

## ARBITRATION AWARD

BETWEEN:

FISH, FOOD AND ALLIED WORKERS UNION  
(FFAW/CAW)  
(hereinafter called the "Union")

AND:

NOTRE DAME SEAFOODS and  
NORTHERN SHRIMP COMPANY LTD.  
(hereinafter called the "Companies")

GRIEVORS:

Allen Starkes and Ross Petten

COUNSEL:

For the Union

V. Randell J. Earle, Q.C.

For the Companies

Denis Mahoney

ARBITRATOR:

James C. Oakley

The hearing with respect to the merits of the grievances was held in St. John's on June 9, 10, 11, 12

and 13, and July 17, 2008. The parties agreed as follows:

1. The Arbitrator was acceptable.
2. The Arbitrator would remain seized of the matter in the event there was a question of interpretation or compensation arising from the Award, with any issue to be referred to the Arbitrator within sixty (60) days following publication of the Award.
3. The parties agreed to waive any applicable time limits for the filing of the Award.
4. Witnesses were excluded from the hearing.

The Arbitrator issued a Preliminary Arbitration Award dated March 31, 2008 following the hearing of evidence and submissions on preliminary issues. The Preliminary Award decided that the Arbitrator had jurisdiction to hear the grievances and the Union had followed the procedural requirements of the Collective Agreement. Also, in the Preliminary Award, the Arbitrator allowed the application by the Companies for particulars of the grievances and directed the Union to provide particulars to the Companies. At the commencement of the hearing on the merits of the grievances, it was noted that the Union had provided particulars of the grievances to the Companies by letter dated April 18, 2008 from Mr. V. Randell J. Earle, Q.C., Counsel for the Union to Mr. Denis Mahoney, Counsel for the Companies. The parties agreed that the evidence entered at the hearing of the preliminary issues could be considered by the Arbitrator when deciding the merits of the grievances. Therefore the list of exhibits, which follows, includes the exhibits entered at the preliminary hearing.

The following exhibits were entered at the hearing:

- Consent 1 - Master Collective Agreement between Association of Seafood Producers (“ASP”) and Fish Food and Allied Workers Union (FFAW/CAW)
- Consent 2 - Spring Shrimp Schedule 2006 - Schedule “A” of the Collective Agreement
- Consent 3 - Grievance Form No. 481 dated July 10, 2006 (Allen Starkes)
- Consent 4 - Letter dated August 14, 2006 from Roland Hedderson to Notre Dame Seafoods
- Consent 5 - Letter dated August 31, 2006 from Roland Hedderson to Notre Dame Seafoods
- Consent 6 - Grievance Form No. 480 dated July 10, 2006 (Ross Petten)

- Consent 7 - Letter dated August 14, 2006 from Roland Hedderson to Northern Shrimp Company
- Consent 8 - Letter dated August 31, 2006 from Roland Hedderson to Northern Shrimp Company
- Consent 9 - Email dated December 13, 2006 from Derek Butler to David Decker
- Consent 10 - Letter dated February 6, 2008 from Denis Mahoney to V. Randell J. Earle, Q.C.
- Consent 11 - Letter dated February 7, 2008 from V. Randell J. Earle, Q.C. to Denis Mahoney
- Consent 12 - Email dated February 8, 2008 from Denis Mahoney to V. Randell J. Earle, Q.C.
- Consent 13 - Email dated February 11, 2008 from V. Randell J. Earle, Q.C. to Denis Mahoney and prior email
- Consent 14 - Email dated February 11, 2008 from Denis Mahoney to V. Randell J. Earle, Q.C. and prior email
- Consent 15 - Letter dated April 18, 2008 from V. Randell J. Earle, Q.C. to Denis Mahoney
- Consent 16 - Decision of Standing Fish Price Setting Panel - Inshore Shrimp Fishery, Spring 2006
- Consent 17 - Decision - Inshore Shrimp Fishery, Summer 2006
- RH - 1 Email dated July 13, 2006 from Derek Butler to David Decker re broken shrimp
- RH - 2 Email dated June 15, 2007 from V. Randell J. Earle, Q.C. to Denis Mahoney
- RH - 3 Letter dated June 14, 2007 from V. Randell J. Earle, Q.C. to Denis Mahoney
- RH - 4 Email dated July 23, 2007 from Denis Mahoney to V. Randell J. Earle, Q.C. and prior email
- RH - 5 Email dated September 10, 2007 from Denis Mahoney to V. Randell J. Earle, Q.C. and prior email
- RH - 6 Email dated September 11, 2007 from Denis Mahoney to V. Randell J. Earle, Q.C. and prior email
- RH - 7 Email dated December 4, 2007 from Earle McCurdy to Derek Butler and prior email
- RH - 8 Email dated July 24, 2006 from David Decker to Derek Butler and prior email
- RH - 9 Grievance Form No. 465 dated July 27, 2007

- RH - 10 Letter dated September 6, 2006 from Richard Roberts, Manager, Northern Shrimp Company Limited to Roland Hedderson
- RP - 1 Shrimp Grading Reports issued to Ross Petten and Ian Petten dated June 10, June 18, June 25, and July 2, 2006
- RP - 2 Shrimp Size and Quality Determination Booklet - Independent Dockside Grading Inc. (IDG) April, 2005
- PR - 3 Shrimp Package
- RP - 4 List of percentages of shrimp having 1 segment to 6 segments, shrimp package June 10, 2006
- RP - 5 Independent Dockside Grading Inc. sampling report dated June 10, 2006
- RP - 6 Receipt issued to Ross Petten for 1,000 pounds, personal use, September 13, 2007 by Ocean Choice International
- RP - 7 Independent Dockside Grading Inc. sampling report dated June 17, 2006
- RP - 8 Independent Dockside Grading Inc. sampling report dated June 24, 2006
- RP - 9 Independent Dockside Grading Inc. sampling report dated July 1, 2006
- RP - 10 Shrimp Inspection Form on loading date September 21, 2002
- RP - 11 Independent Dockside Grading Inc. sampling report dated September 16, 2007
- RP - 12 Shrimp Grading Report issued to Ian Petten dated September 17, 2007
- AS - 1 Shrimp Grading Report issued to Allen Starkes dated June 17, 2006
- AS - 2 Shrimp Landing Report issued to Allen Starkes dated July 1, 2006
- AS - 3 Independent Dockside Grading Inc. sampling report dated June 17, 2006 - vessel named "Seafaring Legend"
- AS - 4 Shrimp Grading Report issued to Allen Starkes dated June 17, 2006
- AS - 5 Independent Dockside Grading Inc. sampling report dated July 1, 2006 - vessel named "Seafaring Legend"
- AS - 6 Shrimp Grading Report issued to Allen Starkes dated July 1, 2006

- DB - 1 Email dated September 26, 2006 from Derek Butler to company representatives - subject - grievances update
- DB - 2 Email dated September 28, 2006 from Martin Sullivan to Derek Butler
- DB - 3 Email dated October 2, 2006 from Richard Roberts to Derek Butler
- DB - 4 Shrimp Size and Quality Determination Booklet, July 1998
- DB - 5 Shrimp Size and Quality Determination Booklet, April 2000
- DB - 6 Shrimp Size and Quality Determination Booklet, April 2001
- DB - 7 Shrimp Size and Quality Determination Booklet, April 2002
- DB - 8 Shrimp Size and Quality Determination Booklet, April 2004
- DB - 9 Email dated July 29, 2004 from Derek Butler to David Decker
- DB - 10 Shrimp Handling Protocol
- DB - 11 Appendix "E" - Shrimp - July 23, 1998
- DB - 12 Amended Appendix "E" - Shrimp - September 3, 1998
- DB - 13 FANL/FFAW Shrimp Agreement - March 23, 1999, Appendix "E"
- DB - 14 FANL/FFAW Shrimp Agreement - April 5, 2000, Appendix "E"
- DB - 15 FANL/FFAW Shrimp Agreement - March 15, 2001, Appendix "E"
- DB - 16 FFAW/FANL Shrimp Price Agreement - 2000 - 2002, Appendix "E"
- DB - 17 FFAW/FANL Shrimp Price Agreement - 2003, Schedule "E"
- DB - 18 Shrimp Price Agreement - 2004, Schedule "A" of the Collective Agreement between Shrimp Processors of Newfoundland and Labrador and FFAW/CAW
- DB - 19 Spring Shrimp Price Agreement - 2005, Schedule "A" of the Collective Agreement between Shrimp Processors of Newfoundland and Labrador and FFAW/CAW
- DB - 20 FFAW/CAW Shrimp proposals March 3, 2007, 8:30 a.m.

- DB - 21      Email dated August 6, 2004 from Derek Butler to David Decker
- DB - 22      Email dated August 6, 2004 from Derek Butler to Marine Annonsen with attached joint press release from FFAW and Association of Seafood Producers
- DB - 23      Email dated July 16, 2007 from Earl McCurdy to Derek Butler
- DB - 24      Page from FFAW web site - Shrimp Monitoring and Grading Program
- DB - 25      Page from FFAW web site - Shrimp Grader's Upload Page

**Collective Agreement**

The relevant Articles of the Master Collective Agreement between the Association of Seafood Producers (ASP) and Fish, Food and Allied Workers Union (FFAW/CAW) are as follows:

Article 1 - Recognition

- 1:01      The Processors agree to recognize the Union as sole and exclusive bargaining agent of the fishers in the Province of Newfoundland and Labrador excluding those communities north of Makkovik, Labrador.

It is further mutually agreed that this agreement shall be for the purpose of regulating the first hand sale of fish and shellfish and the conditions under which it is sold. When the word "fish" is used throughout this Agreement, it will include all species of fish and shellfish sold to processors by members of the bargaining unit covered by this agreement.

For the purposes of this Collective Agreement, a Processor means a processor who is a member of ASP or another processor who is bound by this Collective Agreement.

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Article 3 - Prices

- 3.01      During the term of this Agreement, the parties agree that all purchases of fish shall be made in accordance with prices set forth in the Schedules executed between the parties at which time such Schedules will be deemed to be part

of this Agreement. Schedules in effect shall be posted wherever the Processors or their agents purchase fish.

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#### Article 4 - Discharge

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- 4.03 (a) The fishers, members of the bargaining unit, may appoint a person to represent them in checking the weighing and grading of fish landed, including scales used in the weighing of fish. Prior to such representation, the Processor(s) shall be notified, in writing, of the name of such person authorized to check the weighing and grading of fish landed. All fish shall be receipted at the time of purchase. A fisher may take up any dispute concerning weighing and grading with the Processor directly, or through a Union representative.
- 4.03 (b) The Processor(s) may appoint a person to represent them in checking weighing of fish landed. Prior to such representation, the Union shall be notified, in writing, of the name of such person authorized to check the weighing of fish landed. A Processor may take up any dispute concerning weighing with the Union directly.
- 4.04 All fish shall be receipted at time of purchase. Where deductions from gross weight are made, the Processor shall bear the onus of demonstrating, if called upon, the justification for weigh back. Weigh backs will be subject to the provisions of the various Schedules.

#### Article 5 - Maintenance of Quality

- 5.01 The Union and fishers, members of the bargaining unit, recognize the fact that the maintenance of the highest standards in the quality of fish landed is most important to both parties and assure that the Processors will receive the fullest cooperation in maintaining the highest standards necessary to achieve a quality product.
- 5.02 Where a dockside grading program is in place it shall be conducted in accordance with the detailed specifications and quality standards as set out in the Schedules and related documents.
- 5.03 Where the Processors and the Union determine that a dockside grading contractor is required to administer a quality grading program for a particular species, then the following provisions shall apply, subject to the provisions of the relevant Schedule.
- (a) ASP shall be responsible for selection of the grading contractor(s)

and management and administration of contract(s) with the grading contractor(s).

- (b) The Processors shall be responsible for paying the cost of grading contractor(s).
- (c) The grading contractor(s) shall be independent of the Processors, the Union and individual fishers or Processors and shall be licensed by the Province of Newfoundland and Labrador.
- (d) The Processors and the Union agree to establish a joint committee to meet as required with the grading contractor(s) to deal with issues related to and problems arising from the grading contract(s).
- (e) Should the Processors, the Union, or an individual fisher or Processor allege that the grading contractor(s) has failed to act independently or has otherwise violated the terms and conditions of the grading program, the matter shall be referred to the Processors and the Union for resolution. The Processors and the Union may refer the matter, if necessary, to a joint committee.

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#### Article 14 - Collective Agreement

14.01 The parties to this Agreement agree that this Master Agreement and any one Schedule for a particular fish species together constitute a Collective Agreement for the purposes of the *Fishing Industry Collective Bargaining Act*.

The relevant Articles of the Spring Shrimp Schedule 2006 - Schedule "A" of the Collective Agreement between the Association of Seafood Producers (ASP) and Fish, Food and Allied Workers Union (FFAW/CAW) are as follows:

The prices and related terms and conditions for shrimp for 2006 are as follows. This Schedule applies to shrimp harvested by inshore vessels <100 feet fishing inshore allocation in SFA's 5 and 6, and in NAFO Areas 4R and 3L.

The parties agree that this Schedule and the Master Collective Agreement between the Association of Seafood Producers (ASP) of Newfoundland and Labrador and Fish, Food and Allied Workers Union (FFAW/CAW) dated May 4, 2006 together

constitute a Shrimp Collective Agreement between the parties for the purposes of the *Fishing Industry Collective Bargaining Act*.

1. Prices will be paid on the basis of size frequency by weight, as per the attached price list which is included in and forms part of this Agreement.
2. The parties hereto agree to maintain a computerized grading system. The cost of the computer hardware and software for the grading system shall be cost shared equally by the FFAW/CAW and the Shrimp Processors.
3. Reject Shrimp - Shrimp graded at 2.0 grams and under will be excluded from the determination of price.
4. Sampling protocol - Weight by size frequency will be based on the results of random sampling as per the attached table. Each sample will be approximately 500 gm, using a standardized measuring tool.
  - a. The parties hereto agree that the sampling process at the buying site shall be performed during the discharging of the vessel similar to the past practice which has been utilized by the parties and samples shall be collected and forwarded with the entire shrimp catch to the plant that would be designated to process the raw material.
  - b. Upon receipt of the raw material at the processing plant, independent graders shall be employed to determine the distribution of the catch size and report the statistics on the landing to the harvester and processor. The Union shall be entitled to receive at the end of each of the Spring, Summer and Fall fisheries a report showing the total weight landed and distribution by size for each shrimp fishing area.
5. Trip Limits (includes all landings for a trip, including reject and personal use shrimp) for the period April 1, 2006 to June 25, 2006 shall be:

Cubic Capacity of Vessel	Trip Limit (lbs) Effective April 1 <sup>st</sup> to May 22 <sup>nd</sup>	Trip Limit (lbs) Effective May 23 <sup>rd</sup> to June 24 <sup>th</sup>
[table omitted]		

Trip Limits for the balance of the season will be negotiated in conjunction with prices for the respective summer and fall seasons.

The applicable trip limit for each trip will be determined by the date of landing.

A harvester who exceeds the trip limit for any trip will not be paid for any amount beyond the trip limit in effect at the time of landing. Processors engaged in purchasing shrimp beyond the trip limits outlined above and where trip limits are exceeded will pay the harvester for the amount of the trip limit and will make a separate payment for any additional amount purchased into the Shrimp Development Fund. However, for purposes of calculating the additional amount to be paid into the Shrimp Development Fund, the parties shall deduct the amount of reject shrimp from the catch.

This additional payment will be made to the Shrimp Development Fund bank account established and jointly administered by the parties for that purpose. The additional payment will be made at the same time that the harvester is paid. Funds will be spent for such purposes as determined by the FFAW/CAW Shrimp Harvesters' Negotiating Committee.

Vessels that utilize insulated boxes shall have no prescribed trip limits.

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11. The parties agree that discharge, handling and trucking of shrimp will be in accordance with the Collective Agreement and the Shrimp Handling Protocol implemented by the parties

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13. The parties hereto agree that the spring price list as set out in the attached price list shall be in effect from April 1, 2006 to June 24, 2006. The parties will meet prior to June 24, 2006 to commence negotiations for the price list for the summer period. All terms and conditions of this Schedule except price are in effect from April 1, 2006 until March 31, 2007.

14. Shrimp must not be greater than 3°C at the time of discharge. Temperatures must be taken in the hold of the boat. Two temperature samples will be taken from each 12 hour lot. If the size of the hold permits, these temperature samples will be taken immediately upon landing. If not, the samples will be taken as soon as access to all 12 hour lots is available. If three or more

samples have temperatures greater than 3°C, the entire load is subject to production.

15. Total duration of fishing per trip is limited to 72 hours for shrimp in bags or tote pans and 96 hours for shrimp in insulated boxes (from bringing on board the first tow to bringing on board the last tow) as set out in Articles 4:05 and 4:06 of the Collective Agreement. The harvester is obligated to notify the Processor as soon as it is known that the 72 or 96 hour limitation may be exceeded, due to breakdowns, adverse weather, etc. Trips where harvesting exceeds 72 or 96 hours respectively will be subject to production.
16. Once yellow liver (blackberry) is identified by either harvesters, processors or the grading company, DFA and SCC will immediately be notified. When DFA confirms presence of blackberry, a five day warning period begins. Notification will be provided through public announcements and the parties will make best efforts to notify harvesters in writing prior to sailing, if possible. Upon becoming aware of a blackberry warning, shrimp processors agree to make a reasonable effort to immediately advise shrimp harvesters with whom they normally deal of the existence of the blackberry warning. For all landings occurring during the five day warning period, the catch is subject to production. Following expiration of the five day warning period, all landings with the presence of blackberry are subject to reject. While processors will use best efforts to segregate and save good shrimp, processors can only salvage and process uncontaminated shrimp from these loads subject to the expressed approval and supervision of DFA.
17. Upon the request of either party, a joint committee will be struck by the parties to deal with complaints regarding grading. At the request of either party, the parties agree to invite the grading contractor to attend a meeting of the joint committee for the purpose of resolving outstanding complaints.
18. The maximum amount of shrimp to be stored in bags is 25 lbs., plus a tolerance of 10%. The maximum to be stored in tote boxes is 55 lbs plus a tolerance of 10%. In the case of a vessel with a refrigerated hold, a processor and harvesters selling to that processor may agree on a higher tote pan limit provided quality specifications are met. In any event, the maximum weight in tote pans will not exceed 70 lbs. For the first violation of these limits, the captain of the fishing enterprise will receive a written warning as per the grading company inspection report.

For any subsequent trips in excess of the limits, for bagged shrimp if the average per bag is between 27 ½ and 30 lbs., a 2¢ per pound penalty will apply to the excess quantity. If the average weight is greater than 30 lbs. per bag, a 2¢ per pound penalty applies on the entire shipment.

For any subsequent trips in excess of the limits involving boxed shrimp, if the average weight is between 60 ½ and 66 lbs., a 2¢ per pound penalty applies to the excess quantity. If the average weight is greater than 66 lbs., a 2¢ per pound penalty applies on the entire shipment. In the case of agreement between the processor and captain of a vessel with a refrigerated hold for a higher tote pan weight limit, the penalty provision will be adjusted accordingly.

Any deduction in accordance with this procedure will be forwarded by the processor involved to the Shrimp Development Fund bank account at the same time the harvester is paid for the trip, as per paragraphs 4 and 5 of this Schedule.

**Evidence**

The Union claims on behalf of the Grievors, Ross Petten and Allen Starks for payment for the amount of broken shrimp deducted from landings of shrimp. The particulars of the grievances provided by the Union state as follows:

Grievance No. 480 - Ross Petten

Northern Shrimp Company, purchasing through its agent, Ocean Choice International, has deducted from landings of shrimp for delivery to Northern Shrimp Company, a quantity of shrimp received and processed by Northern Shrimp Company, for the following landing dates and in the following amounts.

Landing Date	Amount Deducted
June 10 <sup>th</sup> , 2006	3,936 pounds
June 17 <sup>th</sup> , 2006	1,417 pounds
June 24 <sup>th</sup> , 2006	1,522 pounds
On or about July 2 <sup>nd</sup> , 2006	4,323 pounds

The purported basis for such deduction is “broken shrimp”. The Collective Agreement does not authorize deduction from landings and non-payment for shrimp classified as “broken shrimp”. Further, the shrimp from which deductions were made was not, in its entirety, shrimp which would meet any accepted definition of the phrase “broken shrimp”. The shrimp concerned has a commercial value to the processor. As this shrimp was not properly graded, the grievor seeks a remedy of payment for such shrimp on the same distribution of sizes as the shrimp landed on

the respective dates that was paid for or, alternatively, on a quantum meruit basis.

Grievance No. 481 - Allen Starkes

Notre Dame Seafoods has deducted from a landing of shrimp for delivery to Notre Dame Seafoods a quantity of shrimp received and processed by Notre Dame Seafoods, for the following landing dates and in the following amounts:

Landing Date	Amount Deducted
June 17 <sup>th</sup> , 2006	2,528 pounds
July 1 <sup>st</sup> , 2006	3,870 pounds

The Grievors, Ross Petten and Allen Starkes testified that they are fishers, and each owns a longliner less than 65 feet in length. They harvest various species, and have been shrimp fishing since the inshore shrimp fishery began in about 1997.

Ross Petten testified that in 2006 he landed shrimp at Port de Grave. The shrimp was then trucked to the plant at Jackson’s Arm for processing. Mr. Petten described the sampling and grading process. During offloading, samples are taken at dockside for the purpose of grading. Mr. Petten testified that he has the opportunity to personally observe the sampling and grading. He usually observes offloading and sampling. He does not personally observe the grading process, because the samples are transported with the catch several hours by truck to the plant at Jackson’s Arm for grading. At the time of offloading, the fisher is provided with a sampling report from the grading company. In 2006, the grading company was Independent Dockside Grading Inc. (“IDG”). The IDG sampling reports for shrimp unloaded from Mr. Petten’s vessel, Atlantic Challenger, were entered for June 10, 17, 24 and July 1, 2006. The sampling reports show the number of samples taken, the dates of fishing, and the temperatures of the samples. The reports showed the actual net weight discharged (gross weight less 2%) to be 69,669, 64,116, 67,644, and 63,195 pounds and the average bag weight to be 29.8, 31, 32 and 32 pounds respectively.

Mr. Petten testified that for each landing he receives a shrimp grading report by email. The shrimp grading report gives a breakdown for each sample of the distribution of shrimp by weight in each size category. The size categories range from 1.0 to 2 grams up to 17 to 30 grams per shrimp. The grading report gives a breakdown for each sample of the total number of pieces, total weight, weight 2 grams and less, weight of broken, percentage of broken in sample, and count per pound in all size

categories of 2.1 grams and greater. The shrimp grading report for Ross Petten dated June 10, 2006 stated, in part, as follows:

Total Weight	18187.6
Total Weight 1.0 To 2 gr	45
Total Broken Weight	1028
Total Sample Weight f/Count	17114.6
% of Broken Overall	5.65%
Total Overall # of Pieces 2.1 gr & >	2695
Overall Count per Lb 2.1 gr & >	71.43

Sample Weight (gr)	18187.6
Foreign Material (gr)	1.6
Shrimp < 1 (gr)	85
Total Sample Weight (gr)	18274.2
% Foreign Material (FM)	0.01%
% Shrimp <1 (gr)	0.47%
% Broken	5.65%

Net Lbs.	69669
FM (lbs.)	6
Net Lbs. Less FM	69663
Shrimp <1 gr (lbs)	324
Net Lbs. Less Shrimp <1 gr	69339
Broken (lbs)	3936
Adjusted Net Weight	65403

Categories	Distributions	Lbs. By %
2 and Smaller	0.26%	170
2.1 2.9	0.96%	628
3 3.9	5.27%	3,447
4 4.9	12.36%	8,084
5 5.9	13.36%	8,738
6 6.9	15.09%	9,869
7 7.9	17.22%	11,262
8 8.9	16.61%	10,863
9 9.9	9.91%	6,481
10 and up	8.97%	<u>5,867</u>
Settled Lbs 2.1 & >		65,239

Information similar to the above was set out on all the grading reports, and was reviewed by the Arbitrator. The four shrimp grading reports for Mr. Petten's vessel reported the following

percentage of broken shrimp and weight of broken shrimp in pounds.

Report Date	Percentage Broken	Weight
June 10	5.65	3936
June 18	2.27	1417
June 25	2.25	1522
July 2	6.84	4323

The shrimp grading reports dated June 10 and June 25, 2006 were issued in the name of Ross Petten and the reports dated June 18, 2006 and July 2, 2006 were issued in the name of Ian Petten, son of Ross Petten. Ross Petten testified that the reason two reports were issued in the name of Ian Petten, was that each of them has a fishing license, and a separate company, to which the settlements are paid. The July 2, 2006 grading report had the logo of the “FFAW/CAW Fish Food and Allied Workers” printed on it.

Mr. Petten testified that he was not paid for the shrimp reported as broken shrimp on the shrimp grading reports. For example, he was not paid for the amount of 3,936 pounds reported as broken shrimp on the report dated June 10, 2006. The shrimp grading report also identifies the category of shrimp pieces less than one gram. Shrimp pieces less than 1 gram are excluded from the samples for the purpose of the distribution by size category because the pieces are too small to weigh. The size category 1.0 to 2.0 grams is weighed, but not included in the settlement paid. The report lists the percentage of shrimp in each size category in the samples. The percentages are then applied to the total weight to calculate the distribution by weight of the catch. The report shows the percentage and weight of foreign material, which may include other shrimp species or other fish species. The report shows the net weight taken from the sampling report, which is the gross weight less 2% for ice, water and bags. The 2005 Shrimp Booklet refers to a 2% deduction from gross weight to allow for bags and ice. Mr. Petten testified that there have been deductions for foreign material, broken shrimp and shrimp under 2 grams, since the inshore shrimp fishery started. He assumed that shrimp under 2 grams could not be processed. Mr. Petten testified that the purpose of the maximum bag weight of 25 pounds (plus a tolerance of 10%) is to reduce the amount of handling and reduce the risk of damage to shrimp. Mr. Petten testified that the penalty for exceeding the maximum bag weight has never been enforced. Mr. Petten referred to the trip limits set out in the Shrimp Schedule to the Collective Agreement. He testified that he usually catches his trip limit of 65,000 pounds on each trip as he has adequate storage space on his vessel. He acknowledged that the landing of

69,669 pounds on June 10<sup>th</sup> exceeded the trip limit.

Mr. Petten testified that the percentage of broken shrimp of 5.65%, as shown on the June 10, 2006 shrimp grading report was higher than the normal range. He said that if the report showed a percentage of broken shrimp in the range of 1.5% to 2% it would be within the normal range and would be acceptable to him. He said that fishers have been improving their practices handling shrimp, and it did not make sense that the grading report showed an increase in the percentage of broken shrimp. He said that quality is affected by the way bags are loaded and stored on shelves in the hold, the trip limits, rough weather, and the length of the tow. Mr. Petten testified that in 2006 he followed the same good handling practices regarding quality, as he always followed.

Mr. Petten testified that he did not recall making any complaint to IDG about the grading reports. It was not practical for him to ask to have broken shrimp returned to him. He said that if he disputed the gradings, his options were to ask for a regrade or to ask the Union for assistance. He said there was no consistency among the graders regarding what they graded as broken.

Allen Starkes usually lands his shrimp at Twillingate where it is purchased by Notre Dame Seafoods for processing in the plant there. Mr. Starkes' grievance concerns two landings of shrimp on June 17 and July 1, 2006. The IDG sampling report dated June 17, 2006 showed actual net weight of 70,234 pounds, average bag weight of 31.8 pounds and 48 samples taken. The shrimp grading report for June 17, 2006 showed a deduction for broken shrimp of 2,528 pounds and stated the percentage of broken shrimp was 3.6%. The IDG sampling report dated July 1, 2006 showed actual net weight of 67,194 pounds, average bag weight of 33.4 pounds and 46 samples taken. The shrimp grading report for July 1, 2006 showed a deduction for broken shrimp of 3,870 pounds and stated the percentage of broken shrimp was 5.76%. Mr. Starkes testified that he was not paid for the weight of the broken shrimp. He was also not paid for the weight of foreign material or shrimp weighing 2 grams and less. Both shrimp grading reports were signed on behalf of the buyer, the fisher and the inspector. Mr. Starkes' son signed the reports on his behalf as the fisher. Mr. Starkes said that his son is captain of his vessel most of the time.

Mr. Starkes testified that he usually personally observes the unloading and sampling of the catch. He testified that there is adequate space on his vessel to store shrimp. He did not believe that exceeding the trip limit affected quality. He did not dispute the deduction of 2% for bags and ice or

the deduction for foreign material or shrimp less than or equal to 2 grams. He did not accept the high percentage of broken shrimp stated on the grading reports. He testified that a reasonable percentage of broken shrimp was in the range of 1.0% to 1.5%. Mr. Starkes did not dispute the importance of quality. He testified that the graders employed by IDG were not consistent and followed a stricter standard than the graders employed by Tavel, the former grading contractor. He testified that the IDG graders called shrimp broken if the shell or carapace was missing. He would be satisfied if the IDG graders applied the same standards as Tavel, which was not to grade shrimp as broken if all the meat was intact. He testified that shrimp can be broken during fishing, offloading or handling in the plant. He said that a longer tow could cause damage. He did not believe that choking off the tow had much impact on breakage of shrimp. He acknowledged that the total weight of the shrimp loaded in each bag could affect quality. He understood that broken shrimp could not be sold on the market and had no commercial value. He said that if he did not accept the grading report he could ask the Union to appoint an observer of the grading process or he could ask for a regrade. There was a risk that a regrade could result in a higher percentage of broken shrimp. He did not ask for a regrade of the two landings in 2006 that were the subject of his grievance. He said it was not practical for a fisher to remove the broken shrimp from the catch before landing.

The parties referred to the Shrimp Size and Quality Determination Booklet dated April, 2005 (the "2005 Shrimp Booklet"), which stated, in part, as follows:

This handbook has been prepared by Independent Dockside Grading Inc. (IDG) for the Association of Seafood Producers and the Fish Food and Allied Workers Union.

### **Role of the Grader**

The grader provides an independent and reasonably accurate measure of the shrimp catch based upon the grade specifications agreed to by processors, representing the processing companies and the FFAW, representing the fishermen. These inspection results are then used by the company to determine the value of the landing based upon the prices in the negotiated contract. The grader applies the grade specifications on a consistent and fair basis to all landings. The grader does not represent the fishermen or the buyer while undertaking the inspection.

### **Rights of Fishermen and Buyers**

A representative of the vessel and the buyer are encouraged to view the sample

collection and the complete inspection process. Viewing the sampling and inspection is very important because re-inspection of a landing is very time consuming and costly.

The vessel's representative and buyer get identical copies of the inspection results. Any disputes concerning access to viewing the inspection, sample collection, or inspection results are to be given to the contracted party immediately, who will subsequently notify FFAW and processors.

...

### **Reject Grading Specifications**

**Undersize Shrimp** - shrimp that are 2 grams or less have no value and are graded as reject.

**Broken Shrimp** - shrimp that have damage to the meat have no commercial value. Broken only occurs when the meat fibers of the shrimp have been damaged. A missing shell or carapace does not mean the shrimp is broken if the meat fibers are intact.

**Spoiled Shrimp** - all shrimp are landed dead. Shrimp that are not stored at an adequate temperature (0-3°) and/or go extended periods before being processed will spoil. Spoiled shrimp are a health hazard and must be graded as reject.

**Tainted Shrimp** - Any shrimp that have been contaminated by oils, gasses, etc. are dangerous to public health and must be graded as reject.

If you identify tainting, you must immediately notify the buyer and fisher so they may identify where the contamination has occurred and separate the contaminated shrimp from the remainder of the load to prevent cross-contamination.

**Other Shrimp Species** - white shrimp, *Pasiphaea tarda*, or *multidentata*, and *Pandalus montagui* are separated and graded as reject. These shrimp are of no commercial value.

**Foreign Material** - any foreign material found while examining a sample is graded as reject.

**High Temperature** - shrimp that are stored at high temperatures will spoil and may be a public health hazard. Whenever temperatures of three samples exceed 3°C, the buyer, fisher and Department of Fisheries and Aquaculture must be notified immediately and the load is subject to processing. It is possible the entire catch may be rejected due to this factor.

**Parasites** - there is one common parasite found on shrimp. It is white and appears to

be filled with puss. If this parasite is found it does not cause the shrimp to be rejected. If an abundance of these parasites are found, inform the buyer.

The 2005 Shrimp Booklet also describes the anatomy of the shrimp, and contains a diagram of the parts. It states that the meat fibers are contained in the six abdomen segments, which are numbered from one to six. The 6<sup>th</sup> segment is also known as the tail segment. There is no meat fiber in the telson or the tail fin, and a missing telson or tail fin does not cause the shrimp to be graded as broken. However, a missing or damaged tail segment, which is one of the six abdomen segments, would cause the shrimp to be graded as broken.

James Chidley testified that he is a fisher, and was employed by the Union at the time relevant to the grievances. He has represented the Union as an observer of offloading, sampling and grading of shrimp. He has visited many offloading sites and fish plants in the Province and has heard the concerns of fishers about grading. Fishers had concerns about not getting paid for broken shrimp. He has not been employed as a grader for IDG, but he received training from the Union in the operation of the computer program and the scales used by the graders. He was informed about the categories of reject shrimp listed in the 2005 Shrimp Booklet. He has filled out grading sheets and sent them to the Union. He did a partial grade for one fisher showing the percentage of broken shrimp to be about 2.5% to 3% and the fisher was satisfied with the result. He was not aware of any web site operated by the Union for the purpose of receiving grading reports. He said the 2005 Shrimp Booklet describes the sampling and grading program. When he was employed as an observer for the Union, he had a copy of the Shrimp Booklet that was similar to the Booklet entered as an exhibit. In his opinion, shrimp was not broken unless there was damage to the meat. He observed the grading of shrimp from about mid June to early July, 2006. When he observed the graders, his instructions were to document the grading and report to the Union. He could ask the graders about their grading, but he could not dispute the grading or interfere with the grading process. He observed that the graders were incorrectly grading shrimp as broken. Some graders classified shrimp as broken if the tail fin was missing and all six segments were intact, if the head was missing and there was no head found in the sample to match, if the shell was broken and the meat was intact, if the shrimp was held up to the light and a single fibre was observed to be broken, and for other reasons that he believed were not included in the definition of “broken” stated in the 2005 Shrimp Booklet.

Mr. Chidley testified that one day he was invited by the manager of the Notre Dame Seafoods plant

to have a tour of the plant. He observed a 10 pound bag of shrimp containing broken shrimp. He was asked to leave the plant after he identified himself as an employee of the Union. He also testified that he bought a bag of shrimp containing broken shrimp, however, his detailed observations of the shrimp in the bag were not admitted by the Arbitrator, because the bag of shrimp was not available to be produced at the arbitration hearing for examination by the Companies.

Ross Petten testified about a bag of shrimp he purchased in 2007. The bag of shrimp was made available to the Companies for examination. Mr. Petten prepared a written summary showing that of 350 pieces of shrimp in the bag, about 69% had six segments, 26% had 5 segments and 5% had four segments or less. He was unable to say if the breakage of the shrimp in the bag occurred during fishing, offloading, trucking, or processing. Mr. Petten also testified that he obtained shrimp for personal use from Northern Shrimp Company. He did not know which fisher caught the shrimp. He received about 300 pounds of processed shrimp as a setoff against 1,000 pounds of raw shrimp landed. He observed pieces in the processed shrimp with one or two segments missing next to the tail fin. Mr. Petten has been a member of the Union bargaining committee for shrimp since 1997. He testified that the Union had significant input into the design of the new grading system introduced in 2004. The computerized size distribution report replaced the former count method used from 1998 to 2003. He acknowledged that during the 2007 negotiations for shrimp, the Union proposed to amend the definition of broken shrimp in the Shrimp Booklet, however, the definition was not changed.

Allen Starkes is an alternate member on the Union bargaining committee for shrimp. He believed that if there were 4 to 6 segments intact, then the shrimp should not be considered broken. He said the software for the computerized grading system implemented in 2004 was designed, in part, by the Union. He believed that the computerized grading system provided a more accurate distribution of the catch by size categories, than the former grading system based on count.

Derek Butler testified that the Association of Seafood Producers was founded in November, 2003 and he was employed as Executive Director commencing in January, 2004. During the 2004 and 2005 negotiations for the Shrimp Schedule, Mr. Butler provided support to the chief negotiator. Mr. Butler served as chief negotiator commencing in 2006. He said that under the Collective Agreement, processors undertake to purchase whole shrimp greater than 2 grams in size. He said that processors never agreed to pay for broken shrimp.

Mr. Butler referred to copies of the Shrimp Schedules for each year from 1998 to 2005. The Shrimp Schedule dated July 23, 1998 included the following paragraphs:

2. The parties have agreed to an industry-wide Dockside Grading Program (attached) which prescribes all procedures and practices for grading of shrimp by count. Key features of this grading program include:
  - maximum trip volume of 40,000 lbs.;
  - maximum core product temperature upon landing of 2 to 4° C;
  - reject shrimp will include broken shrimp, spoiled or tainted shrimp, as well as White Shrimp and Montagu;
  - undersized shrimp (< 2.0 grams) will not be included for the purpose of establishing the count;
  - maximum bag weight of 25 lbs. and box weight of 60 lbs.
  
3. Bags used to hold shrimp are provided at no cost to fishers.

In the Shrimp Schedule dated March 23, 1999, paragraph 2 of the 1998 Shrimp Agreement was deleted. A new paragraph 2 was inserted stating “Reject Shrimp - shrimp graded at 2.0 grams and under would be excluded when determining the product count for pricing purposes”. This language was continued in subsequent Shrimp Schedules, and is similar to paragraph 3 of the 2006 Shrimp Schedule. Mr. Butler said that some other practices continued even though they were no longer expressly stated in the Shrimp Schedules. For example, in later Shrimp Schedules, there was no statement that processors provide bags at no cost to fishers, as stated in paragraph 3 of the 1998 Schedule, however, the practice has continued.

Mr. Butler also referred to the Shrimp Size and Quality Determination Booklets dated 1998, 2000, 2001, 2002 and 2004 which he obtained from files at the ASP offices. The 1998 Shrimp Booklet was signed on the Table of Contents page and dated July 23, 1998. The signatures appeared to be Earle McCurdy of the Union and Allistair O’Rielly of the Fisheries Association of Newfoundland and Labrador. The Booklet is stated to have been prepared by Tavel Limited for the Fisheries Association of Newfoundland and Labrador and the Fish Food and Allied Workers Union. The 1998 Shrimp Booklet lists under the heading of reject grading specifications, the following: undersized shrimp, broken shrimp, spoiled shrimp, tainted shrimp, Pandalus montagui shrimp and other shrimp species, foreign material, and high temperatures. The 1998 Shrimp Booklet states the following about broken shrimp:

### Broken Shrimp

Any shrimp that has broken meat fibers is graded as broken. If the carapace is missing, but there is no damage to the meat, then the shrimp is graded as whole and not broken. Shrimp missing tail fins or telsons are not considered broken.

Broken shrimp weights are recorded separately on the “Shrimp Inspection Form”.

The description of “broken shrimp” in the Shrimp Size and Quality Determination Booklet was the same every year up to and including the April, 2004 Booklet. The cover on the 2004 Booklet states “Independent Dockside Grading Inc.” On the first page of the 2004 Booklet, it is stated that the booklet was prepared by Independent Dockside Grading Inc. for the Association of Seafood Producers and the Fish Food and Allied Workers Union. In 2004, IDG replaced Tavel as the independent dockside grader for shrimp. During collective bargaining for the Shrimp Agreement in 2004, IDG was selected as grader for shrimp as a result of a decision by a committee comprising an equal number of representatives of the Union and shrimp processors.

Mr. Butler referred to the Shrimp Handling Protocol (exhibit DB-10), as attached to the 2003 Shrimp Agreement. There were no subsequent changes to the protocol. The protocol dealt with procedures for transporting and storing bags of shrimp. These procedures were intended, in part, to reduce the amount of breakage.

Mr. Butler referred to an email dated July 29, 2004 that he sent to David Decker of the Union at which time he enclosed the Shrimp Booklet for 2004. The email stated as follows:

Attached please find a copy of the *Shrimp: Size and Quality Determination* handbook which is the full specs for grading for 2004, as per your request from the SCC meeting of Tuesday. This is the same spec used in previous years by Tavel, as developed by the FFAW and FANL. (it is in fact the exact same handbook as in previous years, with some minor edits, and the text that read “© Tavel Prepared for

FANL and FFAW” was changed by IDG (unbeknownst to me) to read “Prepared by IDG and ASP”.

Regarding the definition of broken shrimp, the text (pg. 6) reads simply:

### Broken Shrimp

Any shrimp that has broken meat fibers is graded as broken. If the carapace is missing, but there is no damage to the meat, then the shrimp is graded as whole and not broken. Shrimp missing tail fins or telsons are not considered broken.

That suggests (and accords with past practice according to IDG and Tavel graders) that a loose (free) head without carapace is to be counted as broken. Ultimately, if the body of the shrimp is good, with or without head, it is counted as unbroken. Anything else: head alone, or broken body, is counted as broken.

Another issue had been whether the 6<sup>th</sup> segment (tail segment, as opposed to telson or tail fin/fan) of the abdomen was to be counted in considering if broken or not. Page 5 contains an illustration that suggests that this is indeed considered to be one of the 6 segments of the abdomen, notwithstanding the nomenclature of tail segment. This also accords with past practice.

Mr. Butler testified that he did not receive any grievance in response to the email. He said he had no knowledge of any grievance disputing the independence of Tavel or IDG as graders.

In the 2005 Shrimp Booklet, changes were made to the description of broken shrimp. The 2005 Shrimp Booklet was used by the graders in 2006. Derek Butler testified that he did not know who changed the wording in the description of broken shrimp in the 2005 Shrimp Booklet. He assumed the changes were made by IDG. The changes were not made by the Union or the Association of Seafood Producers. He said that although the description of broken shrimp changed in the 2005 Shrimp Booklet, he did not believe there was any change in meaning.

Mr. Butler testified that the Union made a proposal to amend the definition of broken shrimp in 2007, during collective bargaining held subsequent to the filing of the grievances. The Union's proposal stated as follows:

FFAW/CAW Shrimp Proposals  
Sat. March 3/07, 8:30 a.m.

1. We propose that the current wording for Broken Shrimp on Page 5 of the "Shrimp-Size and Quality Determination" booklet be replaced with the following:

“Broken Shrimp - Shrimp that have damage to the meat have no commercial value. Broken only occurs when the meat fibres of the shrimp have been damaged in abdomen segments 1 to 5. A missing shell or carapace does not mean the shrimp is broken if the meat fibres are intact.

“In determining the percentage of broken shrimp in a sample, separated, unmatched heads or meats shall be discarded from the sample prior to weighing and distribution of the sample.”

Mr. Butler testified that the outcome of collective bargaining in 2007 was that there was no change in the definition of broken shrimp. The issue was not referred to the price setting panel. There was no discussion of the Shrimp Booklet in the 2004, 2005 or 2006 negotiations. Mr. Butler testified that quality of shrimp was often a topic for discussion with the Union. He said the factors that affected quality included the length of time taken to bring the shrimp to the plant, size and duration of the tow, handling methods to load the shrimp into bags, the handling of bags in the hold on the vessel, rough weather, temperature, and offloading methods.

Mr. Butler referred to an email from David Decker of the Union to him dated July 24, 2006, referring to the increased percentage of broken shrimp, which stated as follows:

The protocol for broken states “broken shrimp has no commercial value”. The majority of shrimp that is graded as broken is processed, packed and marketed as Grade A shrimp. This is unacceptable and the practice calls into question the integrity of the grading system.

Again, I feel we should have the grading company put together the required information and meet to try and resolve this issue. The lack of action on this issue leaves the grievance route as one course of action in trying to get this issue resolved.

Mr. Butler testified that he believed the Shrimp Booklet was part of the Collective Agreement. He said there was a reference to the grading program in the Collective Agreement and the Shrimp Schedule. Some contents of the Shrimp Booklet were amended in collective bargaining, in particular, handling procedures, trip limits, temperatures and the sampling plan. Mr. Butler testified there were pages on the Union’s website that referred to grading reports, but he did not know how

the pages were used. He said that when a fisher buys a package of shrimp from a plant, there is no practical method to know which fisher landed the shrimp. Mr. Butler said he was told by David Decker of the Union, and by IDG, that the software used for the computerized grading program was provided by the Union to IDG.

### **Union Submission**

The Union claims on behalf of the Grievors, Ross Petten and Allen Starkes, for shrimp deducted from the settlement amount. The deduction was not authorized by the Collective Agreement. The Union submits that the shrimp was processed and sold. The Collective Agreement comprises the Master Collective Agreement and the Shrimp Schedule 2006. Article 4.04 of the Master Collective Agreement stated that where deductions from gross weight are made, the processors bear the onus of demonstrating the justification for weigh back. Under paragraph 3 of the Shrimp Schedule, the only deduction permitted for reject shrimp was shrimp graded at 2.0 grams and under. The parties have agreed to the deduction for undersized shrimp. The deduction for foreign material is logical, because the parties have negotiated payment for shrimp, which automatically excludes foreign material. The parties have agreed in paragraph 14 of the Shrimp Schedule that if three or more samples have temperatures greater than 3°C, the load is subject to production. The parties have agreed in paragraph 16 that the load may be subject to production where there is presence of yellow liver (blackberry). Under paragraph 5 of the Shrimp Schedule, the calculation made to determine whether trip limits are exceeded is based on total landings including reject shrimp. However, reject shrimp are deducted for the purpose of calculating the amount to be paid by the processor into the shrimp development fund when the landings exceed the trip limit. There is no reference to broken shrimp in the paragraph describing trip limits. The Collective Agreement provides that graders are employed to calculate a distribution on the basis of size frequency by weight. There is no reference to broken shrimp in the references to the grading process or the computerized grading system. The only permitted deductions are those made for exceeding the trip limit or the bag size. The 1998 Shrimp Schedule stated that reject shrimp included broken shrimp, however, subsequent Shrimp Schedules make no reference to broken shrimp. The Shrimp Size and Quality Determination Booklet is not part of the Collective Agreement. It is not incorporated into the Collective Agreement. The Shrimp Booklet was changed in 2005 without the knowledge or consent of the Association of Seafood Producers or the Union. The 2005 Shrimp Booklet appeared to be changed unilaterally by IDG. The Shrimp Booklet's purpose is to serve as an instruction manual for graders. It is not a related document or a quality standard. The fact that a grader describes shrimp as broken

does not mean it is an authorized deduction. The deductions must be authorized by the Collective Agreement. Both Grievors, Ross Petten and Allen Starkes, understood that the meaning of broken shrimp was that it was not suitable for production and had no commercial value. The Shrimp Booklet states that broken shrimp has no commercial value. However, the Companies are processing and marketing shrimp that is missing one or more of the six segments. Mr. Petten purchased a package of shrimp from Northern Shrimp Company and observed the contents to contain a large percentage of shrimp missing one or more segments. James Chidley visited the plant at Notre Dame Seafoods and observed broken shrimp being processed and packaged. There was no evidence to dispute the fact that processors are processing broken shrimp. It was not appropriate to apply the standard of proof applied in criminal court proceedings when deciding whether the Union proved that the Companies were processing broken shrimp. It was not practical for the fishers to ask for the return of any broken shrimp landed. In Mr. Petten's case, the load was trucked to another community for processing. The Union referred to *Conpak Seafoods Inc. and Fish Food and Allied Workers Union*, unreported, June 26, 1996 (Alcock) (the "*Conpak Seafoods*" case) where the arbitrator found the intent of Article 4.04 of the Collective Agreement was that weighed back material was valueless, and where the company retained soft shell crab for later processing, it could not be weighed back against the payment. The fact that the parties have followed a certain practice does not change the meaning of the Collective Agreement (*John Bertram & Sons Co. and IAM, Local 1740* (1967) 18 L.A.C. 362 (P.C. Weiler)). The intention of the parties when the language was negotiated could not be determined by subsequent actions, such as correspondence between the parties, or proposals made by the Union in subsequent rounds of collective bargaining. The Union requested that the grievances be amended to include the landings made after July 25, 2006, when the summer price schedule was in effect, and submitted there would be no prejudice to the Companies as a result of the amendment. Northern Shrimp was properly named as the processor because Ocean Choice International was the buyer acting as agent for Northern Shrimp. Ross Petten was properly named as the Grievor for all four landings. Although his son held a fishing license, it was a requirement that the license be held in individual names and there was, in practice, one enterprise. The Arbitrator was asked to deal with the substance of the matter and not to deny the grievances as a result of a defect in form or technical irregularity. The Union requested that the grievances be allowed.

### **Companies' Submission**

The Companies submitted that the main issue was whether the deduction for broken shrimp was a

violation of the Collective Agreement. There was authority in the Collective Agreement to deduct for broken shrimp. Article 4.03 (a) referred to the grading of fish landed. This was not a case of weigh back under Article 4.04. The Companies distinguished the *Conpak Seafoods* case, in which there was processing of soft shell crab and once it was processed it could not be weighed back. However, the *Conpak Seafoods* case concerned a different species and different grading procedure. At the time of the *Conpak Seafoods* case, the Collective Agreement did not contain Articles 5.02 and 5.03 which allowed the parties to establish detailed specifications and quality standards of a dockside grading program. Pursuant to Article 5.02 the parties had agreed to have a dockside grading program for shrimp. The reference to “related documents” in Article 5.02 meant the grading program documents, which included the Shrimp Booklet and the grading report forms. The Shrimp Schedule also incorporated the Shrimp Booklet and grading forms. Paragraph 2 of the Shrimp Schedule referred to the computerized grading system. Paragraph 4 referred to the sampling protocol and the distribution of catch size and was not limited to reporting on whole shrimp. Paragraph 5 stated that reject shrimp was excluded when calculating payments to the shrimp development fund when the weight of shrimp exceeded the trip limits. Paragraph 3 stated that reject shrimp was shrimp weighing 2 grams and under. Having regard to the history of the language in the Shrimp Schedules, this provision was inserted in 1999 to show the change from “under 2 grams” to “2 grams and under”. Undersized shrimp was not the only category of reject shrimp. In the 1998 Shrimp Schedule, reject shrimp included broken shrimp and other categories. The 1998 Shrimp Schedule said that the Dockside Grading Program was attached, and the Program included the Shrimp Booklet. The 1998 Shrimp Booklet was signed on behalf of the Union. The Shrimp Booklet states that broken shrimp is reject shrimp. Prior to 2004, shrimp prices were paid on the basis of the average count. Broken shrimp were removed for the purpose of calculating the average count. The computerized grading system introduced in 2004 was designed by the Union. The grading report form showed the weight of the broken shrimp listed as a separate category. The Shrimp Booklet and the forms were incorporated by reference into the Collective Agreement. With respect to incorporation by reference, the most crucial element was the intention of the parties. To incorporate a document it must exist and be known to the parties (*NAPE and Compass Group Canada(Chartwells) Limited*, unreported, February 1, 2005 (Oakley)). Once the shrimp is offloaded and sold, the risk shifts to the processor, except in cases where the catch is made subject to processing, for example where there are high temperatures. If there are no exceptions, then fishers are paid according to the grading report. There was no regrading requested by the Grievors. The evidence regarding the samples is no longer available. There was no request to have broken shrimp or samples retained. A representative of Allen Starkes signed the grading reports. According to the

testimony of the Grievor, Ross Petten, his objection to the deduction for broken shrimp in 2006 was that the percentage of broken shrimp on his grading reports was excessive. Union representative James Chidley testified that he used the Shrimp Booklet to evaluate settlement weights. Allen Starkes testified that he felt the graders were being over zealous. There was no evidence of what constituted commercial value for broken shrimp. The bag of shrimp purchased by Ross Petten was not helpful in assigning commercial value. There was no evidence that any of the broken shrimp landed by Ross Petten was processed. The Collective Agreement was concerned only with payment at the time of landing and not with whether there was a commercial value. An email from David Decker of the Union to the ASP dated July 24, 2006 referred to the protocol on broken shrimp and stated that the Booklet defines broken shrimp as having no commercial value, however broken shrimp was being processed. The commercial value of broken shrimp was not an issue for this arbitration. There was no value negotiated for broken shrimp. The grievances raised an issue that was really a collective bargaining issue. The Union raised broken shrimp as a collective bargaining issue during the 2007 negotiations when the Union made a proposal to change the definition of broken shrimp in the Shrimp Booklet. There was an estoppel against the Union. The Union had represented that there was an authorized deduction for broken shrimp. The Union designed the software for the grading program. There was a consistent past practice that had never changed. With respect to the subsidiary issues, Northern Shrimp was not a proper party to the grievance because the shrimp was purchased by Ocean Choice International from Ross Petten and Northern Shrimp could not be made a party to the Collective Agreement by an agency relationship. The two landings of Ian Petten are not within the scope of the grievance of Ross Petten. Ian Petten was not named as a grievor. The Collective Agreement applied to fishers and not enterprises. The grievances were limited to the spring season and did not include the summer season and any landings in the summer were outside the scope of the grievances. There was no justification for an amendment of the grievances. The Companies requested that the grievances be denied.

### **Considerations**

The Union grieves that the Companies, Notre Dame Seafoods and Northern Shrimp Company Limited, have failed to pay the Grievors, Allen Starkes and Ross Petten, for the total value of shrimp landed on various dates in June and July, 2006. The Union claims that the Companies have deducted from the landings shrimp purported to be broken shrimp and that the Collective Agreement does not authorize any deduction for broken shrimp, or alternatively that the shrimp deducted was not properly graded as broken shrimp. The Union claims compensation on behalf of the Grievors for the weight of the shrimp deducted as broken shrimp.

The issues before the Arbitrator are (1) Are processors permitted by the Collective Agreement to deduct the weight of broken shrimp from the settlement amount paid to fishers? When considering this issue, it is necessary to consider whether the Shrimp Booklet, the shrimp grading forms and related documents are incorporated in the Collective Agreement. (2) Was the shrimp that was deducted from the landings properly graded as broken shrimp. One of the issues to consider in this regard, is whether shrimp can be graded as broken if it is processed and sold, and has a commercial value. (3) Is there any estoppel against the Union? (4) Depending on the decision on the above issues, the following subsidiary issues may need to be addressed: (a) Does the grievance apply to landings after June 24, 2006, when the Spring Shrimp Schedule was no longer in effect, and if not, should the grievance be amended? (b) Are the landings of Ian Petten outside the scope of the grievance filed on behalf of Ross Petten? (c) Is Northern Shrimp Company Ltd. a processor bound by the grievance in circumstances where the shrimp was purchased by Ocean Choice International?

The Arbitrator will address whether the Collective Agreement authorizes any deduction for broken shrimp. It is necessary to examine the Master Agreement, expiry date December 31, 2006 and the Spring Shrimp Schedule 2006 and interpret their provisions. The Arbitrator will also consider the effect of the Shrimp Booklet, shrimp grading forms and related documents. The Shrimp Booklet states that broken shrimp is one of the reject grading specifications. The shrimp grading report form shows the weight of broken shrimp, the percentage of broken shrimp and the calculation of adjusted net weight after deducting for broken shrimp. However, the Union submits that these documents are not part of the Collective Agreement and there is no reference to any deduction for broken shrimp in the Collective Agreement.

It is appropriate to apply the principles of interpretation of collective agreements. These principles 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) and the industrial relations practices of the parties (paragraph 4:2300).

The parties have agreed in Article 14.01 of the Master Agreement, that the Master Agreement and the Schedule for a particular fish species together constitute a collective agreement. Article 3.01 of the Master Agreement states that the Schedules are deemed to be part of the Collective Agreement. In this case, the Master Agreement together with the Spring Shrimp Schedule 2006 constitute a Collective Agreement for shrimp. Therefore, when interpreting the Collective Agreement, both the Master Agreement and the Shrimp Schedule need to be considered as a whole. The Union relies upon Article 4.04 which states that all fish shall be receipted at time of purchase, and that the processor shall bear the onus of demonstrating the justification for weigh back, where there is a deduction from gross weight. The Union submits that the deduction for broken shrimp is a weigh back. The Companies submit that the deduction for broken shrimp is part of the grading program and is not a weigh back.

When considering the application of Article 4.04, the Arbitrator will examine other Articles of the Collective Agreement. Article 4.03 (a) of the Master Agreement refers to the grading of fish, and states that a fisher may take up any dispute concerning weighing and grading with the processor directly or through a Union representative. Article 5 is headed "Maintenance of Quality", and provides for a dockside grading program. Article 5.01 states that the Union and fishers recognize the importance of maintaining high standards in quality of fish landed. The relevance of quality to the dockside grading program is also indicated by Article 5.02, which states the dockside grading program shall be conducted in accordance with "the detailed specifications and quality standards as set out in the schedules and related documents". Article 5.03 refers to the appointment of a dockside grading contractor to administer a "quality grading program for a particular species". Article 5.03 (d) refers to the "grading contract" and states that processors and the Union agree to establish a joint committee to meet as required with the grading contractor to deal with issues related to the grading contract. Article 5.03 (e) refers to the "grading program", and states that a processor, the Union or an individual fisher alleging that the grading contractor has violated the terms and conditions of the

grading program may refer the matter to the processors and the Union for resolution. The Arbitrator notes that the Articles of the Master Agreement that refer to a quality grading program do not set out all of the details of the program, but make reference to the Schedules and related documents.

The Spring Shrimp Schedule has several paragraphs that refer to the grading system and indicate the importance to the parties of quality. The Shrimp Schedule states that the Schedule and the Master Agreement together constitute a collective agreement. Paragraph 1 states that prices are paid on the basis of size frequency by weight according to the agreed price list. The calculation of size frequency by weight is to be done by an independent grader using a computerized grading system. Paragraph 2 states that the cost of computer hardware and software for the computerized grading system shall be cost shared by the parties. Paragraph 3 states “Reject Shrimp - Shrimp graded at 2.0 grams and under will be excluded from the determination of price”. The parties dispute whether the effect of paragraph 3 is that the only category of reject shrimp is shrimp 2.0 grams and under, and this issue will be addressed following consideration of other paragraphs of the Shrimp Schedule. Paragraph 4 refers to the sampling protocol and states that samples of 500 grams each are taken for random sampling and the resulting size distribution is then applied to the entire catch. Random sampling is used because it is not practical to grade the entire catch. The sampling protocol in paragraph 4 states that sampling occurs during the discharge of the vessel, and that grading of the shrimp is done by independent graders at the processing plant. Paragraph 5 provides for trip limits depending on the size of the vessel (65,000 pounds was the applicable trip limit for both Grievors). When calculating whether the trip limit has been exceeded, all landings including reject and personal use shrimp are included. However, when calculating the amount paid by processors to the Shrimp Development Fund for shrimp exceeding the trip limit, the amount of reject shrimp is deducted.

There is reference to various reject shrimp categories in the Shrimp Schedule. In particular, paragraph 14 states that the temperature of shrimp must not be greater than 3°C at the time of discharge, and if the temperatures of 3 or more samples exceed 3°C, the load is subject to production. Paragraph 15 sets time limits on the duration of a fishing trip (72 hours for shrimp in bags), and where the duration of fishing exceeds the time limit, then the load is subject to production. Paragraph 16 states that where there is yellow liver (blackberry) the load may be subject to production and may be rejected. Paragraph 18 states that the maximum amount of shrimp to be stored in bags is 25 pounds plus a tolerance of 10%. A penalty may be applied where the maximum amount is exceeded. The purpose of setting a maximum amount of shrimp to be stored in a bag is a quality measure designed, in part, to reduce breakage. There is a reference to quality in paragraph

11 of the Shrimp Schedule which states that the parties will discharge, handle and truck shrimp in accordance with the Shrimp Handling Protocol. The Shrimp Handling Protocol is a separate document (exhibit DB-10). The Shrimp Handling Protocol refers to quality measures to be taken, in particular regarding the handling and stowage of shrimp on board the vessel. These quality measures are important for reducing the incidence of breakage of shrimp, for example, improper stowage could result in crushing of shrimp.

Having regard to the Collective Agreement as a whole, it is evident that the reference in Article 4.04 of the Master Agreement to fish being receipted at time of purchase, and that the processor shall justify weigh back, is subject to the grading program, where the parties have established a grading program under Article 5. In this case, the effect of having a quality grading program for shrimp means that payment for shrimp is made according to the grading program. Therefore, a deduction for reject shrimp is authorized by the Collective Agreement where permitted by the shrimp grading program. A deduction for reject shrimp under the grading program does not have to be justified as a weigh back under Article 4.04, where it is justified under a program established under Article 5.

Is broken shrimp one of the reject shrimp categories under the Collective Agreement? There is no express reference to “broken shrimp” in either the Shrimp Schedule or the Master Agreement. There is extensive reference to quality. The parties have agreed to establish a quality grading program and a computerized grading system. When the Master Agreement and Shrimp Schedule are read as a whole, the parties have agreed that shrimp may be rejected in accordance with the grading program and the computerized grading system. The parties have agreed to various quality measures, such as bag limits, and trip limits, which are designed in part to reduce the amount of breakage. Having regard to the context of the various quality measures agreed by the parties, it would be consistent with that context for the parties to have agreed that broken shrimp is reject shrimp.

The Union submits that the effect of Paragraph 3 of the Shrimp Schedule is that undersized shrimp (2.0 grams and under) is the only category of reject shrimp. In the 1998 Shrimp Schedule, paragraph 2 stated that key features of the grading program were maximum trip volumes, temperature and bag weight limits, that undersized shrimp (less than 2.0 grams) is not included for the purpose of the count, and that “reject shrimp will include broken shrimp, spoiled or tainted shrimp, as well as White Shrimp and Montagui”. Shrimp Schedules in 1999 and subsequent years did not include the list of “reject shrimp”, but did include the paragraph stating that reject shrimp is shrimp 2.0 grams and under. However, it is unlikely the parties intended that the categories of broken, spoiled or tainted,

and other shrimp species, would no longer be reject shrimp, when the parties agreed to various quality measures, and inserted paragraphs in the Shrimp Schedule referring to temperature, trip limits and bag limits. The definition of undersized shrimp was changed from “less than 2.0 grams” as stated in the 1998 Shrimp Schedule to “2 grams and under” as stated in the 1999 and subsequent Shrimp Schedules. It was necessary to insert this paragraph in the 1999 Shrimp Schedule to show the changed definition of undersized shrimp. Paragraph 3 of the Shrimp Schedule does not expressly state that undersized shrimp is the only category of reject shrimp. It is unlikely that the parties intended paragraph 3 to mean that “reject shrimp” is limited to “undersized shrimp” having regard to the history of the language in the Shrimp Schedules, and the reference to various categories of reject grading specifications in the 2006 Shrimp Schedule.

The Union relied on the arbitration award in *Conpak Seafoods Inc. v. Fish Food and Allied Workers Union*, unreported, June 26, 1996 (Alcock). The Companies submit that the *Conpak Seafoods* case is not applicable. The *Conpak Seafoods* case concerned a grievance for payment in full for crab landed and receipted. The grievance claimed payment for soft shelled crab weighed back by the processor. Article 4.04 of the Collective Agreement (similar to the current Article 4.04), stated that fish should be receipted at time of purchase and the processor bears the onus of demonstrating justification for weigh back. One of the items allowed for weigh back was “soft shelled crab”. Quality sampling was done by the processor at the plant, and the processor deducted the weight of soft shelled crab. The processor intended to freeze and reprocess the soft shelled crab later in a mixed product with a lesser value. The arbitrator decided that once the processor intended to process the soft shelled crab, it had to be paid for at the agreed price in the collective agreement. In order to be weighed back the material had to be valueless. The arbitrator ruled that the crab was considered purchased when receipted and it could not be weighed back if it had a value. There was no independent grading program in effect at the time of the *Conpak Seafoods* case. The *Conpak Seafoods* case may be distinguished from the present case for the reason that the collective agreement language has changed. In the current Collective Agreement, there is provision for a quality grading program with grading to be performed by an independent dockside grading contractor. Pursuant to Article 5 of the Master Agreement and the Shrimp Schedule, the shrimp is paid for on the basis of sampling and grading performed according to the quality grading program. Payment is based on the grading program and the grading report. Therefore the interpretation of the collective agreement applied in the *Conpak Seafoods* case does not apply in this case.

The Master Agreement and the Shrimp Schedule refer to various external documents. There is reference to the dockside grading contractor, the grading contract, and the quality grading program in the Master Agreement. The Master Agreement also refers to the “detailed specifications and quality standards as set out in the schedules and related documents”. The Shrimp Schedule refers to the computerized grading system, computer software for the grading system, the sampling protocol, and the Shrimp Handling Protocol. The 2005 Shrimp Booklet includes guidelines for grading shrimp and is part of the quality grading program. What is the significance of these various documents when interpreting the Collective Agreement? Are the documents incorporated as part of the Collective Agreement?

The issue of incorporation by reference of external or ancillary documents as part of a collective agreement is discussed in Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition at paragraph 4:1230 as follows:

For an ancillary document to be part of the collective agreement, it must be intended by the parties to be part of the collective agreement and either meet the formal requirements of a collective agreement, or be incorporated by reference into it. Although there may be circumstances where such documents do not form part of the collective agreement because of their failure to comply with the necessary formalities more commonly whether a document is incorporated as part of the agreement will turn on the parties’ intention. In approaching this question, arbitrators have suggested that ancillary documents should only be incorporated by reference where that intention is clearly expressed.

What is the intention of the parties in this regard? The parties stated in paragraph 14.01 of the Master Agreement and in the preamble to the Shrimp Schedule, that the Master Agreement and the Shrimp Schedule together constitute a Collective Agreement. The parties have expressly incorporated the Shrimp Schedule and other documents as part of the Collective Agreement. For example, paragraph 1 of the Shrimp Schedule states that the attached price list forms part of the Agreement. The parties have not used similar language to expressly incorporate the Shrimp Booklet or related documents. Have the parties expressed an intent to incorporate? There is reference in the Collective Agreement to external documents related to the shrimp grading program, as discussed above. However, there is no reference to a specific document with sufficient particularity to establish from the Collective Agreement language exactly what document is incorporated. Also, the parties would not likely have intended to incorporate a document that could be changed without the

agreement of the parties. The description of “broken shrimp” was changed in the 2005 Shrimp Booklet, apparently by IDG, the grading contractor, without the agreement of the parties. The question of which documents are part of the shrimp grading program is a question of fact, that may be settled if there is any dispute regarding the content of the documents. The absence of reference to external documents with particularity, indicates that there is no clear expression by the parties of an intent to incorporate the Shrimp Booklet and documents related to the grading program as part of the Collective Agreement. Therefore, the 2005 Shrimp Booklet and related documents are not incorporated as part of the Collective Agreement.

External documents may be useful as an aid to the interpretation of the collective agreement, even though not incorporated into it (see Brown & Beatty, *Canadian Labour Arbitration*, 4<sup>th</sup> edition, paragraph 4:1220). The Master Agreement states that, where there is a quality dockside grading program, the calculation of the amounts paid to a fisher is based on the grading of the landing. The Shrimp Booklet, and the grading report form are documents related to the quality grading program and the computerized grading system. Therefore when calculating the amount to be paid for shrimp landed, in accordance with the Collective Agreement, reference may be made to the Shrimp Booklet and the computerized grading system. The Shrimp Booklet refers to several categories of reject grading specifications, namely, undersized shrimp, broken shrimp, spoiled shrimp, tainted shrimp, other shrimp species, foreign material, and high temperatures. Any material graded as reject is not included in the calculation of size frequency by weight. The shrimp grading report, which is produced using the software of the computerized grading system, lists the percentage of foreign material and the percentage of broken shrimp in the samples, and shows the calculation of how the percentages are applied to the entire catch. Therefore, the Shrimp Booklet and the grading report form may be considered when deciding, under the shrimp grading program, whether broken shrimp is one of the reject grading specifications, and to determine the meaning of broken shrimp.

Having regard to the Collective Agreement as a whole, in particular the agreement of the parties as to the importance of quality, and using the Shrimp Booklet and the shrimp grading report form as an aid to interpretation, it is evident that the parties have agreed that broken shrimp is one of the reject grading specifications and broken shrimp is deducted when calculating the price paid for the catch using the computerized grading system. With respect to the first issue, the Arbitrator finds that the Collective Agreement authorizes deductions for broken shrimp.

Was the shrimp landed by the Grievors properly graded as broken shrimp? The complaint of the Grievors, in part, is that there was an excessive percentage of shrimp graded as broken shrimp for the landings in question. Both Grievors testified that the quality standards were followed at all times, and there was no reasonable explanation for the high percentage of broken shrimp, other than improper grading. James Chidley, Union representative, testified that, although he did not observe the landings in question of the Grievors, he observed incorrect grading of shrimp in 2006. He testified that he observed shrimp being incorrectly graded as broken when the shrimp did not meet the definition of broken shrimp in the Shrimp Booklet.

The Shrimp Booklet states that “broken only occurs when the meat fibers of the shrimp have been damaged.” The Shrimp Booklet contains a drawing of the anatomy of shrimp, and an illustration of broken shrimp. The grader is expected to examine the shrimp and apply the description of broken shrimp in the Shrimp Booklet.

The Union submits that the shrimp was improperly graded as broken shrimp, because the shrimp that was graded as broken, or at least part of it, was processed and sold and had commercial value. The Union submits that shrimp that has commercial value could not be graded as broken shrimp. The Union refers to the definition of broken shrimp in the 2005 Shrimp Booklet which states “shrimp that have damage to the meat have no commercial value”. This is the part of the description of broken shrimp that was added to the 2005 Shrimp Booklet that was not part of the description in the Shrimp Booklet in prior years. Although an issue could be raised as to whether the revised description was agreed to be part of the shrimp grading program, it will be assumed that the revised description applied to the 2006 landings in question. What does the revised description mean? The revised description does not change how broken shrimp is graded. The additional words, stating that broken shrimp have no commercial value, do not change the grading specification. The grading specification for broken shrimp is still “shrimp that have damage to the meat”. Commercial value is not a factor required by the 2005 Shrimp Booklet to be assessed by the graders when grading. There is no direction to the graders regarding how to assess commercial value. What happens to the shrimp after it is graded is not a factor required to be taken into consideration by the graders when preparing the grading form used to calculate the payment made to fishers, according to the Shrimp Booklet and the shrimp grading program. Therefore, whether broken shrimp is processed and sold has no effect on the payment required to be paid to fishers under the Collective Agreement.

The evidence of the grading results of the 2006 landings in question is set out on the grading report forms. For the landings of shrimp that were the subject of the grievances, the samples were not retained after the grading. There are no records as to why individual pieces of shrimp were graded as broken. There was no observation by the Grievors or Union representatives of the grading done by IDG of the landings in question. The Arbitrator accepts the shrimp grading forms as proof that the shrimp was properly graded according to the description of broken shrimp in the Shrimp Booklet, in the absence of evidence to the contrary. There is no evidence that the Shrimp Booklet and the computerized grading system were not applied correctly.

In summary, the Arbitrator finds that processors are authorized by the Collective Agreement to deduct the weight of broken shrimp from settlements paid to fishers. This conclusion is based on reading the Master Agreement and Shrimp Schedule as a whole, and by using the Shrimp Booklet, shrimp grading form and related documents as an aid to interpret the Collective Agreement. The amount deducted as broken shrimp from the payments to the Grievors was the amount calculated by the independent graders and shown on the shrimp grading forms, and was deducted in accordance with the quality grading program for shrimp. The grading forms are acceptable proof that the shrimp was properly graded, in the absence of evidence to the contrary. There is no evidence that the Shrimp Booklet and the computerized grading system were not applied correctly. As a result of these findings, it is unnecessary to address the issues of estoppel, or any of the subsidiary issues.

### **Decision**

For the reasons stated in the Award, the grievances are denied.

**DATED** this 8<sup>th</sup> day of October, 2008.

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James C. Oakley  
Arbitrator