



The Canadian Merchant Service Guild

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

La Guilde de la Marine Marchande du Canada

INCORPORATED 1919 ASSOCIATION NATIONALE DES CAPITAINES – OFFICIERS DE PONT – PILOTES – MÉCANICIENS ET AUTRES OFFICIERS MARINS

AFFILIATED WITH / AFFILIÉE À

INTERNATIONAL MARITIME PILOTS' ASSOCIATION - INTERNATIONAL TRANSPORT WORKERS' FEDERATION - NATIONAL JOINT COUNCIL OF CANADA
ASSOCIATION INTERNATIONALE DES PILOTES MARITIMES - FÉDÉRATION INTERNATIONALE DES OUVRIERS DU TRANSPORT - CONSEIL NATIONAL MIXTE DU CANADA

OTTAWA – VANCOUVER – THOROLD – QUÉBEC – DARTMOUTH – ST. JOHN'S

December 16, 2019

Ms. Nicole Dubé
Senior Officer
Marine Occupational Safety and Health
Transport Canada

via: email

Dear Ms. Dubé,

RE: MASTER REPRESENTATION STATUS DETERMINATION

The Guild responds to the submissions of Seaspan with regard to the appointment, by the Guild, of Seaspan employee members on the Seaspan Policy Health and Safety Committee and Workplace Health and Safety Committee (“OHS Committees”), pursuant to Part II of the *Canada Labour Code* (“CLC”).

OHS Committees at Seaspan have existed since 2001. Seaspan argued at the time of their creation that the number of vessels and the short length of trips meant that the appointment of a Health and Safety Representative for each tug would be unworkable. OHS Committees were formed instead. Guild members who are masters of Seaspan tugs have sat continuously as employee representatives on Seaspan OHS Committees without complaint since their creation.

However, Seaspan now argues that the masters of Seaspan tugs exercise managerial functions, and are thus ineligible to serve as employee representatives on Seaspan OHS Committees. The Guild disagrees for the following reasons.

First, it is to be kept in mind that the notion of “managerial functions” is not defined by the CLC and has rather been developed through the decisions of the Canada Industrial Relations Board and its predecessors (collectively “CIRB”).

The term “employee” is defined in both Parts I and II of the CLC. In Part I, the definition excludes any person who “performs managerial functions or is employed in a confidential capacity in matters relating to industrial relations”. The definition does not preclude any person who performs supervisory functions from being included in a bargaining unit. The term “supervisory functions” is not defined by the CLC, but the CLC makes the distinction between supervisory and non-supervisory employees. It specifically allows the CIRB to include in a bargaining unit employees “whose duties include the supervision of other employees”. CLC section 27(5).

The definition of “employee” in Part II does not make these distinctions and thus, unless a specific reference to employees exercising managerial functions or supervisory functions is made in Part II, or the regulations made under Part II, the term “employee” includes all employees.

Section 135.1 of the CLC and section 4 of the *Policy Committees, Workplace Committees and Health and Safety Representatives Regulations* make a specific reference to managerial functions. Under section 135.1, at least half of the

members of OHS Committees are to be selected by the trade union and are not to exercise managerial functions. Under section 4 of the regulations, members selected by the employer are to exercise managerial functions. Neither section makes reference to supervisory functions, although the concept appears in Part II, excluding supervisory employees from being appointed on certain commissions. CLC section 137.1(2).

The current composition of the Seaspan Policy Health and Safety Committee is one master, one deckhand and two management representatives. The current composition of the Seaspan Workplace Health and Safety Committee is three deckhands, three masters and six management representatives. All members appointed by the Guild are thus Seaspan masters.

Simply stated, members of the OHS Committees appointed by the Guild are to be chosen from among members of the bargaining unit, which, by definition, is composed of non-managerial employees. Seaspan masters are included in the bargaining units and thus are eligible to be appointed as members of the OHS Committees.

Seaspan makes no mention of the composition of its bargaining units, but argues that the masters exercise managerial functions and that Seaspan could thus “consider placing a serving master on any [OHS] Committee as a management representative”. The arguments of Seaspan beg the question as to whether the Seaspan masters should be included in bargaining, even though Seaspan has signed consecutive collective agreements with the Guild including its masters in its bargaining units. But that is another question altogether, and subject to the jurisdiction of the CIRB, whether or not the masters exercise supervisory duties, as opposed to managerial functions, on board the tugs.

The CIRB has issued multiple decisions on managerial exclusions, but none more in point than *Captain and Chiefs Association v. Algoma Central Marine*, 2010 CIRB 531, 2011 CLLC 220-001, where the CIRB found that Algoma’s masters and chief engineers did not exercise managerial functions and were thus properly included in the bargaining units. The decision was unanimously upheld by the Federal Court of Appeal, *Algoma Central Marine v. Captains and Chiefs Association*, 2011 FCA 94.

In support of its arguments, Seaspan sets out some of the basic principles of the interpretation of managerial functions. Seaspan refers to criteria discussed in a recent meeting with Transport Canada, whereby their masters would be required to (i) exercise decision making authority in operational matters, (ii) make decisions or recommendations that materially affect the conditions of employment of others, and (iii) exercise disciplinary powers.

There are more than three criteria to be considered in deciding whether an employee exercises managerial functions, as illustrated by the Algoma decision, and by the *Labour Program’s Interpretation, Policies and Guidelines: IPG Selection of S&H Committee members and of Representatives Using “Managerial Functions” as a Criterion – Canada Labour Code, Part II*. But even if the three criteria identified by Seaspan were the key elements considered by the CIRB to demonstrate managerial functions, the factual situation of Seaspan masters does not support any of the three.

As proof of the first element, Seaspan refers to sections 82, 83, 109, 113 and 116 of the *Canada Shipping Act, 2001* (“CSA”). For the second element, Seaspan refers to its Marine Operations Manual (“MOM”) and the power of masters to promote mates and deckhands. For the third, Seaspan admits that the masters cannot employ or terminate any employee, but argues they can discipline employees by preventing the promotion of a mate or deckhand to the position of master.

With regard to the first element, the sections of the CSA identified by Seaspan do not create or concern managerial duties. Section 82 obliges a master to ensure that the crew are properly certificated. Section 83 allows a master to detain a person on board, temporarily to maintain good order and discipline, or where he believes the person has committed a federal offence. Section 109 states that the master shall take all reasonable steps to ensure the safety of the vessel and all those on board. Section 113 states that crew members are to report safety hazards to the master and to comply with his lawful directions. Section 116 states that no person shall board or disembark contrary to the orders of the master.

None of these sections concerns managerial matters, and especially not the managerial criteria identified by Seaspan. Seaspan argues that their masters are to ensure that all voyages are carried out in accordance with the CSA and *Collision Regulations*, but even the most basic job of a master, that of voyage planning, is delegated to the Seaspan shore-based Port Captain on Call for strategic navigation, including in the Fraser River. Section D of the Seaspan Standard Operating Procedures (“SOP”).

As proof of the second and third elements, Seaspan refers to the power of their masters to evaluate the performance of other crew members pursuant to the MOM, and thus to “promote” or “discipline” crew members according to whether they are recommended for advancement or not. The Guild submits that the promotion argument is incorrect. Seaspan masters do not promote, demote, hire or fire other employees.

There are approximately 33 vessels in operation at Seaspan ULC, of which at least 14 have a two-man crew consisting of one master and one deckhand, with no mate or engineer on board. These two-man vessels are often involved in the most safety-sensitive work Seaspan does, including Fraser River movements. The master works with the deckhand, and can be asked to train him, but cannot promote anyone to the position of master. Seaspan port captains make all manning decisions.

Further, the argument that masters can refuse to sail with deckhands does not reflect the reality of a company with several vessels operating locally. In reality, the Seaspan masters are the first to post for positions on tugs. Crew postings come out often weeks later. Crew postings are determined by seniority, regardless of what the master thinks. In reality, the deckhand chooses the master, as he knows which master will be on which vessel. It would be exaggerated to allege that the masters thus “discipline” crews by refusing to sail with them. (Sections 1.12 and 1.13 of the Seaspan Collective Agreement.)

The Guild submits that the internal documents to which Seaspan refers, the MOM and SOP give a better view of who does what, as far as managerial functions are concerned.

Seaspan refers to section 2.3 of the MOM. That section, entitled *Job Descriptions: Onboard Operations*, does say that the master is accountable for the efficient operations of the vessel. However, a review of the list of responsibilities of the master meets none of the criteria set out by Seaspan as establishing the master’s managerial functions. Instead, reference should be made to section 2.1 of the MOM, entitled *Job Descriptions: Shore-based Operations* and to section 2.2 entitled *Vessel Operations Organizational Chart*.

There it will be seen that the position of master is in fact low in the Seaspan chain, under not only the President of Seaspan Marine, but also the VP Operations, the VP Fleet Maintenance, the Director of Health, Safety, Environment and Quality, the Manager of Port Captains, the Manager of Regulatory and Compliance/Designated Person Ashore (“DPA”), the Manager, Quality Management, the Port Captain, the Manager, Marine Personnel, the Manager of the Environment and the Manager, Health and Safety, just to name those.

There is no aspect of the management of the Seaspan vessels that is not carried out on shore. The master is given on board responsibilities, but his main responsibility is to “maintain communication with company dispatch at all times”. MOM section 2.3.

The masters can be involved in crew training, but the job of overseeing crew training falls on the Manager, Marine Personnel. The Assistant Manager, Marine Personnel is responsible for job postings and assignments, as well as discipline and arbitrations under the collective agreements. The master is not in the grievance chain as Seaspan designates the person to whom grievances are to be presented. (Section 1.11(3) of the Seaspan Collective Agreement.)

It is true that the master is required to respond to incidents and emergencies, but that obligation is shared by the mate, if there is one, and is not an obligation of management. Further, section 5.4 of the MOM, entitled *Observing and Reporting*,

obliges the master to report to Seaspan Dispatch any non-conformances, incidents, accidents or hazardous occurrences on board. The Seaspan DPA or Port Captain thereafter holds an investigation and review process and the master and crew are prohibited from giving statements to anyone other than Seaspan management or their solicitors.

The master may well be the only person onboard who can signal a problem to management, but he appears nowhere in the Incident Notification List or Incident Command Team. Further, in case of pollution, the master is to immediately contact Seaspan Dispatch and it is only after validation with the Port Captain on Call that the master is authorized to deploy spill response. WCMRC, the only certified clean-up contractor on the West Coast, must be contacted by the Port Captain on Call. Section C of SOP, entitled *Incident Investigation/Reporting*.

For discipline, section 9.4 of the MOM states that either the Port Captain's Department or the master may make verbal warnings, and the master may put the offender ashore if the immediate problem continues. However, the Port Captain's Department takes all steps to discipline the individual without the master's further involvement. Employees are advised in section 9.4 of the MOM, and in the Seaspan Policy & Procedure Manual, that discipline will be handled by Seaspan management.

Section 2.4 of the MOM refers directly to OHS Committees, confirming that employee representatives will be selected by the union and provides that Seaspan management will establish all safety responsibilities for masters. There is no indication of the masters being involved in safety policy, but rather that they are to carry out that policy on board.

With regard to overtime pay, the SOP sets out the company's policy for paying overtime. It is specifically stated that the master will manage overtime in collaboration with Seaspan Dispatch. Further, "[t]he Company recognizes the master's unique role as Company employee, its onboard manager and Guild member". It is clear that Seaspan recognizes that masters tabulate overtime hours, but are themselves members of the Guild bargaining unit which negotiates overtime rates. This is but another indication of the acceptance by Seaspan that its masters are unionized employees who, by statutory definition, cannot and do not occupy managerial functions.

Whether the masters could be said to exercise supervisory functions, as opposed to managerial functions, is debateable, but irrelevant to the present discussion. The Guild has the obligation to appoint members of the bargaining unit as employee representatives on the OHS Committees. Masters are members of the bargaining unit and uniquely equipped to contribute to health and safety issues on board. They have sat without objection as employee representatives on the Seaspan OHS Committees since their inception, without dispute. Should Guild masters all of a sudden be excluded from Seaspan OHS Committees, the unique two-man crewing arrangements on Seaspan vessels would mean that there would be no Guild representatives on either Seaspan OHS Committee.

It is unclear why Seaspan has recently brought up the managerial function argument for the first time. Seaspan masters do not exercise managerial functions and are properly members of the bargaining unit represented by the Guild. The Guild consequently submits that Seaspan's arguments are incorrect in fact and in law, and the Guild proposes that the present practice of appointing Seaspan masters as employee representatives on OHS Committees has proven effective and should be continued.

Regards,

Joy Thomson

Joy Thomson
National Secretary-Treasurer