The Canadian Merchant Service Guild

A NATIONAL ASSOCIATION OF
MASTERS – MATES – PILOTS – ENGINEERS AND OTHER MARINE OFFICERS

FOUNDED 1917

AFFILIATED WITH
INTERNATIONAL MARITIME PILOTS' ASSOCIATION
INTERNATIONAL TRANSPORT WORKERS FEDERATION

BULLETIN

DATE	December 9, 2015
TO	CMSG MEMBERS @ SEASPAN ULC
SUBJECT	ARBITRATION AWARD – HOURS OF WORK AND OVERTIME

Dear Guild Members,

Following this update (subsequent to page 4), we attach a copy of the arbitration award addressing specific issues of hours of work and overtime, issued on December 7, 2015 by Arbitrator Dalton L. Larson [the Arbitrator].

The Arbitrator has analyzed the Company's and Guild's proposals and the responses to those proposals and has chosen, what he believes is, the appropriate way to change the next collective agreement. In this summary, we outline the Arbitrator's determinations on the different issues that were argued before him.

Overtime Rates

Article 1.26

The Company proposed to reduce the rate it pays for overtime from double time and triple time to time and a half and sought that it be paid in one half hour increments instead of one hour increments.

The Arbitrator rejected the Company's proposals in this area as "any such change would amount to nothing more than a concession or reduction in wages without any demonstrable set off to employees." In the end, **no changes relating to overtime rates will be made to the collective agreement language**.

Meals

Article 2.03

The Company proposed to replace the meal hours' provision with language stating that meal hours should be set by the Master of the vessel, eliminating set hours for meals and deleting penalties for the Company in the event that meals cannot be taken within one half hour of the prescribed meal times.

The Arbitrator has rejected the Company's proposal, but instead chose to introduce a small amount of flexibility for the Company by providing that **meals can now be taken within one full hour** of the prescribed meal times without penalty.

Overtime Conversion

Article 1.26.3

The Company proposed to eliminate overtime to leave conversion entirely and to pay out all overtime as it is earned.

The Arbitrator rejected the Company's proposal but was sympathetic to Seaspan's concern over how OT leave was being used. He chose to amend the agreement "to make it clear that converted leave cannot be taken at the discretion of the Employee by simply giving 14 days' notice … rather the **notice must take the form of an application to the Company for permission to take converted leave which shall only be granted if operational requirements can be reasonably accommodated at the time applied for**."

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Additionally, the Arbitrator offers protection to the Employees that in certain cases converted overtime use must be granted. "In those instances**, the Company will be under an obligation to make every possible effort to accommodate employees to attend to:**

1. **Urgent domestic or personal affairs;**
2. **Reduce red days;**
3. **Further relevant educational or training opportunities;**
4. **Sick days;**
5. **Union Business.**

Finally, the Arbitrator makes a change "to **preclude an Employee from retaining converted overtime and be paid into the red** as is currently permitted under the agreement."

The precise language remains **up to the parties to draft**, with Arbitrator Larson reserving jurisdiction if the Guild and the Company are not able to agree.

Three Watch System

Article 2.01.1

The Company proposed to introduce a three watch system on continuously operated vessels, using three separate crews, each working 8 hour shifts over a 24 hour period. This involved modifying the language which currently only permits the Company to work Officers on a two watch system using alternating 12 hour shifts.

The Guild objected strongly to implementing this system, as – among other things - it would result in less overall pay despite being trapped on a working vessel for the same tour of duty.

The Arbitrator rejected the Company's proposal stating that "the three watch system is simply not the prevailing standard." **No changes will be made to the collective agreement** with respect to this issue.

Boat Hopping

2.01.3

The Company sought the ability to assign employees from one vessel to another, subject to them having the necessary qualifications and ability rather than sit idly by when their vessel is laid up.

The Guild opposed this on safety grounds, stating that there must always be somebody standing watch on a vessel, particularly in case of fire if other employees are sleeping.

The Arbitrator considered the Guild's objections, but felt that safety issues were mitigated by making "other arrangements".

The following language was awarded:

2.01.3 [NEW]

(a) When a vessel is safely secured, Officers may be required, subject to their qualifications, experience and ability, to work on an alternate vessel during their on watch period. Any hours of work on such alternate vessel shall count towards their hours of duty on the vessel on which they were initially crewed.

(b) For the purposes of this Article "safely secured" means that the vessel is laid up within the meaning of the Marine Personnel Regulations Part 2 – Crewing and such other arrangements are made sufficient to secure the safety of any crew remaining on board the vessel and protect the environment.

"Such other arrangements" may include, but are not limited to:

i. The assignment of personnel (including shore staff) to monitor the vessel; and/or

ii. Using secure and reliable technology including high quality alarms to warn of fire and/or sinking.

(c) At a minimum, actions taken to lay up a vessel shall include connecting it to shore power, shutting down such machinery that is not required for the safety or comfort of the remaining crew, closing sea-cocks and ensuring that all fire and bilge alarms are fully active.

The Guild will be looking into the practical realities of the above language to see if it is even possible, as we will not be allowing the Company to infringe on any other safety regulation in order to make use of the above language.

Pager System

New Article

Perhaps the most contentious issue dealt with in this round of arbitration is the Pager System. The Company proposed a fleet-wide pager system requiring employees to be available to be called in for a set amount of time within a 12, 16 and 24 hour period and that would involve split-shifts.

The Guild argued against the imposition of any pager system, particularly one that would be used by the Company as its primary scheduling mechanism.

The Arbitrator agreed with the Guild that the Company's pager proposal was unacceptable. However, the Arbitrator found that back in 2012, a "tentatively" agreement to a trial pager system in the Vancouver Harbour was presented to Guild Members and even though that proposal was voted against by the rank and file membership, the Arbitrator determined that by presenting the trial pager system agreement to the Membership was equivalent to "tentative" agreement which suggested to him that such a trial proposal would have ultimately been agreed to by the parties had negotiations continued.

As such, **the same 2012 pager proposal will be adopted in the Vancouver Harbour on a trial basis**. It is unclear at this time whether current Seaspan vessels will be used for this trial or whether additional vessels will be brought on. We do know that, as per the 2012 agreement, the Company will be limited to two vessels to run pagers on with an additional third vessel to be used as a replacement vessel.

It will be at the Company's discretion whether to implement the trial, but if they do it will be established through a letter of understanding and **the following restrictions will apply**:

- There shall be no split shifts, except in an emergency that involves the safety or well-being of any person including the employee required to work it;
- The Letter of Understanding (LOU) shall be in effect for the entire trial period ending December 31, 2016 but shall not otherwise be terminable on notice;
- The issues to be reviewed by the Committees established under the LOU shall include whether the LOU should be conditioned indefinitely, with or without modifications that are mutually agreed by the Committees. The Arbitrator shall continue to have jurisdiction to make a binding decision in the event of any dispute that cannot be resolved by them; and
- The LOU shall be amended to reflect the above changes or any other changes that are mutually agreed and shall be duly executed by the parties.

There will need to be further discussion with the Company before we know exactly what the pager trial LOU will look like, as it may be modified by mutual agreement from the 2012 agreement originally presented.

Scheduling Relief Employees

Article 3.01, 3.02

The Company proposed amending Articles 3.01 and 3.02 of the Guild collective agreement to qualify the reference to vessels with the word "posted".

The Guild objected entirely to this amendment as we believed it would allow the Company to schedule all "non-posted" vessels at its discretion without any notice whatsoever.

The Arbitrator **rejected the proposal of the Company** stating "[to accept it] would implicitly amount to the creation of a new category of relief employee that is not tied to the replacement of an absent regular employee." However, he was not able to fully conclude the matter, referring it back to the parties for further consideration. **Either party shall have the option to refer it back to the Arbitrator** to decide, which may require additional hearings.
We will need to hold further discussions with the Company to better understand their intentions moving forward before we can say that this matter is fully resolved.

Eight Hour Shifts

Article 3.02.1
The Company proposed the deletion of collective agreement language limiting their scheduling of eight hour shifts to five consecutive days on with two consecutive days off. The Arbitrator summarized competing viewpoints on the issue but said he was not able to make a determination. **He has chosen to leave the issue open should either party wish to apply to provide additional evidence and argument** to "more comprehensively address the impact that the implementation of eight hour shifts would have on the fleet." The deadline for such submissions has been set at 17:00 hours on February 29, 2016.
We will need to hold further discussions with the Company to determine if they wish to pursue eight hour shifts at all, because if they do not the language will remain unchanged.

Crew Change Times

Article 3.01.5 (Shift Vessels)
The Company had requested the option to crew on at 0500 hours without having to first seek mutual agreement from the Guild. **The Arbitrator granted this language to the Company who will now be able to crew on at 05:00 hours unilaterally**.

Crew Change Times

Article 2.02.4 (Continuous)
The Arbitrator accepted the proposal of the Company to allow crew change times on continuous vessels to be done on the hour at any time between 08:00 and 24:00 hours on any calendar day, with accommodation be made for employees who reside on Vancouver Island. We will require further consultation with the Arbitrator and parties to determine the exact wording of this arrangement and if accommodations will be made for employees who reside elsewhere.

Conclusion

While it appears a number of issues have been settled somewhat concretely during this process, there is clearly some areas which are still being worked out. The Guild will need to enter into dialogue with the Company, and perhaps with the Arbitrator, in order to parse out some of the awarded changes here and parlay them into clear and defined collective agreement language that will produce labour stability under a new term of agreement.

Please do not hesitate to contact the Guild if you have any further questions about the above.

CMSG WESTERN BRANCH

IN THE MATTER OF SECTION 79(1)
OF THE CANADA LABOUR CODE

and

IN THE MATTER OF AN INTEREST ARBITRATION

BETWEEN:

SEASPAN MARINE CORPORATION

(the "Employer")

AND:

CANADIAN MERCHANT SERVICE GUILD

(the "CMSG")

AND:

INTERNATIONAL LONGSHORE AND WAREHOUSE UNION, LOCAL 400

(The "ILWU")

Hours of Work and Overtime

ARBITRATOR:	Dalton L. Larson
REPRESENTING THE EMPLOYER:	Chris Leenheer David Woolias
REPRESENTING THE CMSG:	Brett Matthews Jeff Sanders
REPRESENTING THE ILWU:	Leo McGrady Q.C. Sonya Savet-Rasekh
DATES OF HEARINGS:	May 21 – 23, 25 & 27, 2015
PLACE OF HEARINGS:	Vancouver, British Columbia
DATE OF AWARD:	December 7, 2015

AWARD

1. Introduction

[1] This is one of a series of awards which ultimately will culminate in new collective agreements between the parties. Two earlier awards have already been issued both relating to the Health Benefit Plans. All such awards address specific issues upon which the parties were deadlocked but should be seen to be part of the same arbitral process. Each award is intended to be effective according to its terms when issued even though it may take considerably more time before the collective agreements are finally concluded. Under the Memorandum of Agreement by which the process was commenced the parties agreed to a mediation/arbitration process. Although it has been several months since the parties were in face to face negotiations, the mediation portion of the process continues in full force and effect. I have only declared an impasse with respect to certain specified major issues that we have not been able to resolve. The balance of the issues remaining will be addressed once again in mediation after awards have been completed on the major issues. This particular procedure was adopted because the major issues were too large to effectively deal with simultaneously. This case will deal with Hours of Work and Overtime and other related issues.

2. Pressures for Change

[2] All issues referred to interest arbitration are subject to all the normal procedures and rules applicable to any adjudicative proceeding, notwithstanding that the objective is to formulate the terms of a new contract and not to enforce the terms and conditions of an existing contract. The process by which it is done involves a considerable departure from mediation where one party uses whatever powers of persuasion it may have to convince the other that its position is sound. However, if they are unable to agree there is no mechanism available to resolve their dispute other than through the blunt force of job action. Arbitrator Adams described it in somewhat more cryptic terms in *Re Beacon Hill Lodges and SEIU* (1982) unreported @ pp. 4-5 that such arguments are ultimately subject to the inherent bargaining power of the parties to impose their wills on each other. When it comes to arbitration, however, the proceedings are converted into judicial proceedings where the arbitrator is tasked with the duty to issue an award which replicates as closely as possible the terms of an agreement the arbitrator considers that the parties would have reached had they been able to negotiate to a successful conclusion. This was explained succinctly and clearly by Arbitrator Winkler in *Re University of Toronto and University of Toronto Faculty Association* (2006) 148 LAC (4^{th}) 193 @ para 17:

> There is a single coherent approach suggested by these authorities which may be stated as follows. The replication principle requires the panel to fashion an adjudicative replication of the bargain that the parties would have struck had free collective bargaining continued. The positions of the parties are relevant to frame the issues and to provide the bargaining matrix. However, it must be remembered that it is the parties' refusal to yield from their respective positions that necessitates third party intervention. Accordingly, the panel must resort to objective criteria, in preference to the subjective self-imposed limitations of the parties in formulating an award. In other words, to adjudicatively replicate a likely "bargained" result, the panel must have regard to the market forces and economic realities that would have ultimately driven the parties to a bargain.

[3] The authoritative weight of the award is considerably enhanced by the fact that the arbitrator was a highly respected jurist, the Chief Justice of Ontario. Shortly after he issued the award he was elevated to Chief Justice of the Court of Appeal.

[4] In this particular case, it is not unimportant that while Seaspan acknowledged that as the primary proponent of change it carried a particular onus of proving its case, Counsel stated at the outset that it did not assert any immediate term viability or inability to pay to support its proposals. He explained that due to what he called the extreme degree of commercial sensitivity associated with the financial statements in the context of a privately held, non-reporting corporation, the Company concluded that it could not disclose such information in the context of these hearings or otherwise. Therefore, as he said they accepted that it removed one tool of persuasion from the Company's arsenal but otherwise expected to be able to prove its case in other ways.

[5] The problem is that the failure to provide a full picture of the financial state of the Company where it takes the position that the resolution of the issues must necessarily turn on considerations of restricted revenues, costs, competition and other alleged financial impacts may have more of an impact than to just the removal of a tool of persuasion. It may have no less effect than a failure to prove its case. To argue as it does that it faces considerable competitive pressures from other maritime companies as the fundamental reason why it feels compelled to seek substantial changes to the collective agreements without demonstrating how it impacts the financial status of the Company effectively ignores the adjudicative nature of the proceedings. Evidence that there are cost challenges is not sufficient. It does not merely deprive the Company of a tool of persuasion but goes a long way toward negating the compellability of its evidence of cost pressure as a driver of the changes that it seeks. It's interest in preserving the privacy of its financial performance as a private company in a highly competitive business environment does not provide a defense against the onus that it carries to prove its case.

[6] Nor can it properly argue that it is unable to compete in the marine market space and at the same time claim that it is not asserting an inability to pay the costs of the collective agreement by purporting to base it upon a short term horizon. It is true that the Unions did not object to the admission of any of the evidence of the Company even where it involved allegations of financial impact. However, Mr. McGrady argues that I should draw an adverse inference from its failure to produce full financial statements. He argues that I must conclude had they been tendered into evidence, they would have shown the Company to be profitable and Ledcor's impact negligible, both now and during the life of any renewed contract: *Re Steele* BCLRB Decision No. B77/2001. Moreover, he argues that in view of a recent decision of the BC Court of Appeal in *BCTF v. British Columbia* (2015) BCAA 185 a claim of confidentiality could readily have been addressed by a confidentiality order. In that case the Court made such an order covering confidential cabinet documents against the government's objections.

[7] I am not prepared to draw an adverse inference from the failure of the Company to introduce its financial statements into evidence. The inference postulated in the Steele Case is subject to a notable exception that it is always open to a party that has not produced evidence to explain the omission. Where the explanation is satisfactory, no adverse inference is to be drawn. In this case the Company explained that to make the statements public would give competitors a huge advantage and that private corporations do not make a practice of disclosing their financial performance to the public. The problem, however, is that the impact of the decision not to disclose them must be seen to have a much greater impact on most of the issues than Mr. Leenheer suggested. Since these proceedings are adjudicative in nature and rely upon evidence properly admitted to persuade the arbitrator to decide an issue in its favour, what it must properly be seen to do is virtually preclude the compellability of any issue that depends upon financial performance for its credibility. This most certainly must include considerations that the Company is unable to meet the competition from Ledcor Marine and that it has been the operative reason for the loss of many contracts in the recent past and that this may be expected to continue into the future.

[8] What the Company says about that deficiency is that it can prove its case in other ways than providing a picture of the overall financial performance of the Company. For example, Mr. Leenheer contends that he

provided unchallenged evidence of general application that paints a dreary picture of the challenges facing the Company:

a. employment levels, which are of necessity driven by work volumes, have declined by approximately 25% during the term of the current collective agreement from 426 mariners across both Unions in December 2010 to 321 mariners in December 2014;
b. a further 18 jobs will be lost when the Mainland Sand and Gravel contract expires on December 31, 2015;
c. the current hiring of up to 24 deck hands by Seaspan is the first major hiring that has occurred in a number of years and is to replace employees who have retired or otherwise left employment during that period;
d. Seaspan has lost a series of competitive bid processes and/or contracts to Ledcor (Mainland Sand and Gravel; Lehigh Marpole; Tree Island Steel) Mercury Towing (Schnitzer; Lehigh Riverside; Lehigh Tilbury; Lehigh Steelhead), Catherwood (Catalyst, Powell River) and FMW Towing (ABC Recycling) during the term of the current collective agreement.
e. Ledcor will have grown from 3 tugs and no barges in 2010 to 9 tugs and 23 barges by the end of 2015;
f. Ledcor has, in the words of Ledcor's CEO, as at May 2015 commenced "a period of rapid growth for the company's marine division;
g. There are no regulatory, contractual or market-based impediments to Ledcor or another company entering the Vancouver Harbour market other than access to a suitable tugboat to undertake the work;
h. The period required for construction of a tugboat is 11 months or less;
i. When another low-cost service provider, Samson, entered the Fraser River, despite a supposed tariff system as also exists in Vancouver Harbour, rates dropped by 40% and caused the incumbent dominant service provider and Guild-certified SMIT to lose 30% of their market share;
j. Based on its current cost structure, Seaspan is currently in no position to be able to respond to such an incursion into the Vancouver Harbour as evidenced by the matters referred to in paragraph (n) below;
k. Contracts which Seaspan currently holds, which represent approximately $97 million in revenue (and equates to 60% of Seaspan's total revenue) will expire during the expected term of the next collective agreement and be the subject of competitive tendering processes;
l. Seaspan's major customers are under significant financial pressures resulting in the imposition of curtailment of operations and pressure on Seaspan to reduce costs and thus pass on savings through automatic de-escalation clauses;
m. Seaspan's current profit levels are insufficient to cover the cost of capital which means that, by continuing to operate as it currently does, the Company is losing value for its owners as it costs more to obtain the capital required to run the business than the profit generated by the business;
n. Seaspan can pay to charter vessels from competitors to perform some of its own work at a price, which logically must include the competitor's profit margin, that is less than the bare cost to Seaspan of crewing its own vessels to perform that work and can do so on far less restrictive terms that the current collective agreements require (for example, a vessel can be chartered for a single hour rather than Seaspan being required to crew its own vessel for 8 to 12 hours; and
o. The average age of Seaspan's operating fleet is 31 years with 20 vessels over 30 years old and the fleet requires significant reinvestment.

[9] What Mr. Leenheer says about those assertions of fact that effectively summarize a good part of the evidence of Mark Bingham and Brook Walker, is that it would constitute an error of law to reject evidence that was not challenged when they gave their evidence. Both witnesses are key managers of the Marine Division. Mark Bingham was only recently promoted to Manager of Marine Organizational Development reporting jointly to the

Vice President of Human Resources and to the CEO, Jonathan Whitworth. Brook Walker is the Assistant Manager of Marine Personnel. Both were involved in the negotiations leading up to the arbitration.

[10] Contrary to Mr. Leenheer's argument, however, their evidence was contested. Mr. McGrady takes the position that their evidence was deficient in several material particulars and that they were not reliable witnesses. He says they failed to act honestly and in good faith but not because anything they said was not true but rather that they failed to disclose certain fundamental facts that he thought ought to have been provided voluntarily without it having to be extracted through cross-examination. For example, he complains that Mr. Bingham failed to disclose that Ledcor Marine does not operate in the Vancouver Harbour until he was confronted by it on cross-examination. He says that one could properly expect that such a critical fact would have been disclosed by him in his will-say statement. Moreover, he was unable to say whether the rates that apply in the Harbour are set by tariff or by the individual companies. He asserted that this was important information that he could have given but failed to do so even though it is obvious that if the rates are set by an independent government authority it would greatly limit Ledcor's ability to undercut Seaspan's rates. Another salient fact that Mr. McGrady said emerged from his evidence was that there is a high degree of cooperation between Seaspan and its three major competitors: Ledcor, Sampson and Catherwood. Yet another critical omission from his evidence was said to be that an additional deckhand that would be required if the three watch system were adopted was that he would be required to cook. Finally, Mr. Bingham was unable to say whether protection clauses that are a feature of all customer contracts typically result in savings being passed on to the customer or go to the bottom line. Mr. Bingham testified that he did not know the answer because it was a decision made by persons "somewhat higher than my pay grade" which Mr. McGrady characterized as "dismissive".

[11] When it came to Mr. Walker, Mr. McGrady criticized his evidence about rates charged to customers when Seaspan chartered competitors' vessels at lower rates. He said that he didn't know the answer to that question. The methodology that Mr. Walker used to cost the Ledcor Marine collective agreement was also the subject of his criticism because it was done solely based on the language of the agreement without speaking to anyone at Ledcor. Most notably, he was criticized about his choice of words to describe provisions in the collective agreement that he did not like, as if the Company were a victim and not a negotiating partner who had arrived at a mutually acceptable agreement and that he used words such as "forced to" and "irrational limitations" to describe them.

[12] I do not accept that the two Company witnesses were unreliable in any sense. On the contrary, I find that they were model witnesses who gave their evidence without guile or pretense supported by an impressive body of knowledge about the operations of the marine industry in general and the Company in particular. There is simply no adequate reason to reject their testimony on any basis. Moreover, it is disingenuous in my view to suggest that their evidence should be seen to be unreliable for the simple reason that certain salient points had to be elicited on cross examination. I can certainly contemplate circumstances where the principle advocated by Mr. McGrady would apply, that a witness must give their evidence honestly and in good faith. Indeed, the oath administered to every witness, including those called by the Unions, required that they agree not just to tell the truth but the whole truth which obviously fully summarizes the commitment that they made to support the adjudicative processes required for a fair hearing. I have no doubt that they complied with that obligation within the mandate assigned to them by the Company to provide evidence in support of the negotiating position that it was taking on the issues relating to overtime and hours of work. The fact that some additional evidence was elicited from them by Counsel for the Unions on cross examination or that Mr. Walker described some of the terms of the current agreement unfavourably does not come close to the establishment of bad faith in the circumstances here.

[13] What must, however, be seen to be more problematic for the Company is not the evidence that it selected to support the positions it takes on the issues but rather the evidence that it deliberately has chosen to withhold. I do not criticize the Company for its decision not to tender its financial statements into evidence and fully accept its reasons for doing so that in the context of a privately held non-reporting corporation there is a high degree of sensitivity associated with them which precludes them from being made public, even perhaps under the protection of a confidentiality order. In other words, it has decided for good commercial reasons that the risk that it would have to assume if it were to tender its financial statements extends well beyond the risk that it will not be able to persuade the arbitrator to accept its position in these hearings.

[14] I am unaware of any authority that holds that the financial statements of a private corporation are compellable in interest arbitration proceedings, based on the fact that the manner in which the resolution of the issues are resolved will potentially have an effect on its financial performance. Nor has either of the Unions applied for an order to compel the production of them in this case. One may properly assume that to be an acknowledgement by them that the Company made its decision based on its view that it is not in its best interests to disclose the financial statements in these proceedings but with all the consequences that it may have that without them, it may not have the persuasive force required to persuade the arbitrator to accept its position. It is not an issue of good faith but rather an issue of the weight of the available evidence.

[15] Nevertheless, what has to be said is that although it eliminates the issue of bad faith it must be seen to have a much bigger dimension than was suggested by Mr. Leenheer that it merely removes one tool of persuasion from the Company's arsenal and extends to the requirement to provide a fair hearing. In the context here, that means that the Company cannot decide to withhold its financial statements and then argue, for example, that Seaspan's current profit levels are insufficient to cover the cost of capital. Mr. Leenheer argues that it was amongst 15 unchallenged evidentiary propositions that it established. The problem is, however, that without the financial statements the Unions were in no position to challenge it. The issue is not whether any of the evidence submitted was challenged but whether there was sufficient evidence to establish the facts which formed the basis of the propositions that he alleges. It may well be true that its profits are insufficient to cover the costs of capital but to say it does not prove it.

[16] There are other similar problems with the evidence that relate to the failure to provide financial statements such as the assertion that Seaspan lost a series of competitive bid processes due to its high operating costs or that Seaspan is currently in no position to be able to respond to the incursion of a competitor in the Vancouver Harbour or that contracts which Seaspan currently holds which represent approximately $97 million in revenue (and equates to 60% of Seaspan's total revenue) will expire during the term of the next collective agreement and be the subject of competitive tendering processes. While I have no problem accepting that several contracts will expire within the term of the next collective agreement and will have to be competitively retendered, it is unacceptable to assert that it represents 60% of Seaspan's total revenue when it cannot be verified from financial statements or other empirical sources which the Company has deliberately chosen not to produce.

[17] While the ability to compete can be partially demonstrated by showing differences in the cost inputs of specified contracts, it omits all consideration of the revenue side which would be shown in the financial statements. An example of the problem can be extracted from a document tendered into evidence by the Company called "Review of Competitive Challenges and Economic Impact" which was originally presented to the Union bargaining committees when bargaining for new collective agreements commenced on October 2, 2013. At Tab C of the Introduction Section are a series of "Executive Messages" issued by Jonathan Whitworth in which he

directly addresses the employees. At p. 3 of the tab he discusses the problem that the Company has with the confidentiality of contract negotiations and the potential contribution of new revenues on its ability to compete:

> Our team is constantly looking for opportunities in our area of interest (Pacific Northwest and Canadian Arctic) for new business prospects. Since most of these projects involve layers of confidentiality, more often than not we are unable to talk or share information regarding new business prospects. Since most of these projects involve layers of confidentiality, more often than not we are unable to talk or share information regarding acquisitions, joint ventures of new contract opportunities until after the deal is concluded. But I can share with you that we aggressively went after a new project last year, which would have required over $100 million in new marine assets (including five new boats) for a project in the Canadian Arctic. Unfortunately, the customer did not choose us and they are currently working with another marine provider to develop the project. I can also share with you that we have two more projects currently under review, which would grow our fleet in trades and businesses, which we are not in today. As we found with the Arctic project that we lost, the Seaspan brand opens lots of doors and provides instant credibility. But the discerning customers are looking for the best provider of services at the most competitive price. The price point is critically important for current and potential customers in order to conclude a deal, and regrettably this is something where Seaspan continues to struggle to provide.

3. **Evidence of Mark Bingham**

[18] This witness provided an exceptionally good description of the operations of Seaspan Marine which I will summarize. Following that, I will also provide a summary of his evidence on the competitive pressures that are currently faced by the Company.

[19] The fleet is made up basically of two types of vessels: tug boats and barges. There are four types of tugboats: (i) large ocean going tugs; (ii) medium sized coastal tugs; (iii) special purpose tractor tugs used for ship docking /undocking and escort; and (iv) small conventional yarding tugs.

[20] The ocean going tugs are the largest size of tug boats owned by the Company and are certified to work in international waters. It currently had four tugs of this size: the Monarch, the King, the Commodore and the Royal. Typically they sail between Oregon and the north coast of British Columbia but on occasion sail as far south as Mexico and as far north as Alaska. Once every few years they may go as far as China. The crews range between 6 and 9 employees who work on a continuous basis living on board up to 21 days at a time. The work performed by these vessels is highly seasonal depending on demand from the construction and forest industries usually towing a single barge containing raw logs or aggregate material.

[21] The medium coastal tugs are smaller than the ocean going tugs. Their work is confined to the waters of British Columbia and Washington State. The Company currently has 9 of these vessels in its fleet working with a crew of 4 to 5 mariners. These vessels tow up to three barges at a time containing a range of different materials including forest products, chemicals, aggregate, oil and railcars.

[22] Tractor tugs are typically single purpose vessels, powerful and highly maneuverable which makes them ideal for ship docking, undocking and escort work. The Company currently has 11 of these vessels in its fleet working primarily in the Vancouver Harbour and Roberts Bank. The smaller of them are also capable of towing barges. The smallest tractor tug is regularly used as a line boat at Roberts Bank, meaning that it is used to deploy the lines used to dock other vessels and to tie it up to a dock or floating tie-up point. These vessels have the lowest levels of utilization in the fleet.

[23] Finally, yarding tugs are the smallest of the tugboats of traditional design. They perform a variety of work including towing barges, assisting in harbor services and ship docking and operating as a line boat. They generally have a crew of 2 (a captain and a deckhand). Utilization is highly dependent on the operating regions with higher utilization in the river and low use in the Harbour.

[24] Overall the Company has 3 tugs operating in Victoria, 3 at Roberts Bank, 11 in the Vancouver Harbour and 1 in Kitimat for a total of 18 such boats.

[25] Mr. Bingham testified that the Company has been concerned for some considerable time about the growth of competition in the industry and, in particular, the limitations on its ability to adapt its business to meet that competition due to restrictive terms in its collective agreements. He said that prior to 2013 the Company formed the view that it could no longer sustain the agreements in their present form. He said they had not been changed significantly since the industry bargained as a whole more than a decade ago.

[26] Consistently with that view the Company made a presentation to the bargaining committees addressing its concerns using a binder of documents referred to earlier entitled "Review of Competitive Challenges and Economic Impact." The Company then prepared bargaining proposals based on four key needs that it had identified as follows:

- Increasing efficiency;
- Reducing direct costs;
- Revising work rules to promote flexibility; and
- Make housekeeping changes to streamline the agreements.

[27] During bargaining, he said that the Company continued to make presentations to the Unions demonstrating the impact of increasingly successful competition on the Company's business and correspondingly declining employment levels, an inability to reinvest in an aging fleet, and profit levels that were insufficient to cover the costs of capital to the Company. It is, of course, true that the Company did take those positions in bargaining but in arbitration to make those assertions does not establish them as adjudicative facts. As a result, the picture that emerges must be seen to be completely unbalanced without any ability to measure the actual size of the profits or to determine whether it is unable to reinvest in an aging fleet or that the competitive pressures were mitigated to any degree on the revenue side.

[28] As far as Ledcor Marine is concerned, Mr. Bingham testified that the labour rates enjoyed by them were approximately 20% lower than those of Seaspan on a per employee basis. This has directly affected its ability to compete with Ledcor in competing for towing contracts. He said that in 2012 the Company entered into a Letter of Intent with Mainland Sand and Gravel that was designed to continue transportation services to Mainland for the next 20 years. It obligated Seaspan to build four additional barges to be dedicated to this work, given its volumes. Seaspan commenced construction on two of the barges in 2013 but the following year Mainland terminated its existing contract with effect on January 1, 2016 and elected not to proceed with the Letter of Intent. Instead, Mainland entered into a 10 year contract with Ledcor to perform this work.

[29] Ledcor then published a press release in July 2014 indicating that it had commissioned Bracewell Marine Group Ltd. to construct two new tugs. In the May 2015 edition of the industry magazine, the Western Mariner dedicated a six page article on the growth of Ledcor in the industry with the launch of a new tug and two new barges and that ultimately within the next year it intended to add three tugs and eight barges to its current fleet of six tugs and 15 barges. It announced that six of those barges were already under construction.

[30] There are also others competing for limited work. Mercury Towing operates smaller tugs in the Fraser River and does some of the aggregate towing around the Gulf. At the end of 2013 Seaspan lost the Lehigh Riverside work, which involved towing 6000 tonnes of product on a Seaspan barge to Vancouver Harbour to Mercury in a tender process in spite of being the incumbent provider for a number of years. Seaspan similarly lost a tendering process to Mercury for Lehigh Tilbury work and Lehigh Steelhead work. It also lost to Ledcor on a bid for Lehigh Marpole work. The continued erosion of its forest products work resulted in Seaspan changing its fleet assignments and moving the only vessel that had been regularly crewed in the North Arm of the Fraser River to another location. In addition, in the last 6 months it received notices from Nuecel and Catalyst that they would be curtailing their operations. Finally, he testified that it will be required to retender for 5 of its largest contracts during the expected term of the next collective agreement.

4. **Evidence of Brook Walker**

[31] For general purposes, I intend only to deal with the evidence of Mr. Walker on the crewing and shifting arrangements applicable to the boats. He also gave evidence on certain other discrete issues that I will deal with when I address those issues.

[32] The crewing of vessels is subject to the Transport Canada Safe Manning Regulations as well as the collective agreements. The regulations must be followed regardless of whether the agreements also deal with the subject matter of them and in that sense, constitute a minimum standard.

[33] For vessels that are regularly crewed, the Company is required to post vacancies between three and four times per year under Article 1.13(1) of the Guild agreement. Employees may apply for any particular posting. These are not postings as one would typically find in an industrial plant. There is no definition to describe how jobs are to be structured which is the cause of considerable confusion. However, in practice it refers to a job vacancy on a "customary vessel" with a specified schedule at a particular home dock. Appointments are required to be made based on the seniority of the applicants subject to qualifications and the ability of candidates to perform the job under Article 1.13.4.

[34] Mr. Walker testified that when it comes to the ILWU the parties had treated the process of assigning work to deckhands similarly to the Guild posting system, which I take to mean that as a matter of practice vacancies are posted three or four times each year. It is notable in that respect that Article 1.09 of its collective agreement does not contain any reference to how work must be assigned which obviously means that, except for the practice, it is largely left to the discretion of the Company where a deckhand may be required to work subject only to subsection (d) which requires that for placements within the bargaining unit, where the skill and efficiency of candidates are relatively equal, preference will be given to those with the greatest length of service with the Company.

[35] Mr. Walker went on to say that an employee who is not successful in obtaining or who does not apply for a posting is treated as a relief employee who then forms part of a "relief pool". He said that where a temporary vacancy then arises, for example due to a posted employee taking a period of vacation, relief employees will then be approached to fill the vacancy in order of seniority, subject to the employee's qualifications and ability to perform the job which, of course, is what is required by Article 1.09(d) except there is nothing in the collective agreement that addresses a category of "relief employee" or for that matter, that designates any other type of employee.

[36] There are incidental provisions scattered throughout the agreement that indirectly influence the assignment of work such as Article 1.22 dealing with the crewing of vessels. That provision, however, deals with

the minimum manning of vessels but not how assignments are to be made to individual deckhands. Under Part III dealing with shift tugs Article 3.01 refers to "regularly crewed tugs" and to "regular shifts" but as I said above, there are no provisions that specify how such assignments are to be made. Similarly, subparagraph (l) requires that Unlicensed Employee(s) employed on a regularly crewed shift tug must report to a designated place known as the "home dock" which supports the practice referred to by Mr. Walker by which the parties have agreed to treat ILWU members similarly to Guild members.

[37] Currently, the Company has 231 posted employees and 96 relief employees.

[38] In the matter of shift vessel scheduling, Mr. Walker testified that under the terms of the current collective agreements, the Company can crew vessels that do not operate on a continuous basis for either 12 hour or 8 hour shifts. However, he said that the 8 hour shift facility is rarely used because the Company is required to schedule the vessel to work 5 days in a row followed by two days of leave and at the same shift starting time each day. In other words, the agreement permits an 8 hour schedule similar to what may be worked at an industrial plant which he says does not work in the marine industry because of many factors including weather and tides. He says that as a consequence, the Company is required to use a callout, paid at double time or schedule a 12 hour shift when there may only be 7 hours of work to be done.

[39] He says there are other problems relating to scheduling in that the Company is only permitted to crew shift vessels between 0600 and midnight. In addition, subject to the Unions' agreement on a case-by-case basis it may crew between 0500 and 0600. There is a complete prohibition on crewing shift vessels between midnight and 0500. He said that as a result, if a customer were to require a vessel at say, 0300 it must crew the vessel at midnight and pay the crew to sit idle for 3 hours or pay for a callout.

[40] While the Company uses several different scheduling arrangements, he said that the Company tries to ensure that employees will end up with positive leave balances under the lay day system as follows:

- the first scheduling system that is used, known as "week about" requires an employee to work 7 shifts off followed by 7 shifts on and then 7 shifts off. This system creates a significant positive leave balance for most employees over the course of a year. Currently 10 of the 12 regularly crewed shift and pager vessels are crewed in this way;

- the second such system involves a five week routine. It requires an employee to work 7 shifts followed by 7 days off followed by 7 shifts on followed by 14 days off. This system creates a slightly negative leave balance for more junior employees who have a lesser entitlement to vacation than more senior employees. Currently 2 of the 12 regularly crewed shift and pager vessels are crewed in this way;

- finally, the third system involves a three week rotation. It requires an employee to work 5 shifts followed by a weekend off followed by 5 shifts on and then 9 days off. In other words it requires the employee to work 10 shifts over a three week period. It is used for vessels that operate Monday to Friday to align with customer requirements. It creates a neutral to slightly positive leave balance but is not currently in use by the Company.

[41] Some of his will say statement was argument in support of the position of the Company that the current notice requirements in the collective agreements are unduly restrictive and should not apply to relief crew working on a relief vessel, an issue that I not intend to deal with at this point in the award. My present purpose is simply to set out the background factual matrix relating to the issues in dispute.

[42] When it comes to continuous vessels, he says there are 15 such vessels in service with one based in the Fraser River and the balance having Vancouver Harbour as their home dock. They tend to be scheduled for trips of two or three weeks. Other than in exceptional circumstances the entire crew changes all at once. Under the terms of the current collective agreements there are 5 times each day when the Company can "crew-on" a continuous vessel: 0900, 1200, 1800, 2100 and midnight. The actual crew-on time is typically coordinated with the tides, as well as customer and operational requirements.

[43] The scheduling system for continuous vessels is based on a two crew system which means that if one crew goes to sea for 2 weeks the crew will then have two weeks off and the alternate crew will then go to sea for that period.

[44] Vessels may be changed from continuous to shift vessels but that normally would not happen more than once or twice a year. However, there are 17 vessels in the fleet that cannot operate as continuous vessels because they do not have the necessary facilities on board. There are 5 vessels that are capable of operating as both shift and continuous vessels.

5. **Evidence of Captain Mark Chambers**

[45] Captain Chambers has worked for Seaspan and its predecessors since 1980 and has sailed as a Master since 1989. He has sailed on numerous vessels and in numerous postings including both shift vessels and continuous vessels. He currently has no assigned shift or vessel but rather has elected to work in relief of masters who hold postings.

[46] The thesis of his evidence is that basic minimum standards of work have been prescribed by legislation and more recently by Commissioner Harry Arthurs in a 2006 report to the Minister of Labour and Minister of Economic Development Agency of Canada for the Region of Quebec entitled "Fairness at Work: Federal Labour Standards for the 21st Century" (the "Arthurs Report") which was a review of the existing legislated standards. He said that the Commissioner postulated a premise @ p.47 of his report that all employees ought to be afforded at a minimum a level of work that accords with publicly accepted standards of decency:

> Principle 1: Decency at Work
>
> Labour standards should ensure that no matter how limited his or her bargaining power, no worker in the federal jurisdiction is offered, accepts or works under conditions that Canadians would not regard as "decent". No worker should therefore receive a wage that is insufficient to live on; be deprived of the payment of wages or benefits to which they are entitled; be subject to coercion, discrimination, indignity or unwarranted danger in the workplace; or be required to work so many hours that he or she is effectively denied a personal or civic life.

[47] He gave examples from the Report of incursions on the principle of decency as being denied a right to take a break for lunch or personal needs or to work so many hours that one's mental and physical faculties are depleted or to be routinely prevented by work commitments from sharing domestic responsibilities with one's partner or from simply relaxing at the end of a hard day of work.

[48] Captain Chambers also reviewed the Report of the Commission of Inquiry on Navigation and Shipping issued in June 1972 to the Minister of Labour by K.A. Pugh (the "Pugh Report"). While it is now significantly dated, the report is important if for no other reason than it rationalized the lay day system so that it would be the same for every operator. In that respect, Commissioner Pugh recommended that in no case should an employee

accumulate more than 45 lay days; but that for a 12 hour work day an employee should receive 1.13 lay days, or for an 8 hour day 0.4 lay days. As Captain Chambers explained, lay days refers to paid time off earned by working.

[49] He also observed that the Pugh Report addressed the issue of working excessive overtime, which is a problem in the industry particularly on continuous vessels where employees work 12 hours a day for the entire period of their shift rotation. He commented that it legitimized a system in which for weeks at a time employees could work a system which would ordinarily be considered excessive for workers outside of the industry. As he said, it is a system where, while an employee is on a tour of duty (which could amount to almost half the year) there is virtually no time to do anything other than work, eat and sleep. Moreover, the employees are stuck on a boat.

[50] Subsequent to the Pugh Report he said that the BC shipping industry as a whole improved upon the minimum standards by moving to adopt a 37.5 hour standard work week rather than the 40 hour standard upon which the Pugh Report was based. Thus, for each 12 hour day sailed Officers are now paid pursuant to the collective agreement the prescribed wage for the time worked and, in addition, are credited with 1.24 days in their lay day bank for future use. He said that if an employee works a schedule that results in a negative lay day balance they can presently convert overtime into leave so they effectively buy back their negative lay day balance.

[51] Officers are permitted to accumulate up to 45 days of negative leave but once they reach that level the Company blocks them off pay, meaning that in those circumstances they cannot refuse an assignment. He takes the position that it operates as a pseudo-averaging system which allows employees to work exceedingly long hours. In some instances their hours amount to well in excess of the 1928 hours straight time set as the maximum by the Pugh Report. He said that the Company operates without a fixed averaging term and while the Pugh Report suggested that the system was developed as a sort of 52 week averaging period it is, in fact, a rolling average period where straight time hours are averaged over the entire career of the officer. He says that provides a more favorable arrangement to the Company in terms of the number of hours which may be worked at straight time and provides Officers with far less work-life balance.

[52] I shall not review that part of his evidence which took the form of argument although I will deal with the arguments when I come to the individual issues in dispute.

6. **Evidence of Captain Jerry Bowen**

[53] Captain Jerry Bowen also provided a will say statement to the arbitrator but primarily to supplement the evidence of Captain Chambers. He has been a Master for 43 years and currently sails continuously operated coastal vessels. He makes the following points:

- sleep is scarce on a continuous operating vessel because tug boats by their nature require lots of bumping and bashing into things and generate noise;
- because of the 6 on 6 off schedule the maximum stretch for sleep is 6 hours. In addition, overtime occurs not infrequently which disturbs the already fragmented rest periods;
- moving to a three watch system would have a dramatic effect on an Officer's life. In order to maintain a positive lay day balance and avoid being blocked off pay Officers could be confined to a boat for more than two thirds of a year. He said he would not work under such an arrangement;
- tug boats are inherently dangerous. He says he is aware of two fires that occurred on Company vessels in the last year and half on the Seaspan Commander and the Seaspan Pacer. If a fire

occurs a decision must be made by the Master whether to fight the fire or abandon ship. If a crew member is asleep he must decide whether the member can be aroused without risking further life. He said he is aware of crew members sleeping through alarms and would not feel comfortable without someone being on watch while they are sleeping; and

- finally, he said that meal times have been set to straddle shift change times. The meals are prepared by the on watch deckhand. Once it is prepared, the crew that are off watch have 30 minutes to eat before they go on watch and the crew that is on watch have 30 minutes to eat after they finish their watch. He says that Officers who are on watch are unable to eat while the vessel is in operation.

7. **Evidence of Terry Engler**

[54] Mr. Engler has been the President of ILWU Local 400 for 15 years. During that time he participated in negotiating several successive collective agreements and is responsible to the rank and file membership for the administration of them.

[55] He confirms the work scheduling systems in use by the Company described by Mr. Walker that continuous vessels on the Coast of BC leave for weeks at a time carrying a crew of between 4 and 8 crew members. The crew members live aboard the vessel for the entire time and currently work a two watch system of 6 hour shifts in which they work a total of 12 hours in each 24 hour period.

[56] He also corroborates the evidence of other witnesses that shift tugs can work on either 8 or 12 hour shift rotations although the former is not currently used. Therefore, even on shift vessels the crews are replaced every 12 hours. At the end of the shift a second crew comes aboard while the first crew may return home.

[57] In addition to the 12 hour shifts, employees may be required to work overtime and can volunteer to do call-outs. I should like to comment on Mr. Engler's statement that because of the exigencies of the work the parties to the collective agreement have recognized that it would not be appropriate in the circumstances to make overtime voluntary as is the case in other industries but they have attempted to control it by a requirement in Article 1.22(c)(iii) that it be kept to a minimum and, in all events, employees are prohibited from working more than 16 hours of overtime in any consecutive 7 day period. For purposes of that provision, overtime is defined as all time that is actually worked over and above 12 hours per day.

[58] Mr. Engler continued by explaining that call-outs are voluntary. For this purpose a call-out list is used when additional work is required that may involve employees who are not already at work. Employees volunteer to go on this list which the Company may then use to assign unscheduled or additional work during busy periods. He testified that in recent years the Company has increasingly used call-outs and overtime worked before and after a 12 hour shift. The use of call-outs for regular work has become increasingly common. However, the Company is penalized because it is then required to pay double time the regular rate of pay. On the employees' side, while it pays well, it does not attract a credit of lay days.

[59] Under Article 1.28 of the ILWU collective agreement Unlicensed Employee(s) have the option to convert 100% of their overtime into a "bank" of paid time off up to a maximum of 100 days and thereafter 50% of their overtime. The election is required to be made each and every time that the employee submits a claim for overtime. He said that the purpose of the overtime bank is to cover shortfalls in the monthly income of employees due to various factors. It assists them to achieve a reasonable work-life balance because the collective agreement does not provide sick pay to employees (outside of what is provided by the Health Benefits Plan in the form of

short term and long term disability benefits). He said that employees use it for incidental illness that is not covered by the Health Benefits Plan or if they have to miss a trip or a shift. Missing a trip can involve being off work for 4 – 6 weeks because of trip schedules. Weekly indemnity benefits only cover an illness or injury that last more than 7 days. He said that a family crises can also arise that requires employees to take time off or to obtain certification or otherwise pursue training and educational opportunities. Accumulated overtime is also used to decrease red days.

[60] Overtime on continuous vessels is dealt with by Article 2.01 of the collective agreement. Under subparagraph (i) employees who are off duty and called for overtime work are allowed 20 minutes (or 30 minutes during the period October 1 to March 31) to report for work. He says that the minimum payment for a call-out is three hours at straight time but triple time pay if they are woken up and work for less than an hour. Under subparagraph (l) all other time worked in excess of regular hours is required to be paid at a double time rate. He says that the requirement to pay a minimum one hour for overtime under subparagraph (j) where an employee works continuously from straight time into overtime has been in collective agreements in the marine industry since at least 1975.

[61] However, no shift or weekend premiums are required to be paid.

[62] With respect to shift tugs, he referred to language changes sought by the Company to Article 3.01 to insert the words “regularly crewed” which he argues would give the Company the right to decide which vessel would or would not be regularly crewed. The ultimate effect would be that by designating some vessels as not being regularly crewed it could avoid the requirement to provide 7 days of notice of any change in shift starting times. He elaborated his concern by referring to a recent instance on April 6, 2014 where the Company had tied up boats, moved some boats to other companies, and changed the status of some from shift vessels to call-outs. He said that the Company did not notify the affected employees about the changes illustrating the need for language that will provide consistent standards for all employees and compensate them for disruptions to their social lives.

[63] He says the Union has similar concerns relating to the fact that the current agreement does not require the Company to inform employees of the specific jobs to be performed on a call-out. By contrast, the collective agreement with the Guild includes language that requires it to inform employees of the purpose of the call-out and that when the job has been completed the Officer is entitled to go home. Without similar language for deckhands, he says they would be required to stay and complete another job without any additional pay. He said that the Union strenuously objects to the deletion of Article 3.01(h)(ii) which was originally negotiated to ensure that the use of call-outs would not result in a decrease of pay for members. With the increased use of call-outs by the Company he says that this article becomes even more important than when it was first negotiated. However, call-outs are not an issue relevant to the issues of hours of work and overtime. Therefore, I do not intend to deal with it in these proceedings.

[64] The Union is also opposed to changing Article 3.01(k) which provides employees on vessels working 12 hour shifts with a paid lunch break. He said that to replace it with language that would permit the Company to require employees to take lunch while a vessel is under way would mean that a crew practically might be unable to eat a meal for a period of up to 11.5 hours without any compensation. He also dealt with the proposal of the Company to use pager operated vessels in the Vancouver Harbour, which I will deal with separately.

[65] Finally, he provided a description of three new projects that the Union believes will generate work for the Company, two of which involve LNG terminals in the lower mainland. One is the Tilbury LNG Facility Expansion Project being done by FortisBC and the other is Woodfibre LNG. The third project involves the development of Roberts Bank Terminal 2 that will add a three berth container terminal with 2.4 million TEUs (20 foot equivalent

units) of container capacity. He said each of them will require escort or ship docking services which demonstrate the potential for new revenue sources for the Company.

8. **Evidence of Sydney Brown-John**

[66] This witness is an executive member of ILWU Local 400 and a member of the Negotiating Committee for the renewal of the collective agreement with Seaspan. He was also a member of the negotiating committees for two previous collective agreements in 2000 and 2003. On the operations side, he works as a full time deckhand with Seaspan and has worked primarily in the Vancouver Harbour since 2008. He has worked on the west coast since 1988. Prior to that, he worked as a deckhand on the east coast of Canada and on the Great Lakes from 1976 to 1987. During his sojourn on the east coast he worked for companies that used a three watch system.

[67] He testified that he did not know any other maritime company that uses a pager system. He said that one of the problems with the pager system is that it could require an employee to work up to three split shifts within a 24 hour period. This would result in inconsistent sleeping patters and interrupted sleep. In addition, he said an employee could be off for 10 hours and then called into work two hours toward the end of his off period providing the employee with only 8 hours of rest.

[68] Moreover, he says that tugs are not conducive to proper sleep. Shift tugs do not have beds or bunks. They only have a settee with two cushions, which the skipper often uses for short naps. Deckhands sometimes sleep on the floor. He said that Seaspan currently has four escort tugs that will accommodate long periods of stay but that the pager system will use only tractor and conventional tugs that are not conducive to sleep when they are idle.

[69] He said that there are many variables in the Vancouver Harbour that affect the safety of employees and the feasibility of the pager system. These include delays, jobs on short notice, difficult commutes from home to dock and issues relating to weather and tides. He said he recently had an experience where he was directed to go to Dock Lynn Terminal #1. According to him, they picked up the pilot at 3:30 pm and took him to the ship which was scheduled to leave at 4:00 pm. However, problems were had loading the containers as well as the gangway, the problem being that a crew change for the tug used to dock the ship was scheduled for 6:00 pm. He said that as a result, his crew stayed on shift and were late returning to the dock for the crew change.

[70] With respect to the problem of commuting in the lower mainland, he said that living in Coquitlam, as he does, he often experiences delays coming into the Seaspan main dock off Pemberton Street because he is often held up at a railway crossing due to a train. Turning onto Pemberton Street there is a rail crossing before the Seaspan main office and there are no alternatives to reaching the main dock by vehicle.

[71] He said that dispatch often has trouble dispatching tugs when they are manned 24/7 which would be exacerbated by a pager system. There are currently six tugs manned on that basis. These are able to attend to any required jobs as they arise while if a pager system were introduced it would escalate the time because they would be crewed after each new job comes up. He gave an example of an incident involving Kinder Morgan and an oil barge. The oil barge was tied to a ship and required a tug to assist in setting up extra lines because of a large tide. The ship's hydraulics failed which presumably precluded the lines from being set and caused the ship to drift with the tide. The barge phoned Seaspan which sent a manned tug to assist. He said that he believed that a pager system would not have been able to deal with such an urgent and immediate request. He commented that all ships have a certain tide window at the Second Narrows Bridge that affects the nature and amount of jobs that can be done. Seaspan has a policy that no oil or chemical barges can be towed if there is more than two knots of current at the bridge.

[72] Other issues in the Vancouver Harbour are that there are approximately 50 docks not including ship yards and navy buoys that must be navigated around. Ship yards add another 11 docks. Also, the number and type of barges that have to be towed vary dramatically. They often work with oil, chemical, cargo, potash and grain ships each having different characteristics with respect to tide windows and weather. For example, potash and grain ships cannot be loaded in the rain. During the cruise ship season there are often up to two oil barges at Canada Place.

[73] Finally, he contrasted the situation on the east coast on its ability to accommodate a three watch system. He said that ships in the Great Lakes region are set up for a three watch system. Bigger vessels are used which provide crew members with a variety of activities to do during their free time other than sleep for 16 hours. In addition, crew members often have their own cabins with access to recreation facilities and weight rooms on the ships and the ability to go on shore and visit ports and cities which are always nearby.

9. **Evidence of Ziggy Mangat**

[74] This witness is a junior deckhand with Seaspan and a member of the ILWU Negotiating Committee for the current round of collective bargaining. He is a relief employee who does not have a regular schedule.

[75] Mr. Mangat testified that he had previously worked for Rivtow/SMIT Marine and LaFarge. He said that the former employer provided overtime conversion similar to the program at Seaspan where employees had the option to bank their overtime. It could then be used if the employee needed cash or wished to use it to pay for missed days of work. He said that it is particularly important for junior or young employees for the following reasons:

- it permits them to obtain a regular cheque even though they may not have a regular schedule by using accumulated overtime to set off days that they do not work. He said that a regular income is important to demonstrate financial stability for purposes of applying for mortgages or loans or seeking rent. When he recently applied for a mortgage, he said that he had to provide six months' worth of regular pay cheques in support of his ability to repay the loan;
- employees do not receive sick days. Weekly indemnity benefits only begin on the 7th day after seeing a doctor. Overtime conversion allows them to obtain income in cases of emergency, including responsibilities relating to the care of close family members;
- overtime conversion allows employees to offset red days. He said that if an employee accumulates more than 45 red days he cannot refuse an offered work assignment except in an emergency. In his case, he said he was able to use his overtime to offset his red days during a difficult period when his father experienced a medical emergency requiring his assistance;
- overtime allows employees to take time off to pursue education, receive additional training and certifications or upgrade tickets, which he says also benefit the employer. He said that a couple of years ago he used his accumulated overtime to write an exam for a SVMO certification. He has also used it to take courses at BCIT and Transport Canada; and
- junior employees are vulnerable to being laid off in which case any overtime accumulated by them can be used to forestall the period that they would otherwise be without income. He said that he was laid off last summer, which I may properly take to refer to 2014 and recalled two months later in August. He said that he was able to use his overtime bank to cover the shortfall in order to pay his mortgage and other bills.

[76] He took the position that ILWU members should have the same right as Guild members to be informed of the number and type of jobs on a call-out. He said he experienced a situation two years ago when he served as a deckhand on a vessel where both he and a Master were called out for a job to dock a ship. He said they were able to complete the job well within the minimum 4 hour call-out period at which time dispatch called to say that there was yet another ship to be docked. The Master, however, refused because he had only agreed to do one job so that he could pick up his daughter from school which he was entitled to do under the Guild agreement. However, he said he was required to stay for the entire period to work with another captain who was called out for the purpose.

[77] He also related another instance about a year ago when he was called out to do a short shift. He advised dispatch that he could only do the one job because he had to assist his grandmother to attend a dialysis appointment at VGH. Nevertheless, when the job was finished he was told that he could not leave the boat until the end of the shift. I do not understand him to say that he had been required to stay longer than the prescribed shift. Nor did he say that he had been unable to assist his grandmother as a result. Nevertheless, because of his experience he said that he decided to remove his name from the call-out list because of what he called the "deliberate actions of providing inconsistent information about the number and nature of jobs."

[78] The problem with that characterization, however, is that it reflects a gross misunderstanding about the reach of the ILWU collective agreement -- that it does not require that such information to be given. He prefers to see it as insensitive administration but absent language in the agreement similar to that of the Guild it is difficult to treat the concern as a significant issue, particularly in the circumstances described, where he was paid properly for the hours that he worked.

10. General Considerations Relating to the Substantive Issues

[79] Mr. Leenheer stated that the approach of the Company on issues relating to hours of work and overtime has focused on four overriding concerns:

a. its current scheduling options under the collective agreements do not allow it to match the crewing of vessels to customer demands, resulting in an enormous amount of idle crew-on time, wasted costs to the Company and wasted time of its employees;
b. permitting the conversion of banked overtime into leave comes at a significant cost to the employer when the same outcome for employees in terms of time off work and total pay received can be achieved without that cost;
c. the collective agreement allows (and in some cases incentivizes) circumstances where there is an unreasonable discrepancy between the overtime an employee actually works and the cost of the performance of that work to the Company or where there is an effective pyramiding of benefits by employees; and
d. a three watch system on its continuous vessels would provide for a lower cost and lower fatigue way of performing the same work as is currently undertaken under the two watch system.

[80] Quite apart from the argument made by Mr. McGrady relating to the duty on contracting parties to act honestly and good faith, which I addressed earlier in this award, he postulates on behalf of the ILWU that the changes sought by the Company are based upon its perceived need to remain competitive. However, he asserts that the competition by which it seeks to justify what he called, extraordinary changes, is almost entirely limited to Ledcor. He says that the effect of the competition is more evidenced by the growth of its fleet of boats and barges than the actual loss of significant business that could be attributed to them. While the entry of Ledcor into the

sector, particularly into towing in the Fraser River is undeniable, he asserted that no evidence was presented to demonstrate whether most of it is for its own construction projects or for third party customers.

[81] When it came to comparing the relative costs of the collective agreements, the evidence of the Company was that a shift deckhand working for Seaspan will earn a base wage of $62,302.50 based on 1950 hours worked (37.5 hrs/week) plus overtime and benefits of $32,542.65 for a total labour cost of $94, 845.15. This compares to an estimated total labour cost of Ledcor of $82,568.39, a difference of $12,276.76. Expressed as a percentage, a deckhand working for Ledcor costs 22.8% less than one working for Seaspan, which is further exacerbated by the fact that a Ledcor deckhand works 40 hours/week. The difference is slightly less for Masters. A Seaspan shift captain has a total compensation cost of $119,903.69 compared to a Ledcor captain at $108,694.02, a difference of 19.61%.

[82] What Mr. McGrady says about that evidence is that the calculation was based strictly on the arithmetic derived from the language of the collective agreements but no one spoke to Ledcor to make a determination of their actual costs. This is based upon the presumed premise that the actual average cost of a deckhand would provide a more realistic comparison. While I accept that to be true in an absolute sense, in practice I doubt that there would be much of a difference. For our purposes, it is sufficient to know that there is a significant difference between them which most certainly could put the Company at a competitive disadvantage, all other things being equal. Nor would it be reasonable to think that if a representative of Seaspan were to ask Ledcor for financial information on its actual labour costs that it would be provided.

[83] In fact, the evidence was that Ledcor is not the only competitor of Seaspan on the west coast. Ledcor, however, may be the most active. Seaspan lost contracts to them for Howe Sound Pulp & Paper, Mainland Sand and Gravel, Lehigh Marpole and Tree Island Steel. The fact is, however, that there are literally dozens of tug boat companies that operate on the west coast but only two of them were identified as significant additional competitors, Catherwood Towing Ltd. and Samson Tug Boats Inc. The latter company does ship berthing in the Fraser River. The evidence on them was that SMIT lost almost 30% of its market share due to Samson's entry into the New Westminster ship assist business and that in the last two years SMIT's rates for ship docking had to be reduced by 40% in order to match Samson's rock bottom rates raising the question, how long before they do it in the Vancouver Harbour.

[84] Mr. McGrady asserts that Seaspan even subcontracts work to all three of its major competitors, Ledcor, Sampson and Catherwood, which he described as an odd arrangement but not sinister except for the fact that there was no evidence provided by the Company whether any cost savings from those contracts were retained by Seaspan or passed onto its customers. His point derives from the position taken by Counsel for the Company that the competitive pressures on Seaspan must necessarily induce it to reduce its costs and pass any savings on to the customer. Mr. Bingham testified that its service contracts typically have automatic de-escalation clauses that require the Company to pass on 55% of the savings. Mr. McGrady described the absence of any actual evidence that savings had been passed on to customers, as a surprising gap in the evidence although I don't see that as having any particular significance for my purposes. An issue that could properly arise is that if they are real competitors why would Seaspan deal with them at all because the result must necessarily be that it would contribute to the revenues of their competitors and enable them to compete even better.

[85] On the other hand, the truth is that business transactions are most normally mutually beneficial to both parties. I would be more surprised if Seaspan did not make a profit from such subcontracting activities. As we have already seen, the evidence of Mr. Walker was that Seaspan can charter vessels from competitors to perform some of its own work at a cost less than what it costs to do it with its own crews. The fact that Seaspan is prepared to do

business with them is further validation that a negative cost difference exists with them. That is what makes it advantageous to deal with them. The real issue in the circumstances is whether there is a burden on the employees to assist the Company in the mitigation of those cost differences.

[86] Perhaps the most significant factors in the determination of the impact of those competitive pressures lies in the facts that firstly, the Company does not deny that it is making an operating profit. Of course, as I have already said, we have not been provided with the financial documents to demonstrate it but I think it to be implicit in the position that Seaspan takes that it is insufficient to fund its cost of capital. Secondly, the most profitable segment of its operations is ship docking and escort work in the Vancouver Harbour, the busiest in Canada, where it dominates with a 61% market share. The point made by Mr. McGrady in that respect is that one may assume that it will continue to dominate that market well into the future because neither Ledcor nor any of the other two major competitors are in it. Moreover, he postulates there was some evidence that the work is controlled by a tariff except that none of the witnesses were able to say who sets it or provide any other details about it. Nevertheless, he asks me to speculate that if it is tariff work, it would significantly limit Ledcor's ability to compete as a low cost service provider because its revenues would be the same as the other operators.

[87] The problem with that argument is that it ignores the effect of the operators costs in the determination of its profits. As a low cost operator, a tariff would produce a higher profit margin than could be achieved by the higher cost providers. Instead of an impediment to Ledcor deciding to come into the Harbour it could act as an incentive to do so. That thesis was taken up by Mr. Leenheer who took the further position that there are no contractual or market-based impediments to Ledcor or any other company entering the Vancouver Harbour market other than access to a suitable tugboat to undertake the work and that it only takes 11 months or less to build one.

[88] The Guild takes a somewhat different approach to the issue whether the competitive pressures facing the Company are sufficient to compel significant changes to the collective agreement. Mr. Matthews takes the position in that respect that in the absence of fully compelling evidence of the overall significance of emerging competition on the financial performance of the Company the profound changes being sought by it cannot be justified. Of course, the premise of his position rests, as I have already discussed, on the absence of financial statements including overall revenues but he goes one step further, arguing that there was equally no evidence given on any actual impact on revenues due to lost contracts. In particular, he says that even if one accepts the evidence of the Company on the cost advantages of the Ledcor collective agreement, no evidence was presented that demonstrated that it was having any effect on the profitability of the Company. Nor is there any evidence that the difference was the cause of the lost business that it has suffered.

[89] He contends that the Mainland Sand and Gravel contract is a case in point. He says that it was not originally tendered by the Company but rather was inherited through its purchase of Smit Marine Canada Inc. It was a 10 year agreement running from October 18, 2005 to December 31, 2015 and while the parties entered into a letter of intent for a new 20 year contract, for its own reasons Mainland Sand and Gravel decided to give the contract to Ledcor. He says, quite properly, that what we do not know is why the letter of intent was not implemented. It may or may not have been that Ledcor outbid the Company.

[90] That appears to be the case. There was no evidence that the contract was even competitively tendered, quite apart from why it was awarded to Ledcor. The termination letter from Mainland Sand & Gravel dated December 8, 2014 giving a 12 month notice that the contract will expire at 12:01 am on January 1, 2016 states that the Company had been aware for some time that the change was coming. It went on to express appreciation for the exemplary service that had been provided by the Company but otherwise did not state why the contract had

been given to Ledcor. An earlier press release in July 2013 from Ledcor announced that it had been chosen as the Mainland marine transportation provider. One clue perhaps was a comment that Ledcor had committed to make a significant investment in new equipment of some $18 million and that prior to the commencement of service it would construct six new barges and augment its fleet of tugs. At the same time, however, the evidence was that Seaspan had also committed to similarly provide new equipment and had already put two new barges into service at the time notice was given that the contract was going to be discontinued.

[91] Mr. Matthews argues that there is evidence to suggest that even if the changes being sought by the Company were achieved in these proceedings, it would likely still not be competitive on price. He pointed to a document introduced by Mr. Walker which demonstrates that its weighted average operating costs are even above its competitors that share materially identical collective agreements. Each of Harken, North Arm and Pacific Towing all charge hourly rates under those of the Company yet he asserted that they all shared substantially the same collective agreements. He suggests that should be taken to indicate that even with the "concessions" Seaspan now seeks, there is nothing that would permit me to conclude that Seaspan would have won the Mainland contract.

[92] In point of fact, he says that the Company evidence suggested that it has more work than it has boats to perform it in the river and must charter out some of it to other companies and that the loss of the Mainland contract may have been fortuitous because it will free up vessels and personnel to perform this additional work rather than contract it out.

[93] What he says we do know is that the Company is in "pretty good financial shape". He referred to the evidence of Mr. Bingham that the Company had a good 1st quarter in 2015 but continued by saying that it must have been more than good because it recently contracted to build $25 million worth of new barges and that it is borrowing $350 million for 10 years at a fixed interest rate of 3.5%. Moreover, the Company is hiring new deckhands which, he says does not portray a company that needs drastic cuts in order to compete.

[94] I am not prepared to go that far. Certainly the initiation of a significant hiring program appears to be optimistic on its face except that it was explained to be designed only to replace employees who had left and that it would not increase the overall staffing complement. In the same way, incurring debt to pay for capital improvements may be a negative implication because the Company is forced to borrow rather than fund those costs from profits, which is effectively the position taken by the Company in this case. The real problem, as I have already discussed, is that there is simply a dearth of critical financial information which precludes me from obtaining a clear picture of the ability of the Company to compete in the marine sector on the west coast of British Columbia.

[95] Many of its competitors have essentially the same collective agreements that have been negotiated through the Council of Marine Carriers of which the Company is a member. That is beginning to change through a recognition that their individual corporate interests are not always the same and that their collective agreements in some respects can properly be tailored to meet the discrete circumstances of each of them. The CMC ceased functioning as the employers' bargaining agent in 2006 but the collective agreements negotiated amongst them have remained remarkably standardized. Having said that, what must be absolutely clear from the evidence available to me is that nothing in it is indicative that the Company is in a financial crisis. The magnitude of the Company's demands in this case is inconsistent with that evidence. The consequence must be that these proceedings must be seen to be more in the nature of ordinary collective bargaining that must be certainly influenced by the regular competitive pressures within the marine sector but that no financial crisis has been

demonstrated that compels a drastic restructuring of those agreements. The failure of all the parties to these proceedings to recognize that reality has been the cause of the failure of the earlier negotiations.

[96] I addressed the jurisprudential principles that apply in such circumstances in the earlier Health Benefits Plan awards. I do not intend to revisit the jurisprudence here to any great degree except perhaps to reiterate what I said at paragraph 137 of the first award as follows:

> Interest arbitrators are mandated to prescribe agreements using objective criteria by reference to existing standards and other appropriate comparative criteria, including the ability of the Company to compete in an environment that is increasingly dominated by quasi-union contractors: *Construction Labour Relations Association of British Columbia and Plasterers Section of the Operative Plasterers and Cement Masons International Association Local 919* [2002] BCCAAA No. 438 @ para 7.

[97] I went on to say that it does not require arbitrators to lock the parties into a collective agreement that does not provide for long term sustainability. More generally, I accept the summary of principles governing interest arbitration provided by Arbitrator McPhillips in *Nelson (City) and Nelson Professional Fire Fighters Association* [2010] BCCAAA No. 174 @ para 10 as governing the circumstances in this case:

> First, replication is the desired outcome and that refers to the notion that an interest arbitration board should attempt to duplicate what the parties themselves would have arrived at if they had reached an agreement on their own. … In Board of School Trustees, School District No. 1 (Fernie) and Fernie District Teachers Association 8 LAC (3d) 157 Arbitrator Dorsey stated at p. 159 that … the task of an interest arbitrator is to simulate or attempt to replicate what might have been agreed by the parties in a free collective bargaining environment where there may be the threat and the resort to a work stoppage in an effort to obtain demands … and the arbitrator's notions of social justice or fairness are not to be substituted for market and economic realities.
>
> A second principle is the requirement to be fair and reasonable in the sense that the award must fall within a reasonable range of comparators even if one party could have imposed more extreme terms. …
>
> Third, the exercise of interest arbitration has been described as a conservative process and that it ought to supplement and assist the parties' collective bargaining relationship and not unravel or depart from it. … Interest arbitrators are enjoined to replicate the collective bargaining process. Thus, it is predictable, and perhaps inevitable, that they will follow bargaining trends, not set them.
>
> Fourth, as a result of this reluctance to innovate, historical patterns of negotiated settlements between the parties will carry significant weight.

[98] In this case I consider that my approach must necessarily be based on the finding of fact that there is no financial or other crisis that must be addressed through a radical restructuring of the collective agreements. Moreover, I consider the acknowledgement by the Company that its decision not to tender its full and complete financial statements into evidence must result not only in removing a tool of persuasion from its arsenal, as was argued by Mr. Leenheer but is an implicit recognition itself that it is not going to be practically possible through these collective agreements to achieve a complete realignment of its cost structures with other marine carriers. Even in a crisis situation it could not reasonably expect to achieve adoption of its entire package of proposed amendments. The consequence must be that if it is going to be successful in competing with other marine carriers it is going to have to do it not just by reducing operating costs but also by being innovative in other ways such as

moving into new or other expanded revenue markets, not through a radical restructuring of the collective agreements.

[99] At the same time, the Unions cannot expect me to ignore the competitive pressures faced by the Company. Since they are effectively partners in its operations they must take some responsibility for its long term sustainability. Changes must be accepted to reduce costs to make it more competitive, where it can be done without making substantial concessions or other serious incursions upon the existing wages and other conditions of the work. These may be found in productivity improvements, the elimination of restrictive work rules and the introduction of new methodologies and work structures without making substantive changes to the total compensation provided to the employees or to the work-life balance that they currently enjoy.

[100] Part of the issue will also be to address heretofore defective lines of communication which have impeded the parties from renewing their collective agreements amicably, by improving opportunities to collaborate together rather than eliminating them. Effective communication does not lie in the Company simply informing the employees what it expects them to do but rather by engaging them in the planning and administration of it. This imperative was recognized by Mr. Whitworth in several of his executive messages in one of which he quoted from Charles Darwin with approval who said:

> In the long history of mankind, those who learned to collaborate and improvise most effectively have prevailed. Although Mr. Darwin lived over 150 years ago, I firmly believe he hit the nail on the head when he talked about adaptability and teamwork. I can't think of a better team than we have at Seaspan Marine Corporation and together we will work through these periods of change, and we will prevail.

[101] I will now turn to address the substantive issues in dispute between the parties.

11. **Overtime**

[102] The Company has proposed to reduce the rate it pays for overtime from double time and triple time to time and a half and seeks to require that it be paid in one half hour increments instead of the minimum one hour increments provided by the current collective agreements.

Article 1.26 of the Guild agreement provides:

1. Time worked in excess of regular hours to be paid at the rate of double the straight time hourly rate;
2. Overtime shall be calculated at a minimum of one (1) hour and in one-half (1/2) hour increments thereafter.

Article 2.01 of the ILWU agreement provides:

(j) When an Unlicensed Employee(s) is working continuously from straight time into overtime, the minimum overtime payment shall be one hour.

(l) Time worked in excess of regular hours shall be paid at the rate of double the straight time hourly rate.

[103] I reject the proposals to reduce the overtime rate as having no current rationale other than to reduce costs but without demonstrating the impact that this would have on operating revenues. Under the circumstances, any such change would amount to nothing more than a concession or reduction in wages without any demonstrable set off to employees. The triple time premium is primarily, if not exclusively to induce employees to

work at Christmas time or to accept short term call-outs, which I presume was considered by the Parties to be mutually beneficial to induce employees to work at unpopular times.

[104] Mr. Matthews asserts that the provisions of the current agreements represent the prevailing standard in the industry that all work in excess of 12 hours in a day is paid at double time rates which I accept. Nor am I persuaded that any change should be made at this time to the minimum increments set out in Article 1.26.2 of the Guild agreement or Article 2.01(j) of the ILWU agreement. Those provisions are consistently aligned with the collective agreements of most other operators in the marine sector except Ledcor.

[105] Counsel for the Company took the position that current provisions of the collective agreements dealing with overtime and missed meals on the other hand are unfairly punitive and result in unearned windfalls for employees as follows:

<u>Shift Vessels</u>

i. the Company is required to pay an employee 2 hours of pay if 10 minutes of overtime is required, or even if this involves the performance of no actual work such as where the employee is merely 10 minutes late returning to their home dock due to a delay in a water taxi;

ii the Company is required to pay an employee a minimum of 4 hours pay in order to commence a shift 15 minutes early unless the employee happens to be at the dock and ready to start work early of their own accord, in which case the Company is required to pay 2 hours of pay; and

iii. the Company is required to pay an employee 30 minutes of pay for their meal break, pay for the food the employee eats during that break (in the form of subsistence) and then pay a further hour of pay to the employee if the meal is not taken in the short window during the middle of the shift that is specified in the collective agreements. This results in the Company being required to pay 1.5 hours of pay to an employee who is delayed in taking their meal from the precise middle of their shift by as little as 30 minutes for Unlicensed Employee(s) or 45 minutes for Officers.

<u>Continuous Vessels</u>

i. if the Master requires himself or another employee to perform 15 minutes of work during an off watch period, the Company must pay the employee 3 hours of pay at his straight time rate;

ii. if the Master then requires himself or the other employee to perform a further 15 minutes of work 2 hours later, the Company is required to pay the employee 6 hours of pay for that work;

iii. if the Master requires himself or another employee to work 30 minutes from their on watch period into their off watch period, the Company must pay the employee 2 hours of pay in respect of the overtime and 1 hour of pay in respect of the missed meal resulting in a total of 3 hours pay for that 30 minutes of work and the imposition of two penalty payments (overtime and missed meal) in respect of the same 30 minutes of work.

[106] Except for the issue relating to meals, I consider that these issues should be dealt with in the same manner as overtime rates. I am not persuaded that any changes should be made to the collective agreements in that respect at this time.

Meals

[107] This issue was quite controversial even though it does not involve significant value relative to some others. Currently the agreements require that the Company provide a paid 30 minute meal break as well as the food and then a further hour of pay if the meal is not taken at the prescribed time at the middle of the shift.

[108] Article 2.03 of the Guild agreement provides as follows:

> 7. Meal hours for Officers covered by this Agreement shall be as follows: (except as provided in Article 1.27(9) :
>
> Breakfast: from 05:30 – 06:30 hours
> Lunch: from 11:30 – 12:30 hours
> Dinner: from 17:30 – 18:30 hours
>
> These hours may be varied provided such variation shall not exceed one-half (1/2) hour either way, and also provided that one (1) unbroken hour shall be allowed for meals at all times when the vessel is in port. There shall not be more than six (6) hours between the end of one (1) meal period and the start of the next meal period.
>
> 8. Penalty Meal Hours
>
> (a) Where an Officer works from an off watch period into an on watch period, he shall be given one-half (1/2) hour in which to eat immediately following completion of the work. Where an Officer does not receive one-half (1/2) hour in which to eat, he shall be credited with an additional one-half hour at the overtime rate, as a penalty thereof.
>
> (b) Where an Officer works from an on watch period into an off watch period, he shall be given one-half (1/2) hour in which to eat immediately following the on watch period.
>
> 9. Where an Officer does not receive one-half hour in which to eat, he shall be credited with an additional one-half hour at the overtime rate as a penalty thereof, and his time shall be continuous.
>
> 10. Night lunches shall be provided.

[109] Article 2.07 of the ILWU agreement is very similar although it makes provision for a one hour meal period for dinner and supper when the vessel is in port. It also provides for coffee breaks on overtime shifts where the safety of the vessel and tow allows.

[110] What the Company proposed was to replace the meal hours provision in each case with language to the effect that meals hours shall be set by the Master of the vessel, taking into account the watch system being used and the operational needs of the vessel. In those terms, it would eliminate the set hours for meals in favour of a much more flexible system by which the Captain would determine when employees should eat. It also proposes to delete all the other provisions that include penalties in the event that meals cannot be taken within one half hour of the prescribed meal times and substitute it with a provision as follows:

> Each shift includes a thirty (30) minute paid lunch which can be taken while the vessel is under way.

[111] The Unions vigorously opposed the changes on the basis that the current premiums and penalties were necessary to promote regular meal times in an industry that already involves long hours of work and difficult working conditions. They were even more adamant about the proposal to take lunch while the vessel is operating based safety concerns that vessels require the full attention of the crew while under way. In addition, Mr. Matthews took the position that no evidence was presented on the frequency at which the alleged "abuses" said to exist by the Company were to occur. He argued that those presented appear to be anomalous examples. He said that the changes sought are just further examples of the Company attempting to shift the operating costs and inconvenience onto the employees. Mr. McGrady argues that the proposed change would eliminate the regularity of the meal break, which is particularly important on a continuous shift vessel and permit it to be taken at any time during the 12 hour shift.

[112] My view is that while the current system suffers from a degree of inflexibility, to convert to a system of complete flexibility would be a mistake. I am not convinced that it would be justifiable on any basis to do away with actual breaks for meals notwithstanding that they are paid breaks under the terms of these agreements. For example, Section 32(1) of the Employment Standards Act requires that employers under provincial jurisdiction must ensure that no employee work more than 5 consecutive hours without a meal break and that each such break last as least one half hour. However, subsection (2) contemplates that there may be some workplaces where employees must work or be available to work during a meal break. Of course, I understand that the marine industry is under federal jurisdiction but the Employment Standards Act may, nonetheless, be seen to constitute a comparable standard for our purposes.

[113] I am not entirely convinced that it would necessarily be unsafe for the Master to eat while under way, particularly when it is done only on an occasional basis. Without evidence, however, I am not satisfied that it would be appropriate to make the change a permanent one. Nevertheless, I think it would be entirely appropriate to introduce a small degree of flexibility as to when meals may be taken. I would continue the prescribed meal hours under both collective agreements but modify the sentence immediately thereafter to the effect that they may be varied provided that such variation shall not exceed one (1) hour either way instead of the one half (½) hour as is presently the case. The last sentence that requires that there shall not be more than six hours between the end of one meals period and the beginning of another shall be deleted as being unworkable.

12. **Overtime Conversion**

[114] This was a significant matter in dispute between the Parties. Currently, Article 1.26.3 of the Guild agreement and Article 1.28 of the ILWU agreement provide that employees shall have the option to convert 100% of their overtime into time off in lieu thereof up to one hundred (100) days banked and 50% thereafter. In addition, the Guild agreement permits statutory holiday pay to be converted while the ILWU agreement provides for banking overtime and other premium rates excluding flat rates.

[115] The Employer seeks to do away with all overtime conversion and to simply pay out all overtime as it is earned. It says that by permitting employees to accumulate large amounts of overtime and then to take time off essentially at their discretion has forced it to hire the equivalent of some 20 to 25 additional employees to relieve those who are off work on paid overtime leave. It took the position that not only is it required to pay another employee to substitute for the employee off work but because it involves a new hire it adds significant benefit costs including health plan benefits, pensions, vacations, and employment insurance. Mr. Walker calculated that the extra costs in 2014 alone amounted to $1.128 million.

[116] Mr. Leenheer argues that if overtime banking were eliminated, employees could achieve precisely the same outcome in terms of money in their pockets and time off work by taking their overtime pay in cash when it is earned and saving it in a commercial bank and then requesting a leave of absence which would be granted on the same terms as banked overtime which is to say, the employee would have to give 14 days' notice which could not then be unreasonably refused by the Company. In fact, he said that they would be better off because they would be able to earn interest on the money deposited which they do not receive on their overtime bank. Some 32% of employees do not convert their overtime and would be entirely unaffected by a change made resulting from the Company's proposal.

[117] He purported to reduce the reasons advanced by the Unions in support of maintaining this benefit into five objections, which I consider to be an accurate summary of them. They say that banked overtime is needed for the following purposes:

a. to allow employees to have an income when they are sick during waiting periods for weekly indemnity or to allow them to receive an income during absences from work for unexpected events such as a domestic emergency;
b. to prevent employees being blocked off pay during periods when there is no regular work and they are working only call-outs;
c. to enable employees to give the appearance to banks and other lenders that they are regularly employed in order to support applications for mortgages and other loans;
d. to enable employees to defer the payment of income tax to a subsequent tax year; and
e. to provide employees who may be poor at managing their finances with a fund that they have greater difficulty accessing than their own bank accounts.

[118] With respect to the first two objections, Mr. Leenheer says that employees could achieve the same objectives by using their own bank accounts. However, with respect to the other three objections, he proposed an interesting modification that the Company would continue to allow employees to bank overtime and other premium pay which they could then apply to withdraw in cash to cover time off with pay. As he says, it would also allow them to maintain consistent pay cheques or defer the receipt of the money if so desired.

[119] While I have described it as an interesting proposal, I am not convinced that it would provide the same advantages as the employees currently enjoy. What has stood the test of time is the way it works now where the overtime is retained as a form of deferred salary so that it is not subject to income tax until it is actually paid to the employee. If the proposal is that the Company will cease paying the money out as a form of deferred salary but rather treat it as a deposit in a bank account operated by the Company, it would almost certainly be taxable upon deposit which would essentially defeat the purpose of it.

[120] I recognize that it is perhaps possible that the deposit could be structured as deferred salary but if that is the case it is difficult to see what advantage the Company would obtain from it. In any event, it is my view that we have not had a sufficient opportunity to explore the proposal, without which it would not be prudent to accept it. It leaves us with the original issue which is whether there is sufficient reason to justify the elimination of the existing system.

[121] I must admit to a great deal of sympathy with the premise of the proposal which is to simplify the administration of the pay system. In a real sense it resembles the basic nature of the issue whether to remove the health benefit plans from the industry system which also presented economies that could be realized while preserving substantially all of the benefits to the employees. In a similar way, this proposal arguably would not

diminish the earnings of employees. They would continue to receive precisely all monies earned by them without diminution but rather it would be paid to them at a different time. As Mr. Leenheer argued, they could then deposit those same monies in a personal bank account, even accumulating interest on it, and then use it in lieu of wages when they want to take time off in the same manner as is done with the overtime bank except that it enables the Company to simplify the administration of the pay system.

[122] On further analysis, however, there are several problems with the theory, perhaps the primary one being that it ignores the practical reality that for the most part, the employees would not likely have the discipline required do it on their own. In addition, even if all of the employees were to administer their own overtime earnings it would probably not save the Company the expense of hiring the extra 20 – 25 employees because they would continue to take off the same amount of time that they do now. Even if that is wrong, it is not part of the argument that the accumulated overtime is not fully earned by the employees doing work and that it is in excess of what they would regularly be required to do. Having given extraordinary service, the Company should be prepared to accommodate them to take it as paid time off.

[123] Moreover, perhaps the most compelling point to be made is that earnings and overtime banks are a dominant feature of collective agreements in most industrial sectors including the marine industry. On the evidence, language providing for overtime conversion has been included in collective agreements with the Unions since 1977. As Mr. McGrady points out, it has survived a period of 57 years and bargaining for 11 collective agreements, each round either preserving or improving but none reducing the benefit. When one then considers the central fact that the Company does not find itself in a financial crisis, there is no compelling reason to change it. Therefore, the proposal of the Company that all overtime be paid out and not banked for leave purposes is not accepted.

[124] What I am prepared to do, however, is to make changes to the agreements to control the accumulation of overtime by eliminating pyramiding, improving productivity or paying overtime for doing work that is simply not overtime in appropriate circumstances as they may appear. I also considered imposing a cap on the amount of time that may be accumulated or perhaps limiting conversion to overtime only. Had I done that I would merely have precluded employees from converting statutory holiday pay or other forms of premium pay. However, on further analysis it seemed to me that such restrictions would serve little purpose in the overall scheme of the program.

[125] What I think would be appropriate, however, at this time is to restrict the use of converted overtime in a manner that would focus more on the operational requirements of the Company. The Guild had proposed to restrict the use of converted overtime to a maximum of 52 days per year but that seems to me to be somewhat arbitrary and does not address actual operating requirements. What I have decided ought to be done is amend the agreements to make it clear that converted leave cannot be taken at the discretion of an employee by simply giving 14 days' notice, as is apparently the current practice. Rather the notice must take the form of an application to the Company for permission to take converted leave which shall only be granted if operational requirements can be reasonably accommodated at the time applied for.

[126] At the same time, I adopt a proposal of the Guild that will expressly permit employees to apply to use converted overtime for time off to attend to certain specified personal matters that may be particularly important to the employee. In those instances, the Company shall be under an obligation to make every possible effort to accommodate employees to attend to:

1. urgent domestic or personal affairs;
2. reduce red days;
3. further relevant educational or training opportunities;
4. sick days; and
5. union business.

[127] Consistently with the above, the only other change I would make in this respect is to preclude an employee from retaining converted overtime and be paid into the red as is currently permitted under the agreement. The use of red days to supplement an employee's income while off work is effectively a loan to the employee. It makes little sense to permit an employee to elect to access red days when the employee has converted overtime available that could be used for that purpose.

[128] The matter of the drafting of language dealing with those issues is referred back to the Parties. I reserve jurisdiction over it in the event they are not able to agree.

13. **Three Watch System**

[129] The Company seeks the right to implement a three watch system on some of its larger continuously operated vessels. In its most simple form, such a system involves using three separate crews to operate a vessel, each working 8 hour shifts over a 24 hour period. Within that 8 hour limit, however, the shifting arrangements can vary dramatically depending upon the type of vessel and the nature of the work.

[130] The Guild collective agreement only permits the Company to work Officers on a two watch system using alternating 12 hour shifts. Article 2.01.1 provides:

> The hours of work for Officers on continuous operating vessels shall be the two watch system of six (6) hours on and six (6) hours off, commencing at the beginning of the calendar day.

[131] The ILWU agreement contains no such provision. Mark Bingham properly observed that each system has its own advantages and disadvantages. He said that under the two watch system the one watch is called the "Captain's Watch" and the other the "Mates Watch". Each watch is 6 hours long followed by 6 hours off watch. This can be illustrated by the following example which is typical for vessels that have a crew of 5. In that case the Captain, the engineer and a deckhand come on watch at 0600 and work until 1200.Then those crew members go off watch and the Mates Watch begins with the Mate and one deckhand coming on watch at 1200 and working until 1800. The Captain's Watch then commences again at 1800 and finishes at midnight. Finally, the Mate's Watch recommences at midnight and finishes at 0600. That arrangement then continues over the entire period of the voyage which can last for up to 3 or more weeks. Some of the Company's continuous vessels have crews of 4 and 6 employees in which case the shifts can be equally balanced.

[132] Under the three watch system proposed by the Company each crew member would work only 8 hours per day with a rotation of 4 hours on watch followed by 8 hours off watch so that over a period of 24 hours each will be off watch for a total of 16 hours broken into two periods of 8 hours. While the system possibly would provide an increased margin of safety by providing more rest to the crews than under a two watch system, even the two watch system provides an adequate number of off watch hours to provide a normal amount of rest. To the extent that crews may experience sleep deprivation, it results from the quality of it that it occurs in six hour tranches. A tug is a noisy environment with somewhat rough motion which may make it difficult for some to sleep but that aspect is not improved by the three watch system. The short 4 hour shifts may provide an improved margin of safety but there is no evidence of that being that case.

[133] What Mr. Bingham said, however, is that there are other significant benefits to the three watch system beyond safety. He said that it provides operational benefits by making it easier to provide meals at regular times because the on watch periods are much shorter and the off watch periods longer. Also there are more crew available to assist in the event of an emergency. Most importantly, he testified that based on the Company's modelling, by converting one third of its gulf fleet (3 vessels) and three of the 4 ocean vessels from a two watch system would result in approximately $2.1 million in savings.

[134] I am not convinced. The model used to do the calculation compared only individual shifts to demonstrate the cost difference. Obviously that will result in a computational difference based on the 12 hour shift for the two watch system and 8 hours for the three watch system. The problem with the calculation is that if one compares the crewing that would result under each system using the same vessel, the same total number of hours are required to crew it on watch over each 24 hour period. To compare only a single shift would naturally distort the actual cost of crewing it. But there is no difference in the total number of hours required to crew the same vessel under either system over an entire 24 period. If there is a cost difference, it could only lie in whether the two watch system where the crew works 12 hour shifts requires more overtime to be worked than the three watch system. In fact, since only larger vessels will accommodate a three watch system the likelihood is that the number of crew on shift at any one time will likely be greater. Furthermore, the extra 4 hours worked under the two watch system is not overtime but rather is paid at straight time rates based on the legislation that permits it to be averaged with longer periods off work. A cost difference would occur to the extent that the two watch system may typically generate more overtime by requiring the crew to work longer than 12 hours but not from working up to 12 hours instead of eight.

[135] Turning to the frequency of use, the Company provided evidence that the largest marine operator in the Pacific Northwest in the United States, Foss Marine, uses a three watch system under its collective agreement with the International Organization of Masters, Mates & Pilots but no evidence was made available to me whether it was the dominant shifting model. Mr. Brown-John equally gave evidence that the three watch system has been used by maritime companies on the east coast of Canada for a considerable period of time but he explained that most typically it is on large ships where crew members can be given their own quarters and also have access to recreational facilities that are not available even on large tugs. He said that there are a range of activities that are available to them that they can do in their free time other than sleep for 16 hours including an ability to go ashore and visit nearby ports and cities.

[136] Mr. Leenheer argued that although the Unions' objections to the three watch system were strongly framed, many were based on a misunderstanding of how many days per year employees are currently required to attend work. However, he asserted that in cross examination they acknowledged that they did not have a good understanding of how the lay day system, vacations, and statutory holidays translated into actual days at work for employees. They acknowledged that Officers typically are required to work 141 twelve hour days or 38% of the year while under a three watch system they would be required to work 211 days per year or 58% in order to work their full complement of 1950 hours. As he said, they thought that the three watch system would require them to work more than two thirds of the year.

[137] Mr. Matthews argues that any such comparison confused lay days with vacation days and that lay days are intended precisely to compensate employees for the loss of recreation time. He says that whereas the industrial model of 8 hours work, 8 hours recreation and 8 hours of sleep is enforced through employment standards legislation, in the tow boat industry it is recognized that there is no time for recreation. Of course, that may be seen to be more an argument in support of a three watch system but the problem is that it would create

too much time off on vessels where there is no room for recreation. I agree that employees would be able to get more sleep but what would they do for the other 8 hours? That is precisely why the two watch system is popular, which is that with all its disadvantages, what it does is permit employees to work in order to give them more time off at other times to substitute for it.

[138] Of course, it is not a perfect substitute for the ability to go home at the end of an 8 hour shift to socialize with friends and family as other employees are able to do, but they are able to aggregate their time off into longer periods off work which they have come to accept as an adequate substitute. Mariners who work 12 hour shifts do not work less than employees in other sectors who work 8 hour shifts. Rather the work is concentrated in the on board shift rotations. Because they then receive compensating time off it may appear to some that they work less but that is not the case. Their shifts are arranged to average 37.5 hours over the course of a year which is less than Ledcor whose employees work 40 hour work weeks but equivalent to many other sectors. Mr. Engler said that to have to spend more of their free time on a vessel without any meaningful activities would be "just like being in jail but with seasickness."

[139] On that analysis, while I agree that the disruption that would occur to the life style of employees is significant, there are many other factors that militate against the implementation of a three watch system not the least of which is that I am not convinced that the economies sought by the Company would be realized. Nor was I provided with evidence that it is even being used minimally within the range of any relevant comparators which, of course, must necessarily be seen to be the primary indicator left to the Company to replicate the collective agreement that it could reasonably have hoped to achieve in the absence of financial data that would otherwise justify a deviation from relevant prevailing standards. On the evidence available to me, a three watch system is not being used by any other maritime company on the BC coast, in particular by any significant competitors of Seaspan. Foss Maritime is not within the scope of influence of legislation governing Seaspan. The three watch system is simply not the prevailing standard. Therefore, the proposal of the Company in that respect is not accepted.

14. **Boat Hopping**

[140] While Mr. Leenheer conceded that this was not a major issue for the Company, it relates to a much larger issue relating to the assignment of work which I have not yet addressed. The problem is that on some occasions there is no work for a particular vessel to perform at the same time as there is work that can be done on another vessel that is not fully crewed. In those circumstances it seeks the ability to assign employees from the one vessel to the other, subject to them having the necessary qualifications, certifications and experience rather than to sit idly by.

[141] The Unions argued that to do so would create a serious safety risk, particularly where there were other employees sleeping below and no one else is available to stand watch. As I have already noted, Jerry Bowen testified that operating tug boats is inherently dangerous. He said that in the last year and a half two fires occurred on Company vessels. In such cases an alarm will sound and the crews muster in the wheelhouse at which point a decision must be made whether to fight the fire or abandon ship. If a crew member does not muster, the master must decide whether the crew member can be roused without risking further life or limb. He said he is aware of crew members on tugboats sleeping through alarms.

[142] The position taken by the Company is that it is possible to significantly mitigate the risk by limiting the circumstances in which boat hopping may occur to where the vessel is laid up or alternative arrangements are

made to secure the safety of life and the protection of the environment in accordance with the requirements of the Marine Personnel Regulations and advice received from Transport Canada.

[143] According to Mr. Walker that advice was that:

a. a vessel is laid up if something more than ordinary anchoring or mooring or hooking up to shore power is done to indicate that the intention of management is not to work the vessel for some time; and
b. sufficient alternative arrangements would include ensuring that another person, either on the vessel or on the shore where the vessel is moored or docked, is keeping watch over the vessel.

[144] My understanding of that evidence and argument is that it is common ground between the parties that where a boat has been laid up rendering the crew idle, in principle the Company should be entitled to temporarily assign those employees to another boat that is not fully crewed for the balance of the shift, provided that it is safe to do so. Where an employee is asleep below such an assignment should be considered to be safe only if the vessel is properly laid up within the meaning of the Marine Personnel Regulations and arrangements are made to ensure the safety of the employee including the use of secure and reliable technology or the assignment of shore or other personnel to watch over the vessel. Accordingly, I adopt the proposal of the Company with certain changes as follow:

Guild Agreement [New subclause 2.01]:

3. (a) When a vessel is safely secured, Officers may be required, subject to their qualifications, experience and ability, to work on an alternate vessel during their on watch period. Any hours of work on such alternate vessel shall count towards their hours of duty on the vessel on which they were initially crewed.

(b) For the purposes of this Article, "safely secured" means that the vessel is laid up within the meaning of the Marine Personnel Regulations Part 2 - Crewing and such other arrangements are made sufficient to secure the safety of any crew remaining on board the vessel and protect the environment.

"Such other arrangements" may include, but are not limited to:

i. the assignment of personnel (including shore staff) to monitor the vessel; and/or
ii. using secure and reliable technology including high quality alarms to warn of fire and/or sinking.

(c) At a minimum, actions taken to lay up a vessel shall include connecting it to shore power, shutting down such machinery that is not required for the safety or comfort of the remaining crew, closing sea-cocks and ensuring that all fire and bilge alarms are fully active.

ILWU Agreement [New subclause 2.01 (n)]:

(a) When a vessel is safely secured, Unlicensed Employee(s) may be required, subject to their qualifications, experience and ability, to work on an alternate vessel during their on watch

period. Any hours of work on such alternate vessel shall count towards their hours of duty on the vessel on which they were initially crewed.

(b) For the purposes of this article, "safely secured" means that the vessel is laid up within the meaning of the Marine Personnel Regulations Part 2 – Crewing and such other arrangements are made sufficient to secure the safety of any crew remaining on board the vessel and protect the environment.

(c) "Such other arrangements" may include, but are not limited to:

i. assignment of personnel (including shore staff) to monitor the vessel; and/or
ii. using secure and reliable technology including high quality alarms to warn of fire and/or sinking.

(d) At a minimum, actions taken to lay up a vessel shall include connecting it to shore power, shutting down such machinery that is not required for the safety or comfort of the remaining crew, closing sea-cocks and ensuring that all fire and bilge alarms are fully active.

15. **Pager System**

[145] Mr. Bingham gave evidence of the history of using pager boats on the west coast. He said that the Company has operated or sought to operate such a system in four locations: Roberts Bank, Victoria Harbour, Powell River and the Vancouver Harbour. While the details of how each operated are somewhat different, the broad concept was the same. That is, the employees agree to be on-call for a period during which they may be contacted by the Company to come in and perform work at different times of the day subject to being provided with sufficient notice with the benefit of receiving a full day of pay no matter how little work is actually required on a given day.

[146] At Roberts Bank the Company operates with two vessels on a pager system under a Letter of Understanding and one vessel that is used purely for call-outs. Each time an employee is paged and attends work he is credited with a minimum of 4 hours. Once crewed off, they are entitled to 3 hours off but if called again within that time they are entitled to be paid continuously. An employee can only be asked to attend at work twice in each 24 hour period.

[147] In practice, it seldom happens that employees are called out more than once in a day. In 2013 pager boats were used 335 times in 365 days, so on average slightly less than once a day. If the employee attends work for less than 12 hours they still receive the full 12 hours of pay. They are guaranteed 9 hours of uninterrupted rest. Overtime is paid after 13 hours of work in each 24 hour period. Because of the uncertain nature of their schedule, Officers are paid a premium in the amount of $35/day. They are also provided with a cell phone so that they can be contacted wherever they are in the lower mainland. This gives them a certain degree of personal freedom in that they do not have to remain close to a land telephone during the period they are on call. Finally, Officers receive a driving allowance of $35/day. Unlicensed personnel are paid a premium of $21/day but otherwise receive the same driving allowance and cell phone.

[148] Two different Letters of Understanding have been negotiated for the pager system in the Victoria Harbour, one for the summer and one for the winter. The employees in this system are paid 12 hours for 15 hours of availability. They are paid a premium of $15/day and are provided with a cell phone.

[149] At Powell River the system is based on employees working a total of 8 hours per day 5 days/week. Each time the employee comes to work he is credited with a minimum of 4 hours of time. Overtime is paid for work over 8 hours per day or 40 hours per week or for more than 2 calls in a day. Because it is a small operation the work is sporadic and short. Most often employees work much less than 4 hours at a time and it is spread out over different times. It is able to operate because it also services the Company's own barges.

[150] In 2012 the Company proposed a pager system for the Vancouver Harbour on a trial basis as part of an initiative to reduce idle time. The negotiators were able to reach an agreement on similar terms to the Roberts Bank system, using two vessels: the Seaspan Falcon and the Seaspan Eagle subject to ratification by the union members. The Company sought postings for the two vessels and received applications from numerous qualified employees, the names of which I shall not disclose in this award because shortly thereafter it was advised by the Unions that the proposed system had not been ratified.

[151] The trial, therefore, was never implemented and we do not have any information from the successful applicants about it one way or the other. The Company's modelling, however, adequately demonstrates the motivation for it. Mr. Bingham testified that it shows that if idle crew time were able to be reduced by as little as 10% the Company would save $315,000/yr. and that if 3 vessels were used it would save $814,000. Or if just the two vessels contemplated by the tentative agreement were put into service, he said the savings would be about $773,000. In 2014 crews were idle in the Vancouver Harbour about 43% of the total crew-on times while in 2013 it was 47% that vessels were crewed. During the busy summer period when there is typically increased traffic in the Harbour there were some short periods in 2013 when all 7 scheduled tugs were working but for 51.8% of the time only three tugs were working.

[152] Mr. Matthews opposed the implementation of a pager system in the Harbour on behalf of the Guild on the grounds that quite apart from the fact that considerable savings could be realized, most fundamentally the Company failed to demonstrate any compelling need for the change. In other words, while he did not say so directly, his argument must be interpreted to mean that the savings on their own were not a sufficient justification for the change for a number of reasons which can be summarized as follows:

- the Harbour has consistently been a bright spot for the Company in terms of its financial performance given that it has an approximate 60% market share;
- there is no present danger of Ledcor entering the Harbour to compete for ship docking or escort work in the foreseeable future;
- the Harbour is at least partially operated under a tariff system by which customers are required to pay standard charges. This precludes the Company from passing any savings onto the customers so that its ability to compete is not improved;
- although the Unions have agreed to the operation of pager systems in other places, they are vastly different from the Vancouver Harbour which is the busiest port in Canada. There is no obvious need for them to make concessions in the circumstances because there is no competitive risk;
- the commute time for employees is greater because they have to travel through metropolitan Vancouver to access it;
- there are significant operational challenges that the pager system would pose. For example, Captain Chambers expressed concern about how the Company would assign work through the system when, by the time an Officer arrived at the site, it is quite likely that the job would already have been performed by a regularly crewed vessel;

- the proposed system would introduce split shifts which would double the disruption to employees;
- employees sleep pattern would be subject to disruption for entire periods of 24 hours; and
- no evidence was presented by the Company of any other employer using a pager scheduling system.

[153] Although Mr. Engler conceded in cross examination that the ILWU had a somewhat different view than the Guild on the pager system, particularly that it was not opposed to it continuing to operate at Point Roberts, it nevertheless was in agreement with the Guild that it should not be implemented in the Vancouver Harbour for the same reasons expressed by Mr. Matthews. In addition, Mr. McGrady said there were numerous reasons relating to the health, safety and the well-being of the employees that need to be taken into consideration:

- irregular start times lead to disturbed and irregular sleeping patterns. This leads to fatigue and significant health and safety concerns;
- there would be delays getting to and from the dock in North Vancouver due to traffic and weather conditions while commuting to and from home. Local 400 members live throughout the Lower Mainland. In addition, once the crew completes an assignment and the tug is tied up, the crews will go home and will not conveniently be available for subsequent short jobs; and
- the number of docks and the unpredictability of the work as it arises would conflict with delays that are inherent in moving ships and barges. Manned tugs can respond to jobs more quickly than pagers, which is itself a safety issue for the vessels being moved and the basic reason why they pay the tariff at high premium rates. There is typically very little time, if any to call in a crew using the pager system.

[154] Counsel for the Company took a rather peculiar position in relation to one of the primary arguments advanced by the Unions based on operational considerations. That argument was that even if one accepts that the pager system had worked successfully at Roberts Bank, it would not likely work in the Vancouver Harbour because of the difference in the volume of work and the need for urgent response. Mr. Leenheer referred to his cross examination of the Unions' witnesses each of whom accepted that the accommodation of those operational problems would ultimately have to be dealt with by the Company and that if it turned out that it was not practical to operate the system, they would be able to revert back to scheduling regular 12 hour shifts. As Mr. Bingham testified, a pager system would not be implemented to the exclusion of regular shift vessels because for any vessel that is expected to work more than 50% of the time, it can become more expensive to use a pager system. However, as he said, there was no reason to think that just because the Vancouver Harbour is busier as a whole than Roberts Bank it does not mean that individual vessels will be relatively busier. Similarly, he said that if the work is too urgent to permit employees to respond within the 3 or 4 hour notice period it would not work.

[155] Mr. Leenheer also addressed some of the life style issues that the Unions' advanced, for example that the employees would be available for long periods of time and would not be able to plan other activities, saying that the evidence showed that it ignored two important factors. Firstly, employees who work scheduled 12 hour shifts are equally absorbed in their work during their rotations such that they have little time left for anything else but working, eating, bathing and sleeping. Consequently, they will be no worse off under the pager system but in fact will be better off because they will be able to take time off on some days when they are not required to work and will still be paid. Secondly, the system requires that they be given several hours of notice to crew-on and at the end of the call period they will know that the Company would not call them for the next 10 hours.

[156] As for the issues relating to fatigue and safety concerns associated with split shifts and changing work times, he contends that the empirical evidence does not support them. He said that the data demonstrates that Roberts Bank is a safer work environment based on the incidence of both work and non-occupational injuries than those based on a regularly scheduled 12 hour shifting arrangement. Moreover, if individual employees find themselves overwhelmed by the work, they are entitled under the terms of the system to declare themselves fatigued, such as if they are required to stay awake too long or their shift times change too much, they are entitled take time off to rest and still receive their full pay. In such circumstances the Company would be required to rely on a call-out.

[157] Finally, perhaps the most compelling point to be made is that the Company would continue to use regularly scheduled vessels as the dominant system for doing work in the Vancouver Harbour. Employees would be entitled to choose whether to work on pager vessels where they consider that their own particular life style would accommodate it. They would have the same 224 days off work each year as employees working regular 12 hour shifts but would be paid more because of the daily premium. Counsel takes the position that it would have the advantage of preserving employee choice to seek postings on vessels that continue to use 12 hour shifts or work the pager fleet but at the same time, contribute towards the Company goal of reducing idle crew-on time in a balanced way that does not compel employees to work either system against their will.

[158] This has been a difficult issue for all the parties leaving no obvious room for compromise. Quite apart from any consideration of their arguments relating to such things as health & safety and work-life balance, on a more general level the Unions have not permitted themselves to be persuaded that such a change is necessary. Or perhaps it is more accurate to say that in spite of the commitment of the Company to limit its use in the Vancouver Harbour, their real concern is that the ultimate goal of the Company is to convert the present scheduling system in all other locations almost entirely into a pager system where no employees will have a regular schedule.

[159] Although it may not be obvious, it may be useful to consider what I think is probably a close comparator to how Seaspan presently structures its work in the Vancouver Harbour which is to the fire service that one finds in virtually every community in Canada where firefighters are similarly scheduled on fixed shifts even though their work is sporadic. In their case, the firefighters do not know from one moment to another whether their services will be required. They can go through an entire shift or even series of shifts without being called to respond to an emergency. Yet they are scheduled to work regular shifts without any apparent regard to whether it is likely that their services will be required except in a general sense. Of course, the reason for the disconnect between their schedule and the demand for their services lies in the urgent nature of the emergencies to which they must be available to respond. It is true that volunteer firefighters are typically scheduled more like what the Company is seeking here. They are called in only when an emergency occurs. The problem is that is seen to be an ineffective model for communities with large populations.

[160] Ship docking and escort work is directly comparable to a professional firefighting service. It is necessary to have crews on standby that are available to respond to urgent demand except in their case a significant amount of it may be seen to be predictable. It was a point that Mr. Bingham addressed when he said that the scheduling options currently available to the Company are not sufficiently flexible to meet the fluctuating demand that is inherent in the industry and that in order to service its customers it is necessary for the Company to build in and pay for significant redundant capacity in its fleet, which he said leads to higher costs and significant idle crew time. Using that theme, he said that a pager system in the Vancouver Harbour would not make sense if it was likely that the crew would be needed for more than 50% of the time.

[161] What I take from those comments is that in the Harbour there will always be a base need for a regularly scheduled contingent of vessels that will be able to respond quickly when the need arises. In other words, the Company takes the position that any concern that it would be able to operate the entire fleet in the Harbour on the pager system is misplaced and that there will always be a need to maintain a certain portion of it on a regular schedule in order to respond properly to work of an urgent nature, which I accept. The issue that must be addressed in those circumstances is to determine just how much of the work cannot be accurately predicted which would better respond to a more flexible scheduling arrangement.

[162] The problem is that I have not been provided with evidence to determine what proportion of the 11 tractor vessels in its fleet would constitute the minimum base of regularly scheduled vessels. It is true, as I noted earlier, that in July 2012 the Parties agreed to implement a pager system in the Vancouver Harbour to which they assigned two specific vessels and an unnamed replacement vessel for a trial period of about one year. Presumably, one of the purposes of the trial period was to address that very issue which was whether the two vessels would be sufficient to handle the amount of unpredictable work load. The problem is that we do not now have that data because, as I said, it was subject to ratification by the rank & file union members who did not accept the tentative agreement.

[163] As a consequence, we do not have any objective evidence whether it would work as projected by the Company or, on the other hand, if the problems postulated by the Unions amount to mere irritants or fatal flaws. It is true, as they say, that there are no other pager operated vessels in the rest of the maritime industry on the west coast. Therefore, it says that to allow the Company to crew in this manner would create a precedent for the industry and provide the Company with an advantage over other operators in the industry. The problem for them is that the precedent has already been set, in which they participated by establishing pager systems in other harbours. However, they object to it being operated in the Vancouver Harbour because, as they say it is too busy to justify it and yet the members voted against it being tried out to test the theory.

[164] Their concerns based on the health & safety of the crews and fatigue could have been mitigated by modifying the proposed language of the Letter of Understanding beyond the provision in the tentative agreement that gives crews the right to declare that fatigue is affecting their safety or job performance. I agree with them that split shifts in the circumstances could amount to a significant burden on employees under the existing language if they were required to return to work after being sent home. Moreover, it seems to me that to require them to be available for a call for longer periods than a normal shift is difficult to justify. They argue that the utilization data does not take into account the normal everyday work that is required to operate the vessels such as fueling, drills, maintenance, sea trials, loading stores, weather and training but that ignores that much of those are operational issues that the Company would have to deal with in any event. A vessel cannot operate without fuel and many of the other issues involve mandatory regulatory matters that similarly cannot be avoided.

[165] The issue that is raised on those facts is whether the tentative agreement which was arrived at in 2012 in the course of the term of the collective agreement is one that I should presume the Parties would have arrived at in these negotiations had they been able to continue to negotiate to a successful conclusion. The leading cases that suggest that there is such a presumption I discussed only recently in FortisBC Inc. and IBEW [2014] BCCAAA No. 134, the first being a case decided by Paul Weiler in *Toronto Transit Commission and Amalgamated Transit Union, Local 113* (1985) 17 LAC (3d) 385 in which he held @ p.389 that:

> There is a broad consensus among labour arbitrators that a settlement voluntarily arrived at by competent negotiators is a much better index of the appropriate award than the opinion of an outside arbitrator whose involvement in the dispute is inherently limited. I had the occasion to consider this issue

> in my Sixty-five Participating Hospitals award, 1981 (Weiler)[unreported]. There I did say that the preference for the agreed-to settlement should only be a general presumption, not an automatic unyielding rule: otherwise the democratic participation of union members in the ratification or rejection of their contracts would be eroded. However, I went on to say that: "If seasoned representatives produce a comprehensive package out of the give and take at the bargaining table … the product of their work must be treated as strong prima facie evidence of an economically sound bargain … The arbitrator … should treat the settlement as fixing the ballpark figures for a new contract.

[166] I went on to refer to a case subsequently decided a few years later by Michel Picher in *Re Salvation Army Windsor Community and Rehabilitation Centre and Recycling Unit and Service Employees International Union Local 2* (2009) 183 LAC (4th) 127 in which he appeared @ p.135 to elevate the test virtually to the level of an unrebuttable presumption. He said that it is extremely rare for boards of interest arbitration to depart from the terms of a tentative memorandum of agreement which has not been ratified by the rank & file members and that absent extraordinary evidence it is the best evidence of what the parties would have agreed to. Moreover, he said that the fact that a tentative agreement is not ratified "cannot itself be seen as sufficient to necessarily displace the presumptive persuasiveness of the terms of settlement reached by the parties' respective committees at the bargaining table, particularly where both parties expressly recommend ratification to their principals as occurred in the case at hand."

[167] In the Fortis case I rejected the idea that tentative agreements that are not ratified by the rank & file union members should presumptively be considered to replicate what the parties would have agreed to when the evidence was that they were not able to reach an agreement on those same terms. I said that it is most certainly a factor that could be taken into account and is also a reason why the adjudication model is typically used in this province in conjunction with the replication model by which to derive the appropriate terms of the new collective agreement: *Health Employer Association of BC (Canadian Blood Services) and HEU* (2011) LAC (4th) 217.

[168] At para 94 of the Fortis award I attempted to reconcile the various approaches taken in the jurisprudence to provide a useful protocol on the approach that interest arbitrators should take in dealing with tentative agreements:

> … using the Picher test that such agreements are presumptively valid, the presumption should be seen to operate on the base tentative agreement but does not preclude the arbitrator from making the modifications the arbitrator thinks would otherwise have been sufficient to persuade the parties to ratify it. This approach is the one used by Kevin Burkett in *Thames Medical Services Inc. and OPSEU* (2004) 129 LAC (4th) 192 where he dealt with the inherent contradiction of adopting a rejected tentative agreement @ p. 1999 by saying:
>
> > "… the rejection of a memorandum of settlement under free collective bargaining is not viewed as a signal to recommence bargaining afresh. Rather, the bargaining that follows a rejection of a memorandum of settlement is in the nature of a problem-solving exercise designed to "tweak" the terms of the settlement in a manner that preserves the essential bargain while at the same time facilitating a reconsideration by the principals. … The reality is that in free collective bargaining the rejected memorandum remains front and centre. Although it does not constitute a legally binding document, the memorandum establishes the parameters for the bargaining that follows the rejection, notwithstanding the fact that it was entered into by the bargaining committees acting as agents for the principals."

[169] Therefore, I said that a tentative agreement that is not ratified is by definition not one that could be taken to be one that the parties would ordinarily have adopted. However, it can be taken to form a substantial basis of such agreement that with modifications could be expected to make it acceptable to the parties.

[170] In this case, the Company made a proposal for a completely different pager system than the 2012 tentative agreement and in particular, one that would not involve a trial period to determine its feasibility and would require employees to be available to be called in for a set amount of time within a 12, 16 or 24 hour period. Counsel described it as a compromise position that would likely have been agreed that met all parties' needs. That obviously is not the case because otherwise the Unions would have accepted it. Instead, as I discussed, not only did they not accept it but even escalated their opposition to it directly proportionate to the dramatically expansive program being sought. Specifically, it was that the Company would be permitted to use a pager system across its entire fleet, including the Vancouver Harbour, but with at least 50% of vessels in the Harbour required to be posted on a regular shift basis as opposed to a pager basis.

[171] What this would mean, of course, is that outside of the Vancouver Harbour all scheduling would be done on an ad hoc basis depending on customer demand with no regular shifts. The entire existing system would be turned on its head with the only regular shifts being on 50% of the vessels in the Vancouver Harbour. This would be a gigantic departure from the existing system where most employees have the advantage of a regular schedule to one where very few would know in advance when they would be working. In the circumstances, to suggest as Counsel did that it is a compromise position that would likely have been agreed has no basis in reality. There is no evidence to support it.

[172] What can be confidently said, however, is that the pager system that was agreed between the negotiators in 2012 could be made to be acceptable to the rank & file members with minor modifications. However, I am prepared to give an option to the Company whether to implement this particular pager system because although the tentative agreement occurred within the term of the agreement that is being renegotiated, it was 3 years ago.

[173] If the Company elects to implement the system, the changes that I think must be made for that purpose are as follow:

- there shall be no split shifts except in an emergency that involves the safety or well-being of any person including the employee required to work it;
- the Letters of Understanding shall be in effect for the entire trial period ending December 31, 2016 but shall not otherwise be terminable on notice;
- the issues to be reviewed by the Committees established under the LOUs shall include whether the LOU should be continued indefinitely, with or without modifications that are mutually agreed by the Committees. Dalton L. Larson shall continue to have jurisdiction to make a binding decision in the event of any dispute that cannot be resolved by them; and
- the LOUs shall be amended to reflect the above changes or any other changes that are mutually agreed and shall be duly executed by the Parties.

[174] It goes without saying that the proposal made by the Company in these hearings to use a pager system as its primary scheduling mechanism is unacceptable. It goes well beyond the scope of the issues raised in the mediation and justifies the concern expressed by the Unions that its intention was to expand it throughout the fleet. Notwithstanding that individual programs have been negotiated by the Parties in specific locations, it cannot be said that a pager scheduling system is the prevailing standard in any sense. It is not used by any other employer on the BC Coast. I have accepted that it would be appropriate to adopt a trial system in the Vancouver Harbour,

not based on any considerations of comparability, but rather on the jurisprudential principle that it had been agreed by the negotiators of the Parties earlier and although rejected by the rank & file union members in a ratification vote, it could be expected that with some tweaking it could be made acceptable. The issue of the continuation of the existing pager agreements for Powell River, the Victoria Harbour and Roberts Bank is still in dispute. They are yet to be addressed in mediation.

16. **Scheduling Relief Employees**

[175] The Company seeks to amend Article 3.01 and Article 3.02 of the Guild collective agreement by adding the word "posted" to qualify the reference to vessels in the first sentence of each Article as follows:

> 3.01 An Officer, when employed on a **posted** shift vessel, shall report to a designated place known as the Home dock at shift starting time.
>
> 3.02 The shift starting times shall be constant on all **posted** vessels and any change in shift starting times shall require seven (7) calendar days' notice provided that where tidal problems are experienced in a river operation, shift starting times may be altered by agreement between the Parties in accord with the Memorandum of Understanding.

[176] Similar language is found in the ILWU collective agreement in Article 3.01(a) and (b) except the proposal by the Company is to add the words "regularly crewed" and "a regularly crewed shift" to change it:

> 3.01(a) The shift starting time shall be constant on all **regularly crewed tugs** and any change in shift starting times shall require seven (7) calendar days' notice.
>
> 3.01(b) Seven (7) calendar days' notice shall be given of the intent to change **a regularly crewed shift** from an eight (8) hour shift to a twelve (12) hour shift, or vice versa.

[177] The purpose of those changes is not obvious on the face of those provisions. It gave rise to speculation by the Unions that it was sinister in nature and was intended generally to give the Company free reign to schedule all other vessels at its discretion without any notice whatsoever. The Company denies that was its intention. It says that its purpose was only to eliminate notice periods for relief employees who, it says, by definition can have no expectation of working any particular day or any particular time. It took the approach that this could be best managed by language that would only make the notice requirements apply to posted vessels whose regular crew could properly expect to receive notice if their schedules change.

[178] This was explained by Brook Walker who said that the Company has limited flexibility in changing shift arrangements to meet customer demand. He said that the collective agreements currently require the Company to provide the following:

a. 7 days' notice to change a vessel from an 8 hour shift operation to a 12 hour shift operation (and vice versa);
b. 7 days' notice to change a shift start time in respect of a vessel; and
c. 7 days' notice to change the home dock of a vessel

even if the vessel is not normally in service and has no regular crew who could be affected by these changes.

[179] He said this leads to some inconsistent and irrational limitations on the Company's capacity to manage its scheduling in that, for example, it is permissible for the Company to schedule a relief crew to work 7 consecutive

days at 7 different start times so long as the relief crew will work on 7 different vessels. However, if the Company wants to have the relief crew work on the same vessel two days in a row with two different shift start times, the Unions assert that it cannot because it is required to give 7 days' notice to change the shift start time of the vessel. The Unions argue that the effect of the changes would be to create a category of vessels that are not posted or regularly scheduled which would be entirely unregulated because the notice provisions would not then apply to them.

[180] It seems to me that the real problem here is that the parties have two quite different concepts of the nature of relief employment. The Unions see it as a necessary adjunct to the employment of regular employees while the Company would prefer that they have an independent status that would permit it to use them not just to substitute for a specific absent regular employee but effectively assign them anywhere in the fleet that they can be effectively used. The fact is, however, that there is no language in the agreements that would permit it.

[181] There are no type definitions as one finds in most industrial agreements where it is not unusual to find such categories as regular employees, part time employees and casual employees each with their own peculiar scheduling requirements. In these agreements there are no specific provisions for the employment of relief employees. It is true that there are incidental provisions that mention relief employees, which clearly implies that a separate category of relief employee was intended to be created. For example, subparagraph 7 of Article 1.12 in the Guild agreement says that if a vessel is temporarily taken out of service and no substitute is provided, the Company will place the affected Officer in a relief position if requested or he may choose to use any leave available to him. The problem is that there are no provisions that differentiate how they should be scheduled from regular employees.

[182] There are provisions scattered throughout the agreements that provide some differentiation, such as Article 1.13.3 which says that Officers who might wish training for relief positions must advise the Company of their interest. Subparagraph 5 even refers to "posted" vessels no differently from what the Company proposes in this case.

[183] The point, however, is simply this. There are many issues that could potentially arise from the failure of the parties to more precisely address the essential nature of relief work and how it is to be assigned. It is not an issue that I intend to address other than to make the point that the issue should be addressed more comprehensively than to simply attempt to merely differentiate the way they are scheduled from regular employees in the manner proposed. The bigger issue is whether they should be differentiated at all because, as it is at present, the absence of language to that effect suggests that in a large measure the underlying intention of the parties in establishing a general category of relief employee was that they should be treated as much as possible as regular employees.

[184] Under these agreements, the category of relief employees appears to have been created for the specific purpose of relieving regular employees who are absent. Quite apart from how individuals are supposed to be selected for specific relief assignments, which is not an issue for me to decide, once an assignment is made, it is logical that the relief employee would simply fit into the schedule of the regular employee who is being replaced. If that is correct, the notice that the Company has indicated that it wishes to serve in order to achieve greater flexibility would in reality be confined by the schedule of the regular employee. If that is what was intended, relief employees would not have independent schedules. Therefore, if I were to accept the proposal of the Company it would implicitly amount to the creation of a new category of relief employee that is not tied to the replacement of an absent regular employee.

[185] I am not prepared to do that through a back door. It is the kind of issue that should be addressed directly by the Parties. It would be improper for me to change the collective agreement in the manner suggested by the Employer that could effectively change the essential nature of relief employment from what it is now to something quite independent of it, without addressing more comprehensively how it would work. The matter is referred back to the Parties for their further consideration. Either Party shall have the option to refer it back to me to decide, which will require additional hearings in that event.

17. **Eight Hour Shifts**

[186] The Company takes the position that although the collective agreements of each Union currently provide for eight hour shift schedules, the limitation that they be scheduled 5 continuous days on with 2 continuous days off essentially precludes the use of them as a regular shift pattern. This can only be understood in the context of the actual language of the agreements.

[187] Article 3.02.1 of the Guild agreement provides:

> The regular working day shall be eight (8) hours per day, forty (40) hours per week; all work in excess of eight (8) hours per day and/or forty (40) hours per week shall be paid for at the overtime rate. Five (5) consecutive days' work followed by two (2) consecutive days' leave shall constitute a week.

[188] The shift tug provisions in Article 3.02(a) of the ILWU agreement are almost identical although it should also be noticed that certain provisions of general application in Article 2.01 dealing with hours of work and overtime appear to be far more restrictive. They go on to require that the actual shifts for employees in the deck and engine room departments must be scheduled within a specified range or hours:

> (e) The hours of work for all Unlicensed Employee(s) in the deck and engine room departments other than watchkeepers shall be from six (6:00) a.m. to six (6:00) p.m. and any work performed between six (6:00) p.m. and six (6:00) a.m. shall be paid for at the regular overtime rate.
>
> (g) The hours of work for all Unlicensed Employee(s) in the deck and engine room departments other than watchkeepers on Offshore or Salvage tugs, where an eight (8) hour day is in force shall be from eight (8:00) a.m. to five (5:00) p.m. and any work performed between five (5:00) p.m. and eight (8:00) a.m. shall be paid for at the regular overtime rate.

[189] The apparent problem was illustrated by Mr. Walker who explained that the Company interpreted the provisions to mean that it had to (i) schedule a vessel to work 5 days in a row followed by 2 days off and (ii) at the same time each day. He said that because it does not easily respond to the requirements of varying customer demand the eight hour shift is rarely used. Instead the Company is forced to use a call-out paid at double time or schedule a 12 hour shift when there may only be 7 hours of work to be done. In addition, he said that in order to implement regular eight hour shifts it would be necessary for each vessel to have a different crew each day making it difficult to schedule leave in a way that would access weekends. He says that what the Company needs is the ability to schedule eight hour shifts in the same manner as it can currently schedule 12 hour shifts without having to stagger the crew change days.

[190] The Unions simply take the position that the language is not as restrictive as the Company says that it is. They concede that the agreements do not require that the 2 consecutive days off each week must be on weekend, which is correct. Part of the problem is that the chart used by the Company to demonstrate the problem is based upon an assumption that all shift vessels must operate 24 hours a day and 7 days a week which is also not the case.

[191] Nevertheless, I agree that the underlying theme of Article 2.01 is restrictive. Only day shifts are contemplated by that language. It does not permit afternoon and graveyard shifts. Therefore, it is not surprising that the chart prepared by the Company demonstrates a high degree of inflexibility because that is certainly what the ILWU agreement was intended to do. Apart from that, there is a relatively high degree of flexibility under the eight hour shift tug language of both agreements. There are no limits on when the eight hour shifts must be scheduled each day. Nor do they require that the 2 consecutive days off each week must be on normal weekends. In addition, different shift patterns can be scheduled provided that it is done well in advance with a minimum of 7 days' notice to the affected employees.

[192] Mr. Leenheer argues that no good reason was advanced by the Unions to retain limitations on the use of eight hour shifts that are not applicable to the use of twelve hour shifts. In fact, he says that employees would be better off if the Company had the capacity to schedule eight hour shifts as an alternative to twelve hour shifts as this would:

i. increase the amount of time during which a mariner working such a shift arrangement can rest, decreasing fatigue;
ii. permit a mariner working such a shift arrangement an additional 4 hours/day to engage in family, social and civic pursuits to the same or a similar extent to other employees in British Columbia who work 8 hours per day; and
iii. result in the stated ideal of "eight hours labour, eight hours recreation, eight hours rest" that Captain Chambers referred to in his evidence.

[193] The proposed solution that he advocates is to replace Article 3.02.1 of the Guild agreement with a single sentence that: "The regular working day shall be eight (8) hours per day; all work in excess of eight (8) hours per day shall be paid for at the overtime rate." Similarly, he proposes to replace Article 3.02(a) of the ILWU agreement with identical language and to add a new subparagraph (e) that: "Unlicensed Employee(s) working under this Article shall not be required to attend work more than once in a twenty-two (22) hour period. "

[194] I must say that I have a considerable degree of empathy for this proposal for essentially the same reasons given by Mr. Leenheer that the eight hour shift that is the model almost everywhere else as a universal standard should be made accessible to the extent possible in the maritime industry. Nor could I imagine that the Unions are seriously opposed. While argument was made in favour of the status quo, Counsel for the Unions did not raise a sustained or vigorous opposition to it. They acknowledge that employees in this industry do not expect the tight regulation that one finds in other industries with set times for defined categories of shifts that do not change, who always know when they will be working and the time they will have off work to spend with their families or other social activities with weekends off.

[195] The problem that I have is the scope of the proposed solution which would virtually put such shifts into an unregulated state. I have been provided with no evidence on how it would be used. Would it require work to be done other than on day shift? What impact would it have on the current pervasive use of the 12 hour shift arrangement? Those are only examples of the questions that the proposal raises.

[196] I am prepared to leave this issue open for a period of time should either or both parties wish to apply to provide supplementary evidence and argument to more comprehensively address the impact that the implementation of eight hour shifts would have on the fleet. I shall not guarantee that any such application would be successful. It would depend entirely upon the submissions made by Counsel at the time. The opportunity to apply shall remain open until 1700 hours on February 29, 2016 after which it shall expire and will no longer be

available. In that event, or if all the parties advise me in the meantime that they do not wish to pursue it, the proposal to implement eight hour shifts is refused.

18. **Crew Change Times**

Eight Hour Shift Vessels

[197] On the language of both existing collective agreements, no crew changes can occur between midnight and 0600 hours except for emergencies. Provision is made, however, for the Parties to mutually agree to a variance of up to one hour before 0600 hours.

[198] The position of the Company is that the black-out period is the cause of significant inefficiency. The example given was if a customer were to require work commencing at 0300 hours it would have to either schedule a shift commencing at midnight, resulting in the crew sitting idle for 3 hours, or else use a call-out, resulting in the Company paying a minimum of 8 hours of straight time pay to have the work performed. It does not propose, however, to eliminate the black-out period altogether but rather only to permit it to crew-on vessels at 0500 hours without obtaining the consent of the individual Unions. It says that a 0500 hours start time would be particularly valuable because a lot of work in the Harbour commences at 0600 and when it has sought their consent in the past, it has been consistently denied.

[199] The Unions argue that the current language has been in place for a considerable time and was freely negotiated. They say that the difficulties that the Company exposed have always existed. They argue that although a reduction of the black-out period by one hour would give it more flexibility, it would not resolve the problem posed by the example given.

[200] I accept the proposal as a modest change that could increase the efficiency of the scheduling system without a significant imposition on the employees who may be affected by it compared to a start time of 0600 hours. The language of Article 3.01.5 of the Guild agreement and Article 3.01(c) of the ILWU agreement shall be amended to prohibit crew changes between midnight and 0500 hours. The last sentence that provides for the Parties agreeing to a variation of up to one hour earlier shall be deleted as not having any further relevance.

Continuous Vessels

[201] The Company made a similar proposal with respect to crew-on times for continuous vessels. It is interesting that for this class of vessel the collective agreements only deal with crew-on times inferentially by requiring the payment of overtime if crew changes are made other than at 0900, 1200, 1800, 2100 or 2400 hours. No evidence was admitted to explain why the crew-on times for continuous vessels are so significantly more restrictive than those for eight hour shift vessels. Article 2.02.4 of the Guild collective agreement and Article 2.04(g) of the ILWU agreement take a completely different approach to crew-on times. Not only do they restrict crew-on to only 5 specific times during the day, the blackout period between midnight and 0900 is much longer. It was not explained why it was considered feasible to crew-on continuous vessels after 0800 hours (as proposed) or 0900 hours (the current language) when it was felt important to crew eight hour shift vessels starting at 0500 hours. Nor are there penalties provided in the event that that eight hour vessels are crewed on outside those periods, probably as an implicit recognition that the prohibition against crewing on during the black-out period is absolute, whereas the prohibition against doing it for continuous vessels is not and that they can be crewed up if a premium is paid.

[202] It would appear to me that the reason for the difference turned originally on the 6 hours on 6 hours off shifting arrangement for continuous vessels. It would have provided a degree of symmetry by crewing on at 1200 hours and 2400 hours. However, the symmetry was broken when three additional crew-on times were added which is set out in the last paragraph of the Guild agreement:

> In addition to the 1200 and 2400 hour commencement times provided for the pay and leave earned system, three (3) additional times are included: 0900, (1000 for Officers who reside outside the lower mainland) and 1800 and 2100 hours.

which are the precise times that are currently in effect. What is not obvious to me is why there is such a huge difference in the two systems. The explanation may lie in the fact that currently almost all of the work is done with continuous vessels so that by not actually restricting crewing on to the specified times but rather implicitly permitting it at other times if overtime is paid, it could greatly enhance the earnings of employees. However, that would be pure speculation and was not part of the evidence. The fact is that the Company would be able to control the expense by simply making sure that the crew-on of continuous vessels occur precisely at the specified times. If that is the case, the premium pay otherwise available to employees would not be significant. In any event, I am more sympathetic with the approach used to crew-on eight hour shift vessels, which is to simply restrict crewing on to specific times and not permit it to be done outside those times so that no opportunity is required to be made available to do it at premium rates.

[203] On that basis, I accept the proposal of the Employer to replace the two respective articles so that crew changes on continuous vessels may be done on the hour at any time between 0800 hours and 2400 hours on any calendar day but that accommodation be made for employees who reside on Vancouver Island. This will harmonize the approach to crewing up both types of vessels. It will, however, accommodate the differences between them by specifying different hours that may be available for each type of vessel but will not permit it to occur outside those times thus eliminating the need for premium pay.

19. **Conclusion**

[204] That completes my review of the issues in dispute relating to hours of work and overtime. Throughout the award I have attempted to limit my decision to issues of principle leaving the drafting of the relevant provisions of the collective agreements to the Parties. Where that has been done, the matter is referred back to the Parties provided that I reserve jurisdiction to deal with it in the event they are not able to agree. I also reserve jurisdiction to make clerical or mechanical corrections to his award as may appear from the context to be appropriate and to resolve any disputes relating to the interpretation or implementation of the award.

DATED this 7th day of December, 2015 at Vancouver, British Columbia

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Dalton L. Larson
Arbitrator