

IN THE MATTER OF SUMMARY DISPOSITION 2010-02

BETWEEN

**BRITISH COLUMBIA MARITIME EMPLOYERS
ASSOCIATION**

(The Association)

AND

**INTERNATIONAL LONGSHORE AND WAREHOUSE
UNION-CANADA**

(The Union)

Western Stevedoring-Work related to "Pontoons" on Grieg Star Vessels

Article 20

Job Arbitrator: Frederick H. Cuddington

Counsel for the Association: Mr. Jack Vogt
Counsel for the Union: Mr. Mike Rondpré

Witness:
Local 500: Mr. Mark Keserich
Local 500 Business Agent: Mr. Paulo Branco
Western Stevedoring: Mr. Peter Vieweg
Grieg Star Shipping: Mr. Ryan McFarlane

Hearing: June 18, 2010
Location: Vancouver, BC

Decision Published: June 22, 2010

I

The Union's issue was that Western Stevedoring and Grieg Star were in violation of Article 20 of the Collective Agreement because the crew members of a Grieg Star ship were performing work related to the movement and placement of "tween decks" or "pontoons". The Union sought an order that the employer use Local 500 members to do the work. In short, the Union's position was that since there was no specific proviso in the Agreement to except this work from being performed by its members, it should be performed by union members.

The Association's response was that the disputed work was covered by the exceptions set out in Article 20 - DEEPSEA SHIP WORK. Article 20.01 2. (d) allows crew members, at the option of the vessel, to perform such work. In effect the reference to "special hatch covers" captured these structures. A further argument was advanced that this work was "special" and was therefore covered by that exception in the Article. In the alternative the Association argued that there was ambiguity on the face of the Agreement and therefore, past practice should be used to establish that only crew members at Grieg Star had performed this in the past.

II

The hearing commenced with a tour of the ship and my being provided with a description of the work included in the use of these "tween decks" or "pontoons". These are decks that are placed in a hatch or hatches of the ship to separate different types of cargo so as to allow various products or cargo types to be transported in the same ship. In this particular situation, they are decks which are

secured by manually levering metal supports to hold the deck in place; these are referred to as "dogs". In other ships these "dogs" are hydraulic. There could be several levels or separations in a single hatch. These are very large metal structures that clearly would support very heavy loads.

The Union's witness, Mr. Kesrich, is a experienced gantry operator who works (or has worked) in the Vancouver Port; he is presently a Union Official. He has had prior experience, with regard to the use of "tween decks" or "pontoons" in ships. He testified that many years ago when these structures were wooden they had been handled by union members. He further testified that he had loaded ships where the supports or "dogs" were hydraulic, as opposed to manual as on the ship in question here. In cross examination he acknowledged that his only experience was in Vancouver and not other sites where Grieg Star docked ships; and on Westwood vessels as opposed to Grieg Star vessels.

In addition he did provide evidence related to the safe operation of these decks which could be employed by Grieg Star to provide protection to employees who ride these decks and manually put the "dogs" into place. I will have more to say about this later.

The Association called two witnesses - Mr. Ryan McFarlane, the Grieg Star Port Captain and Mr. Peter Vieweg, of Western Stevedoring. Both are very long service and experienced persons. In addition to Vancouver, Mr. McFarlane has responsibilities at other port sites and facilities in British Columbia where these issues might arise. Mr. McFarlane testified that these particular "pontoons" were particular to Grieg Star in that they were manually levered into place. In addition,

they both testified that Union members had never performed these functions on any Grieg Star vessels in their long experiences.

III

The Union argued that the disputed work was Collective Agreement work; that there was no specific exception on the face of the Collective Agreement. The Union asserted that arguments from the Association that these were "hatch covers" or "special" hatch covers was absurd or words to that effect. Further the Union argued that its members had done this work for a long time. The Union also asserted that this work could be performed in a much safer fashion.

The Association argued that "pontoons" were the same, or similar to "hatch covers" and therefore could be put in place by crew members at the discretion of Grieg Star. And that by virtue of the fact that the setting of the "dogs" on these ships was done manually (as opposed to hydraulically on other vessels) that these circumstances constituted a "special" situation within the meaning of the Collective Agreement and that that, in and of itself, explained why union members had never performed this work on Grieg Star vessels.

In the alternative, the Association asserted that there was ambiguity in the Agreement, and therefore, the past practice should be examined; the past practice supported their contention that the work in question could be, and was, performed by ship crew members. In short, because that is the way it has always been done. The Association asserted that their witnesses provided clear and un-contradicted evidence that the work had always been performed by Grieg Star crew members;

IV

The provisions of Article 20 - DEEPSEA SHIP WORK are clearly to be interpreted and applied work to performed for a variety of companies, sites and situations covered by the Collective Agreement. The opening paragraph sets out that the work to be performed by employees covered by the Agreement shall include work in connection with the following (terms), "subject to the exceptions or conditions listed". In a number of instances, the Article uses the expression that work can be performed by "crew members at the option of the vessel" Elsewhere in the Article it sets out that a condition for crew members doing work that the work "is not in connection with regular duties of employees". As well, there are stipulations in this regard that reference specific Companies. In general terms the provisions are going to be subject to interpretation in the context of many situations and changing situations. While in certain situations the provisions are very specific, in others, the provisions are by their very nature ambiguous and subject to debate.

There are no definitions in the collective agreement which might be helpful in sorting out the variety of terms related to the ship structures that were in question here. It is my view that it would be very difficult to define every aspect and piece of equipment in the agreement.

For example, in the hearing there was a rather circular argument arise as to whether one person's ceiling was another person's floor. The Union asserted that the 'tween decks" or "pontoons" were not captured by the term "hatch cover" and performed a completely different function than a "hatch cover". The Association asserted that the functions of these structures were analogous and that frequently, the terms were

used interchangeably. Given that these are structures that have been around for some considerable period of time and that the particular Company is a frequent user of the various port sites covered by the agreement it might appear usual that this definitional argument arose. In my view, it is clear that it arose because the agreement is ambiguous. Given the circumstances generally, and specifically here, the terms of the agreement are ambiguous; that is my finding. One is driven to examine and take into account past practice.

I would emphasize that it was clear in the evidence that union members had not performed functions related to these structures on this party's ships at Western Stevedoring, Vancouver at any time. It is also uncontradicted, that union members had not performed duties in relation to this type of "pontoon" at any other of a variety of locations where Grieg Star docks.

I accept that these "pontoons" or "tween decks" are similar to the "hatch covers"; but in my view they have a sufficiently different function that they are not the same. For similar reasons, I do not accept that the wooden structures from an earlier period referenced by the Union are the same as these "pontoons" and therefore provide a basis to assert that union members have always done this work.

I am more persuaded by the Association's arguments with regard to them being "special" and that they are not handled normally by union members in this operation and with this company. I am satisfied that, in the present circumstances, the work is work that has been performed by crew members and could continue to be at the discretion of the company. Once again, I find that the agreement is ambiguous and therefore this matter is determined by the past practice.

Indeed, the Union's evidence with regard to a safer procedure for placing the pontoons would indirectly appear to confirm that union members did not perform the tasks in question. While Mr. Keserich tendered some commendable suggestions; it was an indication that Grieg Star did not operate in the fashion he thought necessary and appropriate. One might assume that had union members performed these tasks in these circumstances his suggestions would have been the practice.

The result is that the Union's case does not succeed.

I will retain jurisdiction in the event the Parties cannot reach a mutually acceptable agreement.

I thank counsel for their helpful submissions.

Dated in Vancouver, British Columbia this 22 Day of June 2010.



Frederick H. Cuddington
Alternate Job Arbitrator