming compensation based on his established daily sailing schedule of 13.25 hours at time and one half, which would include his travel time.

Grievance dated January 9, 2009, Grievor - Melvin Colbourne (C-8)

Bradley Kane testified that he is the shop steward for Melvin Colbourne. Mr. Kane said that Mr. Colbourne attended a passenger control course in Lewisporte on November 20 and 21, 2008. He

drove from his residence to Lewisporte on November 19th and returned on November 21st. He was paid for 3 days at 8 hours per day at time and one half. Mr. Colbourne also attended a drug and alcohol course in Bishop's Falls on November 26, 2008. He was paid for 8 hours at time and one half. Attendance was mandatory for both courses. Mr. Colbourne claimed pay for 13.25 hours, representing his established daily sailing schedule, at time and one half for each day.

Grievance dated January 8, 2009, Grievor - Joseph Burke (C-9)

Bradley Kane testified that he is the shop steward for Joseph Burke. Mr. Burke attended the same passenger control course in Lewisporte on November 19, 20 and 21, 2008 that was attended by Mr. Colbourne. Mr. Burke was also paid for 8 hours each day at time and one half. He was paid for accommodation, meals and mileage. Mr. Burke resides in Tilting, Fogo Island. His travel time to Lewisporte is about 2.25 hours each way, including the ferry crossing. Mr. Kane testified that payment of straight time based on the established daily sailing schedule would likely have resolved the 3 grievances described in C-7, C-8 and C-9.

Grievance dated January 6, 2009, Grievor - Donald Wiseman (C-10)

Donald Wiseman testified that he is the Chief Engineer on the M/V Island Joiner on the Long Island-Pilley's Island ferry service. His daily sailing schedule is 12 hours between September 15 and June 15 each year. He attended a meeting of engineers, captains and mates in Lewisporte on November 5, 6 and 7, 2008. He attended during his off shift and attendance was mandatory. On November 5 he drove 3 hours from his residence to Lewisporte and attended a meet and greet session. He attended meetings from 8:30 a.m. to 4:30 p.m. on November 6. On November 7 he attended meetings in the morning, and, following lunch, he drove home. He was paid meals, accommodation and mileage. He was paid for 8 hours at time and one half for each day. He is claiming 12 hours at time and one half. He was claiming for loss of his day of rest, which he considered equivalent to having to work 12 hours on shift on the vessel.

Grievance dated December 21, 2009, Grievor - Donald Wiseman (C-11)

Donald Wiseman testified that he attended WHMS safety training in St. John's on November 12 and 13, 2009. He drove from his residence to St. John's on November 11th and returned on November 14th, an 8 hour trip each way. His claim for travel time was not allowed. He was paid for 8 hours

at time and one half for November 12 and 13. He was paid for mileage, meals and accommodations. He requested compensation for the November 11th holiday at the regular rate of time and one half plus double time for each hour of his travel time.

The Employer called Captain Ben Hammett as a witness. Captain Hammett is Eastern Regional Marine Manager and has held the position since February 16, 2002. He testified that he advised Tim Boone to file a claim for travel time, because that was the procedure to be paid for travel time. He did not know at the time that travel time was not payable under the Collective Agreement. He now advises employees that they are not paid for travel time to attend a training session based on Article 34.05(f).

Union Submission

The Union submitted that when the Grievors were required to attend training sessions or meetings on their off shifts, they were required to work and should be paid at overtime rates for their travel time. The Grievors should be paid according to their established daily sailing schedule at the rate of time and one half, under Article 12.04. The Grievors drove from their residence to the location of the meeting or training session and were paid for travel expenses, but not for travel time. The Union referred to various Articles of the Collective Agreement. Overtime was defined to mean work in excess of the daily sailing schedule. Whether or not an individual Grievor was willing to accept less than his entitlement under the Collective Agreement, did not change the interpretation of the Collective Agreement, because Article 3.04 does not permit an individual agreement between an employee and the Employer. Article 10.01 (a) states that the hours of work are determined in accordance with the established daily sailing schedule. Article 12.01 (a) states that overtime applies to all employees. This was not a case of extending or prolonging the established daily sailing schedule under Article 12.02 (a). Having scheduled the employees to attend the course, the Employer could not deny compensation for overtime for travel time. Under L # 8 employees are compensated for hours worked on the daily sailing schedule on the basis of a 12 hour day. For his travel on November 11th, a designated holiday under Article 14.01 (a), Donald Wiseman was entitled to travel time at time and one half plus double time under Article 14.03 (b). Article 34 did not apply to travel on an off shift when work was scheduled by the Employer. To apply Article 34 would have the effect of disregarding the Collective Agreement as a whole. Article 12 takes precedence over Article 34 based on the principle that a preceding Article takes precedence over a later Article in the Collective Agreement. Having regard to the Collective Agreement as a whole, it was not the

intention of the parties that employees be required to travel on their off shift and not be paid compensation. In *Her Majesty the Queen in Right of Newfoundland and Labrador (represented by Treasury Board) and Newfoundland and Labrador Association of Public and Private Employees*, April 26, 2004 (Fagan), the arbitrator found that overtime applied under Article 12.04 to travel to meet the vessel when it was undergoing a refit, and Article 34 did not apply. There was no violation of time limits under Article 8. The grievances were filed as soon as the employees became aware of the violation of the Collective Agreement. It was not unusual for employees to have to wait a long time to receive their time sheets. The Union described the compensation claimed for each grievance. The claim in C-3 was for 18 hours at the rate of 1.5 times, including travel time. For C-4, the claim was for 12 hours at the rate of 1.5 times, including travel time, based on the daily sailing schedule. For C-5, the claim was for 16 hours at the rate of 1.5 times for each of 4 days, including travel time. For C-6, the claim was for 8 hours at the rate of 1.5 times for 3 days plus travel time. For C-7, the claim was for 13.25 hours at the rate of 1.5 times based on the established daily sailing schedule. The amount paid was 8 hours at the rate of 1.5 times. For C-8, the amount paid was 8 hours at the rate of 1.5 times, but should have been based on the established daily sailing schedule. For C-9, the amount paid was 3 days at 8 hours at the rate of 1.5 times, but should have been based on the established daily sailing schedule. For C-10 and C-11, the amount should have been based on the established daily sailing schedule, plus an additional amount for the holiday. The Union requested that the grievances be allowed.

Employer Submission

The Employer agreed that several articles of the Collective Agreement related to overtime and callback did not apply to the grievances. The Employer noted that the claim by some Grievors was for the number of hours on the established daily sailing schedule at straight time, and in other cases the claim was for payment at the overtime rate of time and one half. In the event there is any entitlement under Article 12.04, the calculation should be based on the hours worked and not based on the established daily sailing schedule. The Employer noted that the claim in grievance C-11 now included holiday pay under Article 14, however, the grievance form did not make any reference to Article 14. The effect of Article 34.05 (f) is that employees were not eligible for travel time to attend conferences, training sessions or seminars. The parties cannot change the plain meaning of the language in the Collective Agreement. In *Canada (Attorney General) v. Lamothe* [2008] F.C.J. No. 548, an adjudicator's decision was overturned in the Federal Court where the adjudicator allowed travel time to attend a training session based on fairness, but contrary to the plain meaning of the

collective agreement. The arbitration award between the parties on which the Union relied was based on a different fact situation. In that case, the employees travelled to join a vessel on a regular crew change and Article 34.05 was found not to apply. The other cases relied on by the Union were not relevant. Captain Ben Hammett had encouraged some employees to submit a claim for travel time before he was informed about the interpretation of the Collective Agreement. He did not promise that employees would be paid. Even if employees believed that they could be paid, the Employer could correct the mistake. The Employer agreed that the Grievors named in grievances C-3 and C-4 should have been paid at the overtime rate of time and one half for hours worked and the Employer would make the correction required. The Employer understood that only grievances C-5, C-6 and C-11 claimed for travel time, and the other grievances claimed for attendance at training sessions. Except as noted for grievances C-3 and C-4, the Employer requested that the grievances be denied.

Considerations

The issue before the Arbitrator concerns the interpretation of the Collective Agreement and the entitlement of the Grievors to compensation to attend training sessions or meetings on their off shift and compensation for travel time to travel from their residence to attend the training sessions or meetings.

When considering the interpretation of the Collective Agreement, I 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, and include 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), that specific provisions will prevail over general provisions (2:2120) 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).

Most employees are scheduled to work 14 days on, 14 days off. For the Bell Island ferry service the schedule is 7 days on, 7 days off. The hours of work on the vessel are in accordance with the established daily sailing schedule under Article 10.01 (a). The established daily sailing schedule varies according to the season and the ferry service. Article 11 provides for overtime for callback,

however, Article 11 is not applicable on the facts of these grievances. Article 12 is headed "Overtime". Employees are paid an annual lump sum amount under Article 12.03 for hours worked in excess of the hours contained in the established sailing schedule and for being available for callback for the duration of their shifts. Overtime shall be authorized by the Permanent Head or designated representative, according to Article 12.01 (b). Overtime may be paid in various circumstances. One of those circumstances arises under Article 12.02 (b) where overtime is payable for extra trips beyond the established daily sailing schedule. However, there is no issue of extra trips in these grievances. The claim for overtime here is concerned with events during an employee's off shift, i.e., during the 14 day or 7 day period when the employee is not scheduled to work. In these grievances, the Grievors were required by the Employer to attend a training session or meeting during their off shift. The Grievors drove from their residence to the location of the training session or meeting, either on the same day, or on the day before or after the session or meeting. In most cases when employees attended training sessions, the Employer paid for the amount of time in attendance at the session at the rate of time and one half. On the facts of grievances C-3 and C-4, the payment was made at straight time. The Employer has agreed the payment in those cases to attend the session should have been at time and one half. The Employer did not pay travel time to any of the Grievors.

In the event that employees are entitled to be paid overtime for travel time to attend training sessions or meetings, then Article 12.04 states that employees shall receive the regular rate at time and one half for all time worked. Several of the Grievors testified that they expected to be paid based on the number of hours in their established daily sailing schedule, regardless of the actual hours required to attend the training session. This expectation was based on the belief that an employee who was giving up a day of rest should be compensated for an amount equivalent to a day of work on the vessel. However, the Collective Agreement does not contain language supporting a claim to be paid overtime based on the hours in the established daily sailing schedule. In the event that overtime is payable, then Article 12 applies and the payment is based on time and one half for hours worked. In the case of attendance at a training session or meeting, the Employer does not dispute that the hours worked would be equivalent to the time spent in attendance at the training session or meeting. The Employer disputes the payment for travel time. For the hours in attendance, the Employer correctly paid for time in attendance at the rate of time and one half in compliance with Article 12.04, with the exception of grievances C-3 and C-4. For those two grievances, the Employer agrees that the payment at straight time was incorrect and has agreed to correct the payment.

The parties dispute whether or not Article 34 applies to travel time to attend a training session or meeting on an off day. Article 34.05 (a) refers to “travel time” as travel on authorized business outside the employee’s normal scheduled work period. Article 34.05 (f) states that compensation is not paid “for travel in connection with transfers, educational courses, training sessions, conferences, seminars or employment interviews”. On the facts of these cases, with one exception in Grievance C-10, the employees attended “training sessions”. The travel of Don Wiseman to attend the meetings on November 5, 6 and 7, 2008, in Grievance C-10, did not fall into one of the categories listed in Article 34.05 (f). Therefore, subject to the guidelines in Article 34, Mr. Wiseman is eligible for payment for travel time to attend those meetings.

Applying the plain meaning of the collective agreement language, it is evident that travel by the Grievors to attend the training sessions was travel time within the meaning of Article 34.05 (a). The employees were travelling to attend training sessions required by the Employer, and the travel was during off shifts outside the normal scheduled work period. Article 34.05 contains specific language that applies in these fact situations. Where the travel is for one of the categories listed in Article 34.05 (f), then, having regard to the Collective Agreement as a whole, and the fact that Article 34.05 is a specific provision applicable to the facts, then the travel time provisions in Article 34.05 apply.

The Union referred to the principle of interpretation that a preceding clause in a collective agreement overrides a later clause. However, other principles must also be considered, including the principle that a specific provision overrides a general provision, and the principle that the language ought to be interpreted within the context of the Collective Agreement as a whole.

I find that the travel time provisions in Article 34.05 apply to the travel by the Grievors in the fact situations of these grievances. Therefore, the Grievors are not entitled to compensation for travel time under the overtime provisions in the Collective Agreement. To pay compensation under the overtime provisions would have the effect of disregarding Article 34.05, and failing to give effect to the specific language agreed by the parties.

I have considered the arbitration award in *Her Majesty the Queen in Right of Newfoundland and Labrador (represented by Treasury Board) and Newfoundland and Labrador Association of Public and Private Employees*, April 26, 2004 (Fagan). Arbitrator Fagan considered the issue of travel time and discussed case authorities relevant to the issue. In some of the case authorities discussed in that

award, travel time was considered to be “time worked” and eligible for an overtime payment. However, each case depends on the facts and collective agreement language. Arbitrator Fagan considered that, in the circumstances of that case, the employees were required to travel on their off day to join their vessel for their regular shift, when the vessel was on refit. The arbitrator considered that travel to join the vessel was not travel time as defined in Article 34.05. In the judicial review of the award, a decision dated January 28, 2005 in *Her Majesty the Queen in Right of Newfoundland and Labrador and Newfoundland and Labrador Association of Public and Private Employees*, the Supreme Court of Newfoundland and Labrador, Trial Division upheld the award. The Court found that it was not patently unreasonable for the arbitrator to find that employees were not performing specific duties assigned to them by the permanent head, and therefore they were not on “travel time”, when they were reporting to their vessel in the normal course of their biweekly schedule. Travel to report to the vessel was not travel time under Article 34.05. The facts in the above case may be distinguished from the facts in the present grievances, because the Grievors in these grievances were not reporting to their vessel as part of their biweekly schedule, but were assigned to attend a training session or meeting. Therefore the reasoning applied by Arbitrator Fagan in the application of Article 34.05 in the above case does not apply to the facts of this case.

The Employer submitted that some of the grievances were filed out of time under the grievance procedure in Article 8. The evidence established that there was sometimes a substantial delay between submission of time sheets to the Employer and the return of the time sheets to the vessel. I am satisfied that this delay accounts for the timing of the filing of the grievances, and the grievances were not filed out of time.

The Union claims under Article 14 for statutory holiday pay for travel by Don Wiseman on November 11, 2009 to attend a training session in grievance C-11. The claim for travel time to attend a training session in that grievance is subject to Article 34.05 and is not payable. The fact that the travel occurred on a statutory holiday does not change the fact that Article 34.05 applies.


Travel time to attend training sessions is not eligible for payment based on Article 34.05 (f). Travel to attend a meeting is not a category of travel listed under Article 34.05 (f) and may be compensated within the guidelines of Article 34.05. Time in attendance at meetings or training sessions on an employee’s off shift is payable at time and one half under Article 12.04. Accordingly, grievances C-3 and C-4 will be allowed, in part, with respect to time in attendance at the training sessions. Grievance C-10 will be allowed, as the Grievor is eligible to be paid for travel time to attend

meetings on November 5, 6 and 7, 2008, subject to the guidelines in Article 34.05. The other grievances will be denied.

Decision

The claim for travel time to attend training sessions during off shifts is denied based on Article 34.05 (f). The claim for travel time to attend a meeting during off shifts is allowed, subject to the guidelines in Article 34.05. Time in attendance at training sessions or meetings during off shifts is payable at time and one half under Article 12.04. It follows that: (1) Grievances C-3 and C-4 are allowed, in part, to the extent that the Grievors are entitled to be paid for time worked at time and one half for time in attendance at the training sessions; (2) Grievance C-10 is allowed, in part, to the extent that the Grievor is entitled to be paid for time in attendance at meetings on November 5, 6 and 7, 2008 at time and one half and to be paid for travel time to attend the meetings, subject to the guidelines in Article 34.05; and (3) Grievances C-5, C-6, C-7, C-8, C-9 and C-11 are denied.

DATED this 6th day of January, 2011.


James C. Oakley
Arbitrator