

IN THE MATTER OF A MEDIATION/ARBITRATION

BETWEEN:

BC FERRY SERVICES INC.

(the "Employer" or the "Company")

AND:

BC FERRY AND MARINE WORKERS' UNION

(the "Union" or "BCFMWU")

(INTERIM AWARD)

ARBITRATOR:

Vincent L. Ready

COUNSEL:

Eric Harris, Q.C. for
the Employer

Michael Walton for
the BCFMWU

Shona Moore, Q.C. for
the Ships' Officers Component

APPEARANCES:

Glen Schwartz and
Blaine Ellis for the Employer

Jackie Miller, President,
BCFMWU and Lynda Ruhl
for the Union

HEARING:

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I. INTRODUCTION

This Award is as a result of a protracted and complex collective bargaining dispute between BC Ferry Services Inc. (the “Employer” or the “Company”) and the BC Ferry and Marine Workers’ Union (the “Union”). Many of the reasons for the length of the dispute and its complex nature can be found in events which took place in 2001 through 2003.

In 2001 the new provincial government began a “Core Services Review” of its services and programs. Under this process crown corporations, such as the then British Columbia Ferry Corporation, were scrutinized. The resulting review came up with a number of conclusions about the Ferry Corporation:

- A lack of strategic planning and poor decision-making had resulted in deteriorating service and outdated vessels.
- \$2 billion was required to replace aging ships and upgrade terminals over the next 15 years, but the corporation’s structure inhibited access to outside capital.
- Ferry users had grown increasingly frustrated by service disruption, inefficiencies, late sailings and a lack of service and amenity choices.

To address these conclusions, the provincial government and the corporation’s board of directors recommended a new governance model to

increase the organization's independence from the government and to provide a transition to alternate methods of service delivery.

This new governance model was embodied in the *Coastal Ferry Act* passed on March 26, 2003. Effective April 1, 2003, the new company, BC Ferry Services Inc., would no longer be a crown corporation but would be an independent and self-financing company. There would be a Coastal Ferry Services Contract which would be a long-term agreement (five years) between the provincial government and the new company establishing routes, service levels and fees. The *Act* also established a BC Ferry Authority with a nine member board of directors with full fiduciary responsibility. Government, coastal communities and labour would have direct input to the nominating process for the director positions.

Since the *Act* contemplates that there will be more than one ferry operator, an independent regulator, the British Columbia Ferries Commission was also established under the *Coastal Ferry Act* to regulate the ferry operator(s) and to provide consumer protection through the regulation of fares.

Immediately on its passage, the *Coastal Ferry Act* and its meaning became a source of controversy between the parties. The *Act* not only created a new company, BC Ferry Services Inc., but also created a new maintenance

subsidiary (Deas Pacific Marine Inc.) which had previously been part of the crown corporation.

Employees were transferred from the crown corporation to the new companies and the companies were deemed separate employers under the *Act*. The *Act* declared the new ferry company an essential service under the *Labour Relations Code* and further provided that any provision of the parties' Collective Agreement would be null and void if it conflicted with the *Act*. Such measures struck at the very core of a free collective bargaining regime.

The *Act* further addressed the very basis of how the new Company, as well as any other ferry operators, were to operate. Section 38(1) of the *Act* speaks to the following:

- (a) priority is to be placed on the financial sustainability of the ferry operators;
- (b) ferry operators are to be encouraged to adopt a commercial approach to ferry service delivery;
- (c) ferry operators are to be encouraged to seek additional or alternative service providers on designated ferry routes through fair and open competitive processes;
- (d) ferry operators are to be encouraged to minimize expenses without adversely affecting their safe compliance with core ferry services.

It appeared that a message was being sent to the Company as to how it was to operate, not only within a financial and operational setting, but within the confines of the parties' own Collective Agreement.

Armed with their own, and I might add "disparate", understanding of what that message consisted of, the parties entered collective bargaining in the fall of 2003. Their Collective Agreement was about to expire on October 31, 2003.

The passage of the *Act* just before the parties' collective bargaining commenced set the stage for a disruptive and vitriolic atmosphere at the bargaining table. Recognizing the need for operational change and bolstered by its understanding of the provisions in the *Act*, the Employer tabled an ambitious proposal for settlement which touched almost every provision of the Collective Agreement. The proposal contained what it viewed as a simpler and less costly hours of work system. It called for the creation of different classifications of employees, rather than the mere "regular" and "casual" classifications in the current Collective Agreement. It proposed a loosening of the Collective Agreement restrictions on contracting out (the current Collective Agreement provides for no contracting out if it results in the layoff of a regular employee).

The Employer claimed it only needed \$2.7 million in annual savings from some of these proposals but the tabled package appeared to go much further than that: striking at how overtime was paid, introducing a merit-based selection system, offering compensation in the third year of the Collective Agreement only, stating that many of the classifications were overpaid based on market comparisons. It was akin to the Employer trying to wipe the slate clean, and pretend that collective bargaining had not been taking place for a number of years. It was *tabula rasa* in the extreme.

Not surprisingly, the Union responded in the expected manner and, needless to say, when I became involved in the dispute in December of 2003, there had been little or no progress made at the bargaining table. Nor was there progress made with my initial involvement. That mediation ended abruptly on the second day of my appointment and the Union proceeded to strike.

After five days on strike, the provincial government intervened and ordered an 80-day cooling off period, a complete resumption of work and my appointment as Special Mediator under the *Railway and Ferries Bargaining Assistance Act*. Ignoring the government's edict and questioning its legality, the Union remained off the job.

I met with the parties again on December 11 and 12, 2003 as a Special Mediator but both sides were fixed on their respective positions. In order to bring conclusion to the dispute and in particular to the strike, as well as restore the ferry service to the public, I recommended that the parties refer the outstanding issues to binding arbitration before me and that the employees return to work. The parties agreed and provided me with full and binding authority to settle all outstanding matters in dispute and ultimately conclude a Collective Agreement between them. As a consequence, ferry service resumed on December 12, 2003.

However, that was hardly the end to the collective bargaining dispute, or to the processes which I would have to utilize to bring conclusion to the dispute. In fact, it was merely the beginning. On January 20, 2004, I wrote to the parties describing a mixture of arbitration (interest and perhaps final offer selection), mediation and facilitation whereby certain issues would be subjected to varying dispute resolution techniques depending upon the nature of the issues. Because of the breadth of the dispute (almost every clause in the Collective Agreement had been opened) and in an attempt to narrow the issues and focus on the key issues, I requested written submissions from the parties as preparation for the future processes, including interest arbitration.

The submissions were to bear in mind certain terms of reference:

- 1) The principles of replication, i.e., what the parties would likely have negotiated had the strike continued
- 2) The provisions of the *Coastal Ferry Act*
- 3) The relevant provisions of the British Columbia *Labour Relations Code*
- 4) The economic circumstances affecting BC Ferry Services Inc.
- 5) The operational justification of any proposed change(s) to the Collective Agreement
- 6) The legitimate interests of the Employer, employees and the trade union
- 7) Other relevant comparable working conditions
- 8) The importance and necessity of good labour relations in the BC Ferry system.

The parties complied and provided me with written submissions and replies in February and March of 2004. Once I reviewed the written submissions, I realized that the parties' positions were almost identical to where they had been in December of 2003. In an attempt to narrow the issues, I requested that the parties return to negotiations to try and resolve a number of less contentious matters.

With the assistance of Irene Holden, progress was made on these matters but the more difficult issues remained outstanding. Accordingly, on May 16-18 and May 27-29, 2004, I heard evidence on what I considered to be the major issues in dispute, namely: wages and benefits; contracting out; workforce

restructuring; the parties' relationship; the selection process; recruitment and retention issues; overtime; and other compensation matters.

Having heard such evidence, I remained of the view that the crux of the dispute centered around several key issues: contracting out, hours of work, workforce restructuring, and wages and term. In my view, issues like hours of work should be decided by those who intimately understand the current system and also understand where the Employer needs to go to turn this Company around, i.e., the parties themselves. Consequently, on June 7, 2004 I issued an interim award directing the parties back to the bargaining table to conduct meaningful negotiations on these central issues.

In that award I offered some guidelines as to which issues the parties should be negotiating and what ultimately may form part of my final award. Again, with the assistance of Irene Holden, the parties met and attempted to reach agreement on these three issues. Although they were not successful in concluding a deal, the parties considerably narrowed the gap between them. However, I was still of the view that more had to be done in this regard.

On that basis, on July 22, 2004, I requested a modified position from the parties on all outstanding matters. I cautioned the parties that their revised positions on these matters should be realistic, taking into account operational necessities, bona fide comparators (those with similar operations, qualifications

and duties), and what would have been achievable had a settlement been reached at the conclusion of the strike. The parties provided their final submissions on July 30, 2004 and their replies on August 5, 2004.

II. FINAL SUBMISSIONS

Although the parties provided modified positions in their final submissions as requested, these modified positions in some proposals increased the gap between them, rather than lessening the gap. The following is a summary of the parties' positions in their final submissions.

The Employer

In summary, the Employer's final submission continued to be quite ambitious. It relied heavily on the *Coastal Ferry Act* and what changes in the Collective Agreement the Employer believed the *Act* required. The Employer submitted that it needed changes in the contracting out language of the Collective Agreement. It needed to restructure the hours of work and have more flexibility in the classifications of employees it employed, as well as the exclusion of certain employees. It argued that its compensation and benefits structure was too costly and had to be more competitive and reflective of its market. It proposed a new compensation and benefits structure which would reduce its costs over time.

Further, the Employer proposed a new method of seniority accumulation for the new categories of employees; vacations and leaves based on hours; merit-based appointments; mandatory substitution requirements; and a broadening of sea-time accrual opportunities to assist in career development. Finally, the Employer submitted that a longer term for the Collective Agreement would allow the parties sufficient time for the implementation and review of the significant changes it was proposing, as well as allow the parties time to create a more effective working relationship.

The Union

In its final submission, the Union argued against the Employer's interpretation of the *Coastal Ferry Act* and the requirement to make changes in the Collective Agreement - particularly when it came to the contracting out provisions. Having said that, the Union recognized a need for changes in the hours of work and categories of employees, but suggested gradual changes to both, and with increased costs attached to its proposals. The Union's submission highlighted its view of the anticipated officer shortage in the marine industry and argued that if the Employer succeeded in its proposals not only would it have problems recruiting officers, but it would also have problems in retaining the current ones. Consequently it proposed large wage increases for the officer ranks, a general wage increase for all, and increased premiums for longer hours of work.

The Union submitted that the Employer's costing model was flawed and if the Employer were to succeed in its ambitious restructuring plans, it would save money even with the Union's proposed increases in compensation and benefits. The Union rejected the Employer's other proposals on exclusions, seniority accumulation, sea-time accrual opportunities, substitution, and merit-based appointments, although it did acknowledge that the current assessment process for selections was problematic and needed review.

Finally, the Union proposed a shorter term to the Collective Agreement, arguing that such a term would be consistent with industry standards. More importantly, the Union wanted a shorter term because it believed that, as a result of the privatization of the Company, there was chaos in the workplace and positive labour relations was at an all time low. Given such an environment, the Union did not want to be locked into a long term Collective Agreement.

III. THE ROLE OF THE INTEREST ARBITRATOR

I pause at this juncture to briefly state what my role as interest arbitrator is in a collective bargaining dispute. The role is to attempt to replicate or formulate a Collective Agreement that the parties would have negotiated had they been left on their own to do so, with the use of conventional economic sanctions such as a strike or lockout. In more colloquial terms, the interest arbitrator stands in the shoes of the parties and creates an award he/she

believes best replicates what the parties would have negotiated on their own. In that regard see *Saskatchewan Health Care Association and Canadian Union of Public Employees*, unreported, May 17, 1982, a decision made pursuant to the *Cancer Foundation (Maintenance of Operations) Act*. In that case, Mr. Justice Halvorsen stated as follows:

In compulsory arbitration of this type it is a duty of the arbitrator to strive for a resolution of the issues which will be consistent with the result which the parties might reasonably have expected had the collective bargaining process not been interrupted by the legislation. That is, the arbitrator is not to mediate the differences, nor is he to wear the mantle of a crusader for social change and impose his notions of what is fair and just. Rather, it is his obligation to apply the evidence subjectively so that his award will reflect what probably could have been attained in a freely negotiated settlement. The award should then be consistent with labour relations realities.

(at 2-3)

See also *Board of Police Commissioners of the Corporation of the City of Regina and the Regina Police Association*, unreported, April 21, 1994 (Ready), wherein I stated:

In my view, the appropriate replication approach imposes an obligation on the arbitrator to essentially stand in the shoes of the negotiators and pose the question: what settlement is possible in the current circumstances? Answering this question requires that the arbitrator view and examine the evidence, as well as examine factors such as current economic

conditions, the cost of living index, a comparison of other police force settlements, internal comparisons (i.e., settlements between other unions and the same employer) and collective agreements negotiated generally in both the public and private sectors. This, of course, is not a complete list of factors. It is, however, typical of the factors assessed by negotiators representing each side of the bargaining table when the crunch comes and it is time to settle a collective agreement.

In its initial submission the Union presented what I consider to be a rather specious argument with respect to the principles of replication. Stated briefly, the Union asserted that it had bargained for many years with this Employer and had not agreed to changes in the Collective Agreement which would adversely change its provisions. Therefore, there is no reason to believe it would agree to such changes during the course of this dispute. Consequently, I was urged to adhere to the historical pattern and behaviour of the Union and not award any significant changes to the Collective Agreement.

However, in its final submission, the Union restricted its argument regarding the replication theory solely to its wage proposal. The Union submitted that replication was to be based on objective criteria such as the relevant labour market. From its point of view, the Union's relevant labour markets are unionized environments and marine industries in general (such as Deas Pacific Marine Inc., one of the companies created by the *Coastal Ferry Act*). It cited *Beacon Hill and the HEU* decision, March 31, 1985, 19 L.A.C., since the interest arbitrator in that decision was constrained by a piece of

legislation, just as I am by the *Coastal Ferry Act*. In this regard, the Union argued that since I do not know how the *Coastal Ferry Act* will be applied in the future, I can only rule on the terms and conditions that exist today.

The Employer, on the other hand, asserted that in utilizing the replication theory I have to be ever mindful of the *Coastal Ferry Act* and acknowledge that when I am trying to replicate a Collective Agreement which could have been reached by the parties themselves, that a Collective Agreement would not have been possible if it conflicted with, or was inconsistent with, the *Act*.

Although I am mindful of the content of the *Coastal Ferry Act*, I am particularly concerned with what was happening with collective bargaining in this province when this dispute began. I hold the view that a plausible outcome of this dispute, had it been allowed to reach its ultimate conclusion in December, 2003, would have been a legislated settlement. It is very likely that an imposed settlement would have incorporated the terms and conditions of the Employer's last offer prior to the parties' agreement to submit the dispute to arbitration and end the labour dispute.

Indeed there is ample precedent in the last three years for that type of provincial government intervention. This dispute, in my view, would have ended in a similar manner.

Therefore, in applying the principles of replication in the case at hand, I believe the more prudent approach is to deal with the present labour relations realities at BC Ferries. That is, to deal with real and substantive issues as they presently exist and issue an award accordingly. Such an award should take into consideration the collective agreement which was freely bargained by this Union and Deas Pacific Marine, but cannot ignore the present unique financial and operational realities facing the parties.

IV. SETTLEMENT FRAMEWORK

Faced with the parties' final submissions, and my role as interest arbitrator, I forewarned the parties that this award must, and would, address those realities which include changes to the method of contracting out of work; hours of work; workforce restructuring; exclusions; and the establishment of additional categories of employees. I advised the parties I would further be awarding an equitable method of converting employees into those categories, and provisions which could more appropriately deal with employees who are affected by the fallout from these major changes.

I also advised the parties I would award a longer term Collective Agreement. I believed that a longer term agreement would allow the parties to implement the changes to the Collective Agreement contained in this award and

also allow the day-to-day labour relations to stabilize between the parties which, in the end, is in both parties' and the public's interests.

In early September, 2004 I once again met with the bargaining principals of both parties and entered into further exploratory talks with them. I did so because I still felt that their bargaining proposals and positions presented an irreconcilable gap. I advised them that it was time they faced up to the responsibilities and established a settlement framework that would meet their "real and substantive" issues and that such approach would give this board the type of arbitral guidance necessary to render an award that would more meaningfully meet their needs.

The recent talks have been extremely productive. The bargaining principals have established a defined framework which accommodates their interests, as well as those of the public. The framework provides for long term stability and takes a fresh and different approach to issues such as hours of work and job selections. To be more specific, the framework consists of a longer term Collective Agreement; general wage increases; classification increases; a different wage grid for new employees; an hours of work committee to review the operation on a route by route basis or operational area; exclusion of certain bargaining unit positions so as to allow for more efficient administration of certain operational functions; revisions to special leave and family illness leave; revisions to STIIP; the resurrection of the joint committee

on increasing productivity, reducing cost, increasing revenue and gainsharing; changes to the job selection system for certain positions; revisions to overtime and differentials; vessel designation provisions; the creation of a workforce planning committee; the introduction of seasonal employees; recognition of officer shortages; and an increase in the number of full-time regular and part-time employees from the current system.

Consequently, in issuing this award I have adopted the parties' settlement framework and have considered all of the submissions and evidence put before me over the past several months.

V. AWARD

I therefore award the following:

1. TERM

Throughout these proceedings I have advocated a longer term to the Collective Agreement in order to stabilize labour relations between the parties. In their recent exploratory discussions both sides appeared to recognize the advantage of a long term Collective Agreement. Such a term would create a stable and predictable operating environment for customers and the traveling public through the 2010 Olympics. Just as importantly, a term such as this has the significant potential of stabilizing employee trust, labour relations and allows a long timeframe within which to gradually introduce some of the

changes to the operation and the Collective Agreement, such as in hours of work etc., embodied in this award. One must also take into account that almost a year of the Collective Agreement has passed – cutting into the timeframe during which industrial stability has to be established in order to ensure the ongoing viability of the Company.

For these reasons I award that the term of agreement become effective November 1, 2003 and expire October 31, 2010.

2. HOURS OF WORK

Currently, Article 16 of the Collective Agreement provides for several hours of work structures originally conceived to suit the needs of various parts of the organization, routes, and vessels. So, for example, there is a different hours of work clause for seven day operations (other than clerical and stores); one for clerical and stores operations; and one for Monday to Friday operations. There is an Annual Scheduled Time Off system (“ASTO”) for the seven day operations in the Northern Gulf Islands; a provision for ten hour vessels; flex time provisions for clerical staff; as well as job sharing. Article 29 also provides for varying hours of work provisions for twelve hour vessels (both those where the employees live aboard and non live-aboard vessels).

The parties agree that there are problems with some of these hours of work systems and that some of them cannot meet the needs of the public

unless the Employer incurs inordinate amounts of scheduled overtime. This scheduled overtime has resulted in significant costs to the Employer (\$4.23 million in 2003), and several of the routes have the overtime built into the schedules as a matter of routine.

In addition to overtime costs, many of the hours of work systems incur penalties which range from a 5% differential added to the employee's basic pay for work on a ten hour vessel, to a 27% or 29% differential for varying schedules on the twelve hour vessels. The ASTO system also incurs Scheduled Surplus Differentials ("SSD") which cost the Employer \$1.15 million in 2003.

The overtime incurred may lead to Compensatory Time Off ("CTO") which, coupled with vacation scheduling and Paid Time Off ("PTO"), creates scheduling problems, according to the Employer. Further operational problems occur since many of the shift lengths cannot meet operational needs without the occurrence of scheduled overtime.

To alleviate the complex administration of the varying systems the Employer, throughout these proceedings, proposed a single hours of work system for the entire operation based on 1958 compensatory annual hours of work for Vessel and Operational Support employees and 1827 hours per year for Monday to Friday employees (basically status quo for the latter group of employees). The system has been deemed the "threshold system" and included

the creation of annual work and time off schedules, plus the elimination of scheduled overtime and various premiums.

This far-reaching proposal, the Employer submitted, would reduce its costs, allow it to take control of the operation and provide better customer service. Recognizing the magnitude of the changes to the hours of work, the Employer proposed an Hours of Work Umpire to assist the parties in resolving disputes.

Acknowledging that change is needed in the Vessel and Operational Support side of the Company, the Union initially proposed that the ASTO system be the one comprehensive hours of work system. The Employer rejected that proposal on the basis of the costs associated with the system, such as the cost of the SSDs. During the facilitation process, the Union began to bargain towards the kind of threshold system the Employer was proposing, but based its proposal on 1827 compensatory hours instead of 1958, with fewer shift patterns and fewer shift lengths. The employees would also still maintain a fair amount of flexibility in terms of time off. Again this was rejected by the Employer.

In the Union's final submission, it proposed a combination of its previous positions on hours of work. It contended that the Employer's "radical proposal" would be detrimental to its members, both financially and in terms of their

lifestyles. It further contended that the far-reaching effects of the threshold system were not known at this stage, so the parties should proceed slowly and cautiously.

In the recent framework discussions, the parties appear to have adopted a slower and more cautious approach by which I am guided. I therefore award the following Memorandum of Understanding on Hours of Work:

MEMORANDUM OF UNDERSTANDING
RE: HOURS OF WORK COMMITTEE

An Hours of Work Committee(s) comprised of an equal number of Company and Union representatives shall be formed.

The purpose of the Committee(s) will be to reduce the operational costs and improve operational efficiencies and services, through changes in the Hours of Work, consistent with customer requirements by operational area and/or route on or before April 1, 2005 or as otherwise agreed to by the parties.

Differences shall be submitted to an Hours of Work Umpire (Vince Ready or Irene Holden) who shall resolve the dispute within fourteen (14) days of receiving a submission from either party. The Umpire(s) shall have the right to determine his or her own procedures.

In resolving a dispute, the Umpire(s) shall take into consideration customer requirements and operational efficiencies relative to the impact on employees of the proposed changes to the hours of work and schedules.

3. DIFFERENTIALS

In association with the hours of work proposal, the Employer had proposed that Clause 7.07 relating to work on a 10 or 12 hour vessel should be deleted due to the presence of special differentials in that Clause. This Clause provides that employees who work on a 10 or 12 hour vessel would receive their normal daily rate plus the 10 or 12 hour differential that would apply otherwise.

The Employer had also proposed that the current provisions of Article 29 relating to 12 hour vessels be significantly changed to align them with the new comprehensive hours of work system.

I agree that in the current economic circumstances differentials and premiums such as these need revision. I do not agree that they should be deleted in their entirety. I am therefore awarding that Clause 29.01(d) be amended so that the 29% and 27% differentials be reduced to 10%. However, a new clause should be added to this Article which reads as follows:

Employees currently holding these positions or an employee whose current Point of Assembly includes the above, shall be “grandfathered” for the duration of this Collective Agreement.

4. OVERTIME COMPENSATION – CLAUSE 18.02

Also associated with the hours of work provisions is the significant amount of overtime paid. Further, under Clause 18.02 of the Collective Agreement, all overtime worked is calculated in half hour increments. In this dispute, the Employer's position was that overtime should be paid for actual time worked with no payment for periods of overtime of 5 minutes or less per day. The Employer has not proposed a change in the rate of payment for overtime which is at double time. However, the Employer has proposed that overtime pay on a day of rest would not apply to casual, seasonal or regular part time employees.

As another example, under Clause 18.03 employees in certain circumstances not only receive overtime pay but also can receive two hours' accumulated time for each day worked. The Employer has proposed that this premium be deleted, along with myriad of others.

Nevertheless, in keeping with possible changes in the hours of work systems, and the need for efficiency and productivity, I award that Clause 18.02 be amended as follows:

In accordance with Article 18 all overtime worked shall be calculated in one-half (1/2) hour increments, provided that employees shall not be entitled to any overtime compensation for periods of overtime of five (5) minutes or less per day.

5. MOU VII – JOINT COMMITTEE ON INCREASING PRODUCTIVITY, REDUCING COST, INCREASING REVENUE AND GAIN SHARING

Rather than have a completely new hours of work system, the Union had, at one point, proposed that a new Letter of Understanding be entered into under Clause 2.11 establishing a Ferry Committee of equal membership between the Union and the Employer. The purposes of the Committee were to conduct a salary and benefit survey, and an hours of work survey.

During the course of the hearing, I was impressed by the number of committees and consultative mechanisms which already exist between the parties. Indeed, the parties in past collective bargaining have put their minds to the issues at the very heart of this dispute. I speak specifically of Clause 2.12 and more importantly, Memorandum of Understanding VII. Clause 2.12 provides for the creation of Union/Management Consultation Committees – both at the senior and local levels. These committees were designed to “review matters related to the maintenance of good relations between the parties” and “correct conditions which may give rise to grievances and misunderstandings”. Memorandum of Understanding VII is entitled “Joint Commitment on Increasing Productivity, Reducing Costs, Increasing Revenue and Gainsharing” and provides for the establishment of a joint committee which was to discuss “enhancing the delivery of service to the public...improving work practices, systems, and processes...and identify opportunities for revenue enhancement”.

The real and substantive difficulty is that there is little evidence the parties have followed these provisions. Rather than establish a new committee to review these very important issues, I order that the joint committee found in Memorandum of Understanding VII be resurrected and a final clause added which would provide a dispute resolution mechanism to the clause and put some “teeth”, if you will, into the purpose of the language found in the Memorandum. The final clause would read as follows:

In the event the parties cannot reach agreement, the matter may be referred by either party to Vince Ready or Irene Holden for adjudication.

6. CONTRACTING OUT

Currently Article 14(a) limits the ability of the Employer to contract out work if such contract would result in the layoff of employees. The Employer views this provision as a hindrance to its obligations under the *Coastal Ferry Act* to take a competitive, commercial and cost-effective approach to the delivery of ferry services. Consequently in its submission, the Employer proposes deleting Article 14(a) and the restriction found within that clause.

Further, the Employer proposes that it would conduct a business analysis on all contracting out proposals with respect to contracting out of designated ferry routes and meet with the Union to discuss the proposals. The

Union would be eligible to submit its own request for proposal to perform the work. After giving it “due consideration”, if the Union’s proposal does not meet the Employer’s requirements, the Employer submits it should be allowed to “summarily dismiss” the Union’s proposal with the Union having no ability to grieve the Employer’s decision. The Employer finally submits that it would meet with the Union to provide it with reasons for rejecting its proposal or to formalize a contract with the Union for the performance of the work.

Conversely, the Union does not agree that the *Coastal Ferry Act* requires the Employer to contract out in order to minimize expenses. The Union further argues that the government had no intention of interfering in collective bargaining by passing the *Coastal Ferry Act*. If it had intended to do so, says the Union, it would have plainly stated it in the *Act* or passed some other form of legislation – as it had done in a number of other collective bargaining disputes. The Union cites certain pieces of legislation which were specifically designed for that purpose: the *Health Care Services Collective Agreements Act*, Bill 15 passed in 2001; the *Medical Services Arbitration Act*, Bill 9 passed in 2002; the *Coastal Forest Industry Dispute Settlement Act*, Bill 99 passed in 2003 – to name a few.

Consequently, the Union submits that contracting out should be viewed as proper subject matter for normal collective bargaining under the *Labour Relations Code*. In keeping with its view, the Union therefore proposes in its

final submission that the restrictions on contracting out, found in the current Article 14(a), should remain. It proposes a consultative process between itself and the Employer prior to any contracting out – during which the Employer would be required to provide the Union “with sufficient information to demonstrate that the business purpose of the contract is able to meet a threshold test”.

At the same time, the proposal suggests that the Union would be given the opportunity to put forward its case for keeping the work in-house. It should be noted that the Union is not interested in bidding on the work, as is contemplated in the Employer’s proposed language. Finally, the Union proposes that, should a new group of employees join the bargaining unit, terms and conditions of employment be immediately bargained for them.

Decision Re Contracting Out

From the outset of my involvement in this dispute, I have emphasized the need for the parties to address the realities of their situation. In the Terms of Reference provided to the parties on January 20, 2004, and described in more detail in an earlier part of this award, I underlined the reality of the provisions of the new *Coastal Ferry Act* as well as the economic circumstances affecting the Company. Equally, I identified those factors which reflected the interests of employees.

In order to encourage the parties to examine their new circumstances and to reach a conclusion on this issue, I have been very candid with them. They must adjust the contracting out provisions to reflect the need to make the Company successful and competitive with other potential ferry operators. I have reminded the parties that the challenge which has been given to them by the new legislation is to work cooperatively in order to increase the efficiency of the Company so that it can withstand the challenges which may be provided with the appearance of other ferry operators.

I have satisfied myself that the Employer is dedicated to preserving the current ferry system rather than dismantling it. That is why I have placed such an emphasis on improving the relationship between the parties so that the parties can work together to support this objective.

However, I cannot ignore the possibility that the parties will be unsuccessful in working together cooperatively. After taking all of the submissions and evidence into consideration, I concluded that the provisions of Article 14 dealing with Contracting Out must be modified. In a last attempt to cause the parties to address this issue on a serious basis, I issued an Interim Award dated June 7, 2004 where I said, in part:

Having not heard or received legal argument on the Coastal Ferry Act my comments in no way reflect my ruling on that matter. However, a simple and plain reading of the Act would leave any reasonable person

with the understanding that the Act will have an impact on the contracting out language in the parties' Collective Agreement.

Whether the parties and/or myself like or dislike the legislation is irrelevant. What is relevant is that the legislation is in place and has to be adhered to as law. So the parties, as will ultimately this Board if it comes to that, have to shape the contracting out provisions accordingly.

I visualize a process of meaningful consultation between the parties regarding contracting out which takes into consideration the content and purpose of the Act, as well as the impact and effect on members of the bargaining unit. The Employer should indicate its intent to the Union in order to provide the Union with the opportunity to put forward its case for keeping the work in-house. The business purpose of the contract should be able to meet a threshold test. The contracting out provisions could undoubtedly result in work reorganization, layoffs, and all of the resultant measures (such as bumping) and entitlements (recall rights) that flow from events such as these. In some cases, as well, these provisions could mean additional work opportunities for the bargaining unit members.

The parties, as will this Board, have to face up to those realities and structure Collective Agreement language to deal with all of these elements in a way that meets both sides' interests. Some of these interests will be dealt with under workforce and workplace restructuring. Some of them will be covered under specific language regarding the layoff and severance provisions of the Collective Agreement. Others may be dealt with via specific memoranda, from time to time, which take into consideration the unique circumstances of a specific contract.

I have now had the opportunity to review the last positions of the parties against the terms of the direction I gave them at the end of the hearing. The

Employer has modified its position to provide a consultative mechanism as well as a business threshold test for circumstances where it is considering seeking service providers to provide ferry services on designated routes. As referred to earlier in my award, the Union's last position has added a new consultation obligation on the part of the Employer but has not provided any accommodation with respect to future contracting out.

I understand the Union's reluctance to forfeit the restriction to contract out which currently exists in the Collective Agreement. However, in order to shape the business in a certain way, the Employer needs to be able to consider all its options, and where it can prove that contracting out is the best option from a business point of view, it should be able to proceed with the contract. Having said that, it was not my intention to provide the Employer with an unfettered right to contract out bargaining unit work. Nor should the current employees bear the full impact of the contracting out. There should be protection for these employees in a variety of forms: bumping rights, recall rights, enhanced severance, etc.

Nor did I intend that the Union would be bidding on contracts but that the Union may have to consider in some circumstances, agreeing to a separate memorandum which would keep the work in-house, based on altered conditions of employment for the life of the contract. There are many creative ways to keep the work in-house and I am sure the Union is capable of putting

forward creative proposals. Finally, it goes without saying that, if a variance to the bargaining unit occurs as a result of this, the Union would be able to bargain terms and conditions for their new members. Such provisions are provided for under the *Labour Relations Code* and would be no different in these circumstances.

Consequently, I have crafted language which I believe addresses both sides' concerns. Coupled with my intent outlined in this award, I believe the language protects the interests of the Union, its members, and the Employer. Article 14 of the Collective Agreement should therefore be amended as follows:

ARTICLE 14 – CONTRACTING OUT

- a. Except as otherwise provided for in this Article, the Employer agrees not to contract out work presently performed by employees covered by this Agreement which would result in the laying off of such employees.
- b. Prior to any work, which is presently performed by employees covered by this agreement, being contracted out, the Employer shall determine whether the work can be done by the B. C. Ferry Services Inc. based on:
 - i. its operational needs;
 - ii. the capability of its work force; and
 - iii. whether the work can be done in a cost effective and competitive manner, including the availability of resources.
- c. Notwithstanding the foregoing provisions, where the Employer, after considering the requirements of (b) above, determines that it will seek additional or alternative service providers to

provide ferry services on designated routes, the Employer shall meet to discuss and provide the Union with the documents which constitute the request for proposal to bidders on this work. The Union shall be given an opportunity to discuss with the Employer whether the members of the Union could continue to perform the work in a manner which would satisfy Clause (b) above and the terms of the request for proposal.

- d. If the Union provides a written proposal as to how the members of the Union could satisfy Clause (b) above and the terms of the Request for Proposal, the Employer shall give the Union's proposal due consideration. Due consideration shall mean that the Employer has considered the proposal in good faith and has met with the Union to provide it with reasons for its decision to reject or accept the Union's proposal.
- e. In considering the contracting out of ferry services on designated ferry routes, the Employer's decision has to be made in good faith and pursuant to a bona fide business purpose.
- f. Notwithstanding the above, the Employer may contract out work in emergencies.
- g. If having satisfied the provisions of this Article, the Employer decides to proceed to contract out or to proceed with additional or alternative service providers to provide ferry services on designated ferry routes, employees directly affected shall be subject to work force adjustment in accordance with Article 12. The Employer shall consult with the Union through a Work Force Adjustment Committee in accordance with Clause 12.01 (c).
- h. Where the Employer decides to contract out work, all such contracting out shall be awarded to unionized employers, provided the service required is available from unionized employers on terms which satisfy the provisions of this Article. In particular, it must take into account whether the work can be done in a cost effective

and competitive manner, including the availability of resources.

- i. Any disputes arising from this Article will be referred to Vince Ready or Irene Holden for binding resolution.

7. WORKFORCE RESTRUCTURING

There are two aspects to the workforce restructuring issue. One relates to hours of work and categories of employees, and the other relates to enhanced Collective Agreement provisions in the event of a layoff.

Categories of Employees

Currently there are only two categories of employees which exist under the terms of the Collective Agreement: regular employees and casual employees. As a result, a lot of casual employees have worked full-time hours without the benefit of full-time status. Both parties recognize that has to be corrected.

The Employer had proposed two new types of employees: regular part-time employees and seasonal employees. Regular employees would be divided into regular full-time and regular part-time. The Employer submitted that regular part-time employees would work to a fixed schedule and receive benefits and entitlements on a pro-rated basis. Seasonal employees would be utilized to fill jobs in seasonal fluctuations, and eliminate the exodus of regular and casual employees from the south to fill temporary operational needs in the

north. The Employer stated that the new seasonal category would also eliminate the need to backfill in the south during peak periods and would provide the Employer with the ability to offer work to people in local communities.

Accordingly, the Employer has proposed that Collective Agreement entitlements and benefits should relate to the category of employee and its attachment to the workforce. Consequently, regular employees would receive more benefits than casuals or seasonal employees.

Finally, since the Employer wanted to utilize the casual category as it was meant to be utilized, the Employer offered protection to the current casual employees by proposing that those casuals who, prior to November 1, 2003 were entitled to health and welfare benefits, would maintain those benefits.

Although the Union agreed with the creation of two new categories of employees, regular part-time and seasonal, that is the only point of agreement between the parties' proposals in their final submissions. The Union submitted the creation of a regular part-time position should only happen as a result of the Union agreeing to its creation. The Union's proposal provided for regular part-time employees enjoying all the benefits of the Collective Agreement, being guaranteed a minimum and maximum number of hours per month, and the ability to fill casual positions over and above their part-time regular hours. The

proposal also allowed regular part-time employees to have the ability to choose a casual assignment if it means more hours to the employee than the employee would work as a regular part-time employee.

Decision on Workforce Restructuring

In my Interim Award dated June 7, 2004, I said at page 9, under the heading Workforce Restructuring:

As I said earlier, this issue is linked to both contracting out and hours of work and naturally flows from both, but in different ways. In the case of contracting out, it may result in a pre-layoff canvass of employees, bumping, placement of workers including a short timeframe for the selection of options. These are normal concepts which many industries, both public and private, have to deal with in varying economic and political times. In the case of hours of work, workforce restructuring may take the form of changing employee status, the creation of seasonal and part-time positions with their resultant definitions. All of these are natural components of workplace change and will have to be dealt with by the parties.

When the parties met in the final exploratory talks regarding this issue, they adopted a more collaborative approach to Workforce Restructuring which calls for the creation of a Workforce Planning Committee. They also agreed with the principles of grandfathering of current casuals (who already have the benefits) and proper utilization of casuals when it comes to certain benefits in the Collective Agreement. I therefore award the following Memorandum of

Understanding regards Workforce Planning based on the parties' settlement framework:

MEMORANDUM OF UNDERSTANDING
RE: WORKFORCE PLANNING COMMITTEE

The parties are committed to the ongoing determination of an efficient, productive and skilled workforce.

The parties recognize that a fair and reasonable workforce structure and balance of Regular Employees, Casual Employees and Seasonal employees are necessary to the efficiencies of the business.

On or before November 15th each year, the parties shall meet in one or more Workforce Planning Committees for the purpose of discussing and identifying workforce staffing requirements, trends and needs by operational area and/or route.

The Committees are to give appropriate consideration to past requirements relative to anticipated future plans so as to identify:

- skill shortages and training needs
- regular full time postings
- regular part- time postings
- term certain positions
- conversion of casual employees, who worked full time equivalent shifts during the preceding twelvemonths, to regular status and/or to the Staffing Pool
- termination of casual employees working less than 240 hours during the preceding twelve months.

Differences may be submitted for adjudication to Arbitrator Vince Ready or Arbitrator Irene Holden.

In resolving any differences the Arbitrator(s) shall take into consideration customer requirements, operational efficiencies, costs and benefits relative to the appropriateness of the workforce structure and proposed changes.

8. SICK LEAVE OR STIIP

Amend Clauses 8.03(b)1 and (c) to delete eligibility of casual employees for STIIP. Replace with the following:

Casual employees currently eligible for STIIP shall be “grandfathered” for the duration of this Collective Agreement.

Further, delete Clause 8.03(f) and amend as follows:

Effective the first of the month following the issuance of this award, temporary employees shall be paid ten and one-half percent (10.5%) of their gross earnings on each pay cheque in lieu of Annual Vacations, General Holidays, Health and Welfare Benefits, applicable statutory requirements and all the other benefits and perquisites of the Agreement for which they are ineligible.

9. SEASONAL HELP EMPLOYEES

I award that a new Memorandum of Understanding be incorporated into the Collective Agreement which reads as follows:

MEMORANDUM OF UNDERSTANDING
RE: SEASONAL HELP EMPLOYEES

The Company may employ Seasonal Help (i.e., students) under the following conditions:

- (a) Seasonal Help shall be defined as those employees hired between April 1st to October 15th (or other period as mutually agreed) of any calendar year for the purpose of supplementing the regular workforce and/or replacing regular employees compensatory time off.
- (b) Seniority shall not accumulate during the designated seasonal period. In the event a seasonal employee is retained outside the designated seasonal period, his/her probationary period will commence as of the first day outside the period. Should the employee complete his/her probationary period, the seniority date will be established as of the original date of hire as a "Seasonal Help" employee.
- (c) Seasonal Help employees shall be paid at 85% of the classified rate and shall not:
 - (i) be entitled to benefits normally granted to other employees
 - (ii) be entitled to any premiums or differentials
 - (iii) be guaranteed a minimum number of hours
- (d) Seasonal Help Employees shall be entitled to overtime compensation for all work performed in excess of standard daily hours.

10. WORKFORCE ADJUSTMENT

The second aspect of this issue is linked to both contracting out and hours of work. As the workforce is restructured, there should be enhanced

provisions provided to employees. The current Article 12 provides for layoff and recall provisions, but does not adequately address the major changes to the Collective Agreement and the manner in which the workforce will be structured in the future.

The Employer wants increased flexibility and control as to how it will conduct business in the future. It should therefore be prepared to afford the current employee base with added protection should it choose to utilize such flexibility in the future.

The Employer attempted to address this in its final submission by creating a new Article 12 called "Workforce Adjustment" which would provide written notice to the Union of workforce adjustment; consult with the Union via a Workforce Adjustment Committee; allow the Employer to canvass the employees to see if they would be interested in retirement, placement in alternate positions, etc.; and provide displaced employees with a variety of options, including increased severance pay. In order to create a more timely process, the Employer also proposed a shorter notice period than what currently exists in the Collective Agreement (one month instead of five months), and restrictive bumping and recall rights to minimize the impact on other employees.

The Union responded by maintaining the five month notice period; consultation via a Workforce Adjustment Committee which would allow the Union to attempt to reverse the Employer's decision; employment security for twelve months following the expiration of the five month notice period; the layoff of seasonal employees prior to casuals and casuals prior to regular employees; maintenance of the current system-wide bumping ability; training and familiarization in order to qualify employees to bump; and enhanced severance for both casual and regular employees. The Union also proposed that voluntary severance and early retirement be offered to all employees immediately following the issuance of this award.

Decision Re Workforce Adjustment

As a consequence of my award with respect to Contracting Out and with respect to the new workforce structure, it is necessary to consider what appropriate measures should be taken in the event that employees are laid off. In the past the issue of layoffs has been somewhat dampened by the restrictive contracting out language and the presence of so many casuals.

It is therefore necessary to address the question of whether the Workforce Adjustment provisions of the Collective Agreement should be changed. On this subject, my award is as follows:

- a. Article 12 relating to layoff and recall should be deleted and replaced with new workforce adjustment language.
- b. The Employer will be obliged to provide notice to the Union of its intention to reduce the amount of work required to be done by the Employer, the reorganization of work, contracting out, the relocation of positions, and changes in or elimination of programs and/or services. In providing notice to the Union, the Employer shall provide full particulars. The process which flows from this notice shall be in accordance with the specific provisions of the workforce adjustment language set out below.

My intention here is to specifically provide as many possible workforce adjustment options as may be possible in the circumstances. I therefore award the following:

ARTICLE 12 – WORKFORCE ADJUSTMENT

12.01 Workforce Adjustment Committee

- (a) The parties recognize that workforce adjustments may be necessary due to a reduction in the amount of work required to be done by the Employer, the reorganization of work, contracting out, the relocation of positions, and changes in or the elimination of programs and services.
- (b) The Employer shall provide the Union in writing with 4 months notice of the workforce adjustment. The notice shall identify the reason for the workforce adjustment, the classification and location of employees directly affected, whether the Employer intends to implement a pre-adjustment canvass, and the nature of such canvass. This notice may run concurrent with

any notice of layoff to regular employees in accordance with Clause 12.04.

- (c) The Employer will consult with the Union through a Workforce Adjustment Committee established pursuant to Clause 2.11 that shall meet within seven (7) calendar days of receipt of the notice referred to in Clause 12.01(b). Members of the Workforce Adjustment Committee shall work cooperatively to facilitate the workforce adjustment in the best manner possible for the employees affected.

12.02 Workforce Adjustment Processes

- (a) The following processes are available to facilitate workforce adjustments:

Pre-Adjustment Canvass

1. At the discretion of the Employer, a pre-adjustment canvass may be implemented. The pre-adjustment canvass may be general or targeted to specific employee classifications, work groups, or work locations.
2. The pre-adjustment canvass shall call for eligible employees to decide within fourteen (14) calendar days whether they want to retire, to take early retirement, or to sever their employment. A copy of the notice to employees shall be provided to the Union.
3. A decision made by an employee to retire, take early retirement or to sever his or her employment that is confirmed by the Employer shall be final and binding.

(b) Workforce Adjustment - Regular Employees

1. Where the Employer decides not to implement a pre-adjustment canvass, or where such canvass does not result in the degree of flexibility required to meet the

objectives of the workforce adjustment, the Employer will provide regular employees with notice of layoff in reverse order of service seniority, except where such notice is specifically related to a decision under Article 14 in which case those regular employees who are directly affected will be given notice of layoff. A copy of the notice to regular employees shall be provided to the Union.

2. The notice of layoff shall be effective one (1) month from the date of issuance, unless the following occurs:
 - (i) the regular employee is placed in a vacant position, for which he or she is qualified, at the employee's current point of assembly,
 - (ii) the regular employee is offered and accepts placement into a vacant position through lateral transfer at another point of assembly,
 - (iii) the regular employee is offered the opportunity for training and familiarization so that he or she is eligible to work in an alternate position which is vacant at his/her current point of assembly,
 - (iv) the regular employee bumps a junior regular employee in a position for which s/he is qualified at the employee's current point of assembly,
 - (v) the regular employee bumps a junior regular employee in a position for which s/he is qualified at another point of assembly, or
 - (vi) the regular employee elects to sever.

3. A regular employee who bumps may not receive a promotion. However, in the event that this prevents the employee from bumping pursuant to 2 (iii) or (iv) above, the regular employee may:
 - (i) bump a junior regular employee in a position that is in one salary grade level above his or her current salary grade level, subject to his/her ability to meet the requirements of the job, or
 - (ii) be severed.
4. A decision made by a regular employee to accept a lateral transfer that is confirmed by the Employer shall be final and binding.
5. A regular employee who is placed into a vacant position or who bumps shall not be salary protected.
6. Relocation expenses shall not be paid when a regular employee accepts a placement into a vacant position through lateral transfer or who bumps. A regular employee who is placed into a vacant position, including one obtained through lateral transfer, or who bumps shall be required to serve a 120 working day trial period to determine his/her ability to meet the requirements of the job. An employee who fails to meet the requirements of the job at any time during his/her trial period shall be severed.
7. Should a regular employee be bumped as a result of a senior employee exercising his or her seniority rights in accordance with this Article, then that employee shall have bumping rights in accordance with Clause 2 (iv) and (v) above.

(c) Workforce Adjustment Casual Employees

1. Casual employees shall be given notice of layoff in reverse order of seniority, except where such notice is specifically related to a decision under Article 14 in which case those casual employees who are directly affected will be given notice of layoff. A copy of the notice to casual employees shall be provided to the Union.
2. The notice of layoff shall be effective one (1) month from the date of issuance, unless the following occurs:
 - (i) the casual employee is offered the opportunity for training and familiarization for recall in another classification at his her current point of assembly
 - (ii) the casual employee is offered and accepts the opportunity to be recalled at another point of assembly in their current classification, or
 - (iii) the casual employee elects to sever their employment.
3. Relocation expenses shall not be paid when a casual employee accepts the opportunity to be recalled at another point of assembly.

12.03 Layoff

In the event of a layoff, employees shall be laid off at the point of assembly in the following order:

- a. Seasonal employees shall be severed prior to casual or regular employees being laid off.
- b. Casual employees shall be laid off in reverse order of service seniority prior to regular employees.

- c. Regular employees shall be laid off in reverse order of service seniority.

12.04 Notice to Regular Employees on Leave

Notice to regular employees on STIIP, WCB, LTD or serving an apprenticeship shall be effective the date of receipt. The employee shall provide the Employer with seven (7) calendar days' notice of the date upon which s/he can return to work. The Employer will confirm the placement of the employee into a vacant position for which he/she is qualified at the employee's current point of assembly, or facilitate the ability to exercise the remaining options under Clause 12.02 (b) 2 above.

12.05 Severance Pay

- (a) A regular employee whose employment is severed shall be entitled to severance pay of four (4) weeks' basic pay for each year of completed service and a pro-rated amount for any partial year of service to a maximum of fifty-two (52) weeks' basic pay.
- (b) A casual employee whose employment is severed shall be entitled to severance pay of one (1) week's basic pay for each completed year of service and a pro-rated amount for any partial year of service to a maximum of twelve (12) weeks' basic pay.

12.06 Recall

- (a) The Employer shall create a recall list that shall indicate the name, service seniority, former classification and point of assembly and current classification and point of assembly of regular employees who are laid off. A copy of the list shall be provided to the Union.
- (b) Regular employees on the recall list shall return to their former classification, employment status, and point of assembly in order of service seniority when a vacancy arises. An employee on the recall list who does not accept a vacancy

when offered shall be deemed to have resigned and shall not be entitled to severance pay.

- (c) A regular employee shall have his/her name remain on the recall list until:
 1. s/he receives an appointment through Clause 10.07 or 10.08
 2. s/he returns to her/his former classification, employment status, and point of assembly, or
 3. two (2) years have passed from the last day worked by the employee; whichever occurs first.
- (d) Should a regular employee on the recall list accept a casual assignment, such casual assignment shall not affect his or her recall rights under this Clause.

11. PERSONAL LEAVE DAYS

I award that Clauses 26.02 and 26.03 be deleted and a new Clause 26.02 entitled "Personal Leave Days" added:

- (a) Effective January 1, 2005, each regular employee shall be entitled to three (3) personal leave days off, with pay, in each calendar year, to be taken at a time that is mutually agreeable to the employee and the Company, except in the following cases when the employee shall be entitled to the leave by providing the Company with as much advance notice as possible in the circumstances:
 - (i) serious household or domestic emergency,
 - (ii) attendance at a funeral involving a death not covered by Clause 26.01 to a

maximum of one-half (1/2) day for any one death, or

- (iii) illness or hospitalization of a member of the employee's immediate family, as defined in Clause 26.01

Casual employees currently eligible for Special Leave shall be "grandfathered" for the duration of this Collective Agreement so as to be eligible under the "Personal Leave Days".

12. POSTINGS AND ASSESSMENTS

In its final submission and throughout these proceedings, the Employer argued for merit-based appointments whereby an employee would be selected to vacancies based on knowledge, ability, education, experience and past performance. Seniority would be used as a tiebreaker where these factors were relatively equal.

Currently, appointments are based on seniority but the Collective Agreement provides for a complicated and cumbersome assessment process every six months for some groups, and for others, upon request, in order to be considered for appointments.

In its final submission the Union argued against merit-based appointments stating that such a selection process was in place prior to the current assessment process and it resulted in a number of grievances. The current assessment process was an attempt to rectify that situation. Resorting

to a merit-based system would therefore result in an increased number of selection grievances. The Union, however, did recognize that the current assessment process is onerous and offered to discuss it during the life of the Collective Agreement with a view to altering the process.

Notwithstanding their previous positions, in the final exploratory talks, the parties seemed to address this issue in a more realistic manner. Therefore, I defer to the settlement framework in awarding the following.

The appointment and assessment process contained in Clauses 10.07, 10.08 and 10.09 are deleted in their entirety. Clause 10.06 is deleted and amended as follows:

10.06 Postings

- (a) Vacancies that are posted under this section shall be filled within sixty (60) days of completion of the posting period. This period may be increased with the approval of the Union, which approval shall not be unreasonably denied.
- (b) Regular vacancies that are to be filled shall be posted on the bulletin board(s) and electronically on the Company website for a period not less than seventeen (17) calendar days.
- (c) Term Certain vacancies of ninety (90) consecutive calendar days or more that are to be filled shall be posted on the bulletin board(s) and electronically on the Company's website for a period of not less than seven (7) calendar days.

- (d) Postings shall contain the following information:
 - 1. Nature of position;
 - 2. Duration of the position;
 - 3. Duties required;
 - 4. Required qualifications and ability;
 - 5. Whether shift work is involved;
 - 6. Wage rate;
 - 7. Closing date.
- (e) The Company shall provide copies of all job postings to the Union.
- (f) A regular or fixed-term employee who attends a job interview during what would otherwise be his/her regularly scheduled working hours shall suffer no loss of regular pay.

Clause 10.07 is deleted and amended as follows:

10.07 Selection Procedure

- (a) Posted positions for all supervisory positions and Grade 9 or higher positions, or as otherwise agreed to by the parties, shall be filled based on seniority, qualifications and suitability, with seniority prevailing unless a difference in required qualifications and suitability is shown. In the event that the Company selects a junior applicant, the Company shall bear the onus of showing a difference in qualifications and suitability between the applicants.
- (b) In the application of seniority, the sole factor shall be group seniority for Officers and service seniority for all other employees.
- (c) Posted vacancies in all other bargaining unit positions shall be filled on the basis of seniority provided the employee to be appointed has the required qualifications and abilities.

- (d) The Company shall post on the bulletin board(s) and electronically on the Company's website a "Notice of Appointment" for all appointments made to posted positions.
- (e) The Company shall provide the Union with the required qualifications, abilities and suitabilities associated with each job classification covered by the Collective Agreement. Where the Union objects, its objections shall be limited to whether the qualifications, abilities and suitabilities established by the Company are relevant and reasonable.

I also award that the following Memorandum of Understanding regarding Job Posting and Selection be inserted in the Collective Agreement as follows:

MEMORANDUM OF UNDERSTANDING
RE: JOB POSTING - SELECTION

In order to encourage and facilitate the posting of regular job postings during the initial three years of the Collective Agreement, selection of candidates are to reflect a balance between employees already at the position location (often referred to as the Homestead) and senior employees at other locations. The parties may by mutual consent extend this process.

The intent is for the Company and the Union to exercise sufficient discretion on a "case by case and geographic basis" so as to reach a reasonable and responsible reflection of these potentially contradictory factors.

In the event the parties cannot reach agreement, differences may be referred directly for expedited adjudication to Vince Ready or to Irene Holden, in the event Mr. Ready is not available.

13. EXCLUSIONS FROM THE BARGAINING UNIT

At the commencement of this protracted process, the Employer proposed to exclude approximately 300 members from the bargaining unit. The Union has throughout this process strongly resisted that approach. However, in the recent exploratory discussions between the bargaining principals, it became evident that it was necessary to exclude three groups of employees in order to afford management more control over its decision making processes so it could administer certain parts of its business more efficiently. Consequently, I am awarding that these three groups be excluded from the bargaining unit. Further, I am of the view that such exclusions are appropriate to assist the Company in streamlining the administration of the current hours of work. I would normally hesitate to make such an order but the bargaining principals have specifically confirmed to me that I have jurisdiction to do so.

I therefore award that the following Letter of Understanding be introduced into the Collective Agreement:

LETTER OF UNDERSTANDING
RE: BARGAINING UNIT EXCLUSIONS/INCLUSIONS

It is recognized that the composition of the bargaining unit relative to the principles of exclusions and inclusions by the Labour Relations Board has and continues to change and that the October 13, 1999 "Consent Order" issued by Rod Germaine no longer facilitates reasonable and effective relations.

The 1999 Consent Order is repudiated and further exclusions/inclusions shall be determined on an

assessment of the Traditional Management Responsibilities Test (e.g., hire, fire, demote, confidentiality, industrial relations input, etc.) and/or the contemporary test of “Management Team” responsibilities.

Consistent with this understanding, currently included positions in Human Resources, Crewing and the position of Assistant Terminal Manager shall be excluded from the bargaining unit on the basis of their industrial relations affects.

Current employees affected by this Letter shall retain all options under the Collective Agreement for a period of six (6) months. This period may be extended by mutual agreement on a case by case basis.

Notwithstanding this Letter, included persons may continue to substitute into excluded positions as determined by the Company.

For the duration of this agreement, disputes with respect to exclusions/inclusions shall be referred to Vince Ready and/or Irene Holden. It is agreed that Mr. Ready and Ms. Holden will have the necessary jurisdiction to bind the parties on all exclusion/inclusion matters.

14. LICENSED OFFICERS AND VESSEL DESIGNATION

Throughout this dispute there has been an ongoing discussion about whether or not there was a bona fide shortage of Licensed Officers. Associated with that was the Union’s argument that unless paid properly the Company would lose its qualified people. Vessel designation is part of that problem; rates of pay are another (which I address in the next section of this award). I was pleased to see that in the recent exploratory discussions the parties

addressed the issues in the following manner, and I follow their lead by awarding the same:

Vessel Designation

Effective the first of the month following the issuance of this award, the following vessels shall be designated as Intermediate on the understanding that there shall be no further designation changes during the term of this agreement, except in the case of new vessels:

1. Bowen Queen
2. Powell River Queen
3. Mayne Queen

A one time lump sum payment of \$250,000 along with the special wage adjustments contained in the wage rates as provided in this award as consideration with respect to this issue.

MEMORANDUM OF UNDERSTANDING RE: LICENSED OFFICERS

The parties acknowledge the unique concerns of Licensed Officers including certification, training, rates of compensation and liabilities.

Further, the parties recognize the historic problems associated with the homogenous nature of the bargaining unit resulting in compression of licensed wage rates and reduction of salary levels as compared to industry and market comparators.

The parties also recognize the growing shortage of Licensed Officers worldwide and the need to review incentives being offered for the recruitment, development and retention of Ships' Officers at BC Ferries.

Therefore, the parties agree to meet within ninety (90) days of the issuance of this award and whenever necessary thereafter in order to discuss solutions to these concerns as well as any others identified by the

parties within the context of the Ships' Officers' Component Review Committee.

15. COMPENSATION MATTERS

In the submissions of the parties throughout this protracted process there existed a Himalayan gulf between them with respect to all compensation matters such as: wage increases; start rates; grade level maximum salary ceilings; deletion of the Memorandum of Understanding on Vessel Designation Overlay; and the number of wage classifications.

When I met with the bargaining principals during the final stages of this mediation/arbitration process in early September, 2004, I encouraged them to view these matters more realistically than they had in the past and to do some real soul searching as to what was realistically achievable in the current bargaining climate. Having now had the benefit of the latest discussions between the parties I am persuaded that the following compensation increases more realistically reflect the real and substantive needs of the parties in the current economic circumstances.

I have also concluded that there is a need for the parties to review the wage schedules and classifications. In the result, I am awarding a mechanism to do so.

- (a) Wage rates will be adjusted in accordance with the following schedule:

Effective November 1, 2005

For positions requiring 1st Class and 2nd Class Motor Certificates (e.g., Masters, Chief Officers, 2nd Officers and Sr. Chief, Chief, 2nd Engineer) increase by 5%. For Junior licensed positions (3rd and 4th Engineers, 3rd and 4th Officers and Trades persons) increase by 3%.

Effective November 1, 2006

For positions requiring Senior License increase by 5%; and for positions requiring a Junior license and Trades persons increase by 3%; all other classifications to be increased by 1%.

Effective November 1, 2007

For positions requiring Senior license increase by 5%; and for positions requiring a Junior license and Trades persons increase by 3%; all other classifications to be increased by 1%.

Effective November 1, 2008

General increase of 2% for all classifications or wage re-opener. In the event the parties cannot reach agreement, the matter may be referred to Vince Ready for adjudication.

Effective November 1, 2009

General increase of 2% for all classifications or wage re-opener. In the event the parties cannot reach agreement, the matter may be referred to Vince Ready for adjudication.

- (b) Wage Grid

- (i) A wage grid* for new employees to be established as follows:

85% of the Standard Rate for the 1st year
(240 days worked)

90% of the Standard Rate for the 2nd year
(240 days worked)

95% of the Standard Rate for the 3rd year
(120 days worked)

(ii) a rate of 85% of the Standard Rate would
be applicable to seasonal employees.

* The Wage Grid would not be applicable for
the Ships' Officers, Trades persons and
Bridgemen classifications.

(c) Wage Schedule and Classifications

The parties are to establish a Committee for the
purpose of simplifying the wage classifications
and establishing a Standard Wage Rate for each
grade by November 1, 2005. Failing resolution,
parties are to submit the outstanding issues to
Vince Ready or Irene Holden for binding
resolution.

I now turn to the unresolved issue which was not part of the recent
framework, namely the Bridgemen's rate of pay relative to certifications
required by the Company. With respect to that matter I award:

There will be the establishment of a new classification
called Bridgeman with a rate of pay 4% higher
than the Deckhand classification.

16. COMMITTEES

I award:

Payment of Committees

All committees established by this award shall be deemed to be Article 2.11 committees for the purpose of payment.

17. ITEMS AGREED

All items agreed between the parties during direct negotiations and the previous facilitation process are to be incorporated into the renewed Collective Agreement. Any other article not changed by this award shall remain unchanged from the previous Collective Agreement.

I direct the parties to establish a committee consisting of equal numbers, with a maximum of three per side, to incorporate and finalize the terms and conditions of the renewed Collective Agreement consistent with this mediation/arbitration award.

In the event a dispute arises in finalizing the Collective Agreement, I shall retain the necessary jurisdiction to resolve those disputes as well as any disputes arising out of the implementation of this award.

18. CONCLUSION

I would be remiss if I did not commend the parties on the work that they have done in trying to improve their working relationship over the past several months. I was encouraged by their progress on the settlement framework and was also encouraged by the improvements I observed with respect to the labour relations atmosphere which the parties have developed since the publication of the last interim award. For instance, I am advised that the parties have successfully resolved a large number of grievances and policies which should go a long way to avoiding similar types of grievances and problems in the future.

I also want to thank Counsel for the parties and the bargaining principals for their candour and assistance throughout this dispute.

Because of the complexities and the nature of this dispute omissions and errors may occur. In the event that should occur, the parties should meet to resolve such matters. Failing resolution, the matters should be referred to the undersigned for binding resolution. I have made this award as an Interim Award so that I have generally reserved by jurisdiction to issue a final award. I have done so to ensure that this award is capable of implementation and that I can modify a provision of the award if I am satisfied it is unworkable or has an unanticipated effect.

Dated at the City of Vancouver in the Province of British Columbia this
15th day of October, 2004.

Vincent L. Ready

Vincent L. Ready