

IN THE MATTER OF AN ARBITRATION  
UNDER THE CANADA LABOUR CODE, RSC 1985 c. L-2

Between

SAAM SMIT VANCOUVER INC.

(the "Employer")

-and-

CANADIAN MERCHANT SERVICE GUILD

(the "Guild")

( Class 10 Masters - Article 21.2 Arbitration )

ARBITRATOR: John B. Hall

APPEARANCES: Kim Thorne, for the Employer  
Sandra I. Banister, Q.C., for the Guild

HEARING: October 4 & 5, 2017 and  
March 7 & 8, 2018  
Vancouver, BC

AWARD: March 26, 2018

## AWARD

### I. INTRODUCTION

The parties' most recent Collective Agreement has a ten year term and includes new language in Article 21.2:

Currently there are four (4) Class ten (10) vessels including the SST Orleans. *One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category.* If these tugs are taken out of service for more than four (4) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed. (italics added)

The Guild filed a grievance after the Employer introduced a new Class 10 vessel named the Salish. The Guild maintains this vessel was an "additional tug added in the Class ten (10) category" and, accordingly, that one Master should have been added to Pay Group 10. For reasons explained below, the Employer contends the Salish was not an "additional tug added" to the Vancouver fleet for purposes of the Collective Agreement provision now in dispute.

### II. FACTS

The parties presented an Agreed Statement of Facts to be used solely for this arbitration. The following text incorporates relevant extracts from the joint book of documents, as well as certain aspects of the oral evidence which were not in dispute.

#### (a) Background

- I. The Canadian Merchant Service Guild (the "Guild") and Saam Smit Vancouver (the "Employer" or "Smit") are bound by a collective agreement with a term April 1, 2015 to March 31, 2025.

2. Saam Smit Vancouver is part of a larger international group of companies that has three operations servicing ports in British Columbia, each of which are under separate collective agreements with the Guild:
  - i. Saam Smit Vancouver, the Employer in this arbitration, currently has seven tugs that dock and undock deep sea vessels in the ports of Vancouver, Port Mellon, and Squamish and conduct tanker escort duties from Vancouver to the Victoria Pilot Station and beyond;
  - ii. Saam Smit Westminster Inc. currently has four tugs which operate in the Fraser River servicing the port of New Westminster; and
  - iii. Saam Smit Canada Inc. currently has nine tugs which service the ports of Prince Rupert, Kitimat, and Stewart.
3. The Guild is certified to represent all officers who work on the Employer's tug boats: Masters, Mates, Chief Engineers, and Other Marine Employees ("OME").
4. Appendix "B" of the collective agreement lists nine vessels, ranging from 551 to 900 BHP to 4801 and up. BHP stands for Brake Horse Power.
5. Vessels which are 4801 BHP and up are referred to as Class 10 tugs. Pay for the Masters who operate them is governed by Article 21.2 and Appendix "A", of the collective agreement.
6. Appendix "B" is not always current as Saam Smit occasionally moves tugs between its three operations. When the most recent collective agreement was concluded, four Class 10 tugs were listed: the Tiger Sun (also referred to as the Sun), the Orleans, the Capilano and the Venta.
7. The Employer operates its vessels primarily as callouts, but also as continuous operating vessels and shift vessels.
- (b) 2016 Negotiations
  8. On March 30, 2015, the Guild sent the Employer notice to bargain the renewal of the April 1, 2011 to March 31, 2015 agreement.
  9. On August 11, 2016, the Guild filed a notice of dispute under the *Canada Labour Code* to force the Employer to bargain a new collective agreement.
  10. The Federal Government appointed Mediator John Rooney on August 25, 2016, and negotiations were scheduled for October 11, 13, 14, 20, and 21, 2016.

11. A tentative agreement was reached October 21, 2016 (the "October 21, 2016 MOA").
12. On November 10, 2016, the ballots were counted and the bargaining unit rejected the October 21, 2016 MOA.
13. November 12, 2016 the parties agreed to three additional days of mediation (November 15, 16, and 17, 2016) which was an extension of the 21-day cooling off period mandated by the *Canada Labour Code*. During that time it was agreed there would be no strike or lockout and the Employer would not try to impose a contract.
14. November 15, 2016 the Guild tabled its position on Masters' pay. The "Recommendations" included a proposal that the most senior eight (8) employees in the Masters classification be paid a minimum of Pay Group 10 regardless of the type of vessel being operated.
15. November 17, 2016, at 10:40, the Guild tabled a revised position paper which retained its position on Masters' pay. That is, the Guild maintained its position regarding the "Recommendations".
16. November 17, 2016, at 14:44, the Employer verbally presented its position on what would be contained in a five-year agreement and in a ten-year agreement.
17. The Guild presented proposed changes to the October 21, 2016 MOA on November 17, 2016 at 19:50. Its revised position regarding Article 21.2 was as follows:
  - 1) The most senior seven (7) employees in the Masters classification shall be paid a minimum of Pay Group ten (10). This rate shall apply at all times regardless of the type of vessel being operated.
  - 2) The seven (7) referred to in point One includes the four (4) shift Masters.
  - 3) Masters covering all relief on shift shall receive pay Group ten (10).
  - 4) Any Master who is not protected per points One, Two, or Three shall be paid a minimum of Pay Group seven (7).
  - 5) Masters referred to in point Four (4) operating vessels that are in a higher Pay Group shall receive the rate of pay for such vessel.

- 6) The long standing past practice regarding scheduling/callout arrangement shall continue to be in effect.
- 7) Any changes occurring as a result of this Article should be subject to full retroactivity.

Currently there are four Class 10 vessels including the SST Orleans.

*One (1) Master will be added to the highest rate of pay for each additional tug added in the Class 10 category.*

If tugs arrive with a higher bollard pull than ninety tons at any time during this agreement a new class will be established with the wage reopener or at any time in the last five years of the CBA. (italics added)

As part of this proposal, the Guild agreed that the rate of pay increase for Masters would be 1% effective October 1, 2018 instead of the 2% being negotiated in the industry and applicable to other officers covered by the collective agreement.

18. November 17, 2016, at 23:45, the Employer presented a proposal. The relevant position of the Employer's position regarding Article 21.2 was as follows:

Currently there are four Class 10 vessels including the SST Orleans.

*One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class 10 category. For this to apply, the tug must be added as a regularly used tug - does not apply to underutilized or spare tugs. If a Class 10 tug is taken out of service or becomes underutilized for more than four (4) consecutive months, then one (1) Master will be removed form Pay Group ten (10) for each tug so removed. (italics added)*

The Employer's proposal regarding rates of pay would have seen the Masters receive a 1% increase effective October 1, 2014.

19. That Employer's proposal resulted in the Guild serving strike notice on November 18, 2016 just after 1:00 am, effective 6:00 am November 21, 2016. Due to statutory requirements, the strike notice named all of the Employer's vessels, and included the Salish which both parties understood at the time would become part of the Vancouver operation.
20. November 18, 2016, Ms. Vlassopoulos, the Employer's Vice President, Administration & Legal Affairs, responded to a Guild correspondence, indicating

that “for the purposes of the builder’s certificate the Salish was registered in the name of SAAM SMIT Canada Inc.”. The body of the letter read:

With regard to the above referenced letter, this is to advise that Saam Smit Towage has not yet taken delivery of the SST Salish. The vessel is not yet complete and so not yet owned by Saam Smit Towage. For purposes of the Builders Certificate, it was registered in the name of Saam Smit Canada Inc.

As previously discussed with Mike van der Gracht [of the Guild], the plan for the SST Tiger Sun is to move it to Saam Smit Westminster. When the SMIT Spirit returns from Allied Shipyard next week, the plan is to take the SST Tiger Sun to Allied Shipyard for three to four weeks repairs prior to relocating to Westminster.

21. November 18, 2016, Captain John Armstrong, the Employer’s Marine Advisor and spokesperson in the negotiations, sent an email to the bargaining unit, the Guild’s negotiating committee, and the Employer’s negotiating team. The email gave the Guild reason to believe that there might be a basis for continuing negotiations.
22. November 18, 2016, Captain Mike van der Gracht [the Guild’s spokesperson in negotiations] contacted Captain John Armstrong to discuss recommencing bargaining. They agreed to meet again on Saturday, November 19 to discuss the matter further.
23. November 19, 2016, Captain John Armstrong emailed the same individuals, referred to in paragraph 21, a labour update with an email thread providing the text of an email to Smit’s customers, which was sent to customers on November 18, 2016.
24. Saturday, November 19, 2016, the parties met at the Guild’s office to determine whether there was a sufficient basis to resume negotiations.
25. The parties met on Sunday, November 20, 2016, at 13:00 at the Federal Mediation Offices with the assistance of the Federal Mediator, John Rooney.
26. November 20, 2016, at 19:00, the Guild presented its proposed changes to the Company based on the October 21, 2016 MOA. The material portions of its proposals regarding Article 21.2 read:
  1. The most senior seven (7) employees in the Masters classification shall be paid at Pay Group ten (10). This rate shall apply at all times regardless of the type of vessel being operated.

2. The seven (7) Masters referred to in point One above includes the four (4) shift Masters.
3. Masters covering all relief on shift shall receive Pay Group ten (10).
4. Any Master who is not protected per Points Once, Two, or Three above shall be paid at minimum Pay Group eight (8).
5. The long standing past practice regarding scheduling/callout shall continue to be in effect.

Currently there are four (4) Class ten (10) vessels including the SST Orleans.

*One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category. If these tugs are taken out of service for more than six (6) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed.*

The Most Senior seven (7) Masters at Pay Group ten (10) shall not be reduced below seven (7) due to this Clause. (italics added)

The significant aspect of this proposal for present purposes was the Guild's removal of the Employer's language stipulating "... the tug must be added as a regularly used tug - does not apply to underutilized or spare tugs". The Guild also moved the "out of service" period from four to six months before a Master would be removed from Pay Group 10. As part of this proposal generally, the Guild made the 1% increase for Masters effective October 1, 2016.

27. On November 20, 2016, at 22:10, the Company provided its counter offer to the Guild MOA. The relevant excerpt from Article 21.2 read:

Currently there are four (4) Class ten (10) vessels including the SST Orleans.

One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category. If these tugs are taken out of service for more than four (4) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed.

Thus, the only change made by the Employer was to return the "out of service" period to four months from the six months proposed by the Guild. The October 1, 2016 date for the 1% increase was not altered.

28. On November 21, 2016, at 00:10, a Memorandum of Agreement was reached.

The new Article 21.2 in its entirety reads as follows:

**21.2 Masters**

1. The most senior seven (7) employees in the Masters classification shall be paid at Pay Group ten (10). This rate shall apply at all times regardless of the type of vessel being operated.
2. The seven (7) Masters referred to in point Clause 1 above includes the four (4) shift Masters.
3. Masters covering all relief on shift shall receive pay Group ten (10).
4. Any Master who is not protected per Points One, Two, or Three above shall be paid at Pay Group eight (8).
5. The long standing past practice regarding scheduling/callout shall continue to be in effect.

Currently there are four (4) Class ten (10) vessels including the SST Orleans.

One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category. If these tugs are taken out of service for more than four (4) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed.

The Most Senior seven (7) Masters at Pay Group Ten (10) shall not be reduced below seven (7) due to this Clause unless it is pursuant to the re-opener at October 1, 2019.

Probationary Masters shall receive Class 5 pay on tugs Class 5 and smaller, and at the Class 8 pay when they work on larger tugs until such time as they are cleared on all larger vessels as per Company procedures.

All continuously operating vessels crewed for escort assignments will continue to be paid at Class 10 rate of pay.

(c) The Grievance

29. On November 21, 2016, a new Class 10 vessel, the Salish, arrived at the Vancouver dock.

30. Sea trials were conducted and Saam Smit Vancouver Inc. crews began familiarization.
31. On December 20, 2016, the Salish commenced performing revenue producing jobs for Saam Smit Vancouver Inc. At this point, there were five (5) Class 10 vessels at the Vancouver dock.
32. On January 11, 2017, the Smit Venta was put into drydock, resulting in four (4) Class 10 vessels in service at the Vancouver dock.
33. Between December 20, 2016 and January 11, 2017, all five (5) Class 10 vessels performed revenue producing jobs on at least six occasions.
34. On January 11, 2017, Captain Mike van der Gracht emailed Captain Armstrong advising that as the Salish had been added to the Vancouver fleet, bringing the total to five Class 10 vessels, and consequently an additional Master should have been paid the Class 10 pay rate.
35. On January 12, 2017, Captain Armstrong responded by email stating he disagreed the Salish had been added because the Employer was only able to utilize the vessel on a limited basis and it was still sorting out deficiencies and familiarizing the crews. The email continued:

... During this time we have been able to utilize the vessel on a limited basis.

Meanwhile, at the end of September, the Sun had an incident where a crew operational error resulted in an incident causing 100K plus damage. This required temporary repairs on the Sun to keep the tug running until the Salish was delivered. Once we had delivery of the Salish we proceeded with repairs on the Sun at Allied which were completed just before Christmas. After the Christmas shut down at Allied we dry-docked the Sun at Allied for routine underwater maintenance (note: the dry-dock was not available earlier). Once the Sun was completed we then put the Venta into the dry-dock for its scheduled class survey; it will remain in Allied for at least 6 weeks.

At the end of this month following a time consuming permitting process, Vancouver Pile Driving will be installing new piles and fendering at West Tug after which the Sun will be transferred to that location. As you know, having the Sun in the river has been the plan all along and for reasons mentioned above has taken longer than originally planned.

Trusting this clarifies that we have not added an additional class 10 tug to the Vancouver fleet.

36. On February 3, 2017 the Smit Orleans was transferred to Prince Rupert, resulting in three (3) Class 10 vessels in service at the Vancouver dock.
37. On March 18, 2017, the Smit Venta was returned from drydock, resulting in four (4) Class 10 vessels in service at the Vancouver dock.
38. April 5, 2017, the Guild filed the current grievance which asserted in part:

It is clear by referencing the following spreadsheet there were 5 Class 10 tugs at the Tiger dock beginning 2016/12/20 necessitating eight (8) class 10 Masters. This was made clear to Captain J. Armstrong via email January 11, 2017. He responded by dismissing the issue January 12, 2017.

Further, the number of Masters is not to be reduced to seven (7) until tugs are taken out of service for more than four (4) consecutive months (beyond 2017/02/07).

Due to the particular circumstances, the grievance seeks to have two Captains made whole "for any lost wages and ancillary losses" during different periods of time. The parties have agreed that jurisdiction to address remedy will be reserved should the grievance succeed.

39. On April 6, 2017, the Smit Orleans returned to the Vancouver dock. The crew then transferred to the Smit Venta and returned to Prince Rupert with the Smit Venta.
40. On April 13, 2017, Captain John Armstrong contacted Captain Mike van der Gracht by telephone and both persons agreed to schedule a meeting between the parties to discuss the grievance.
41. Pursuant to Article 21.2, on August 6, 2017, Captain van der Gracht emailed the Employer taking the position the Venta was no longer considered a Class 10 tug in the Vancouver fleet as four months had passed since the Venta had been relocated to Prince Rupert. Accordingly, he stated the number of Class 10 tugs in the Vancouver Fleet was four.

### III. THE EVIDENCE

The October 21, 2016 MOA which the bargaining unit rejected had been recommended by the Guild's negotiating committee. One of the obstacles was that the membership wanted to see as many senior Masters as possible in Pay Group 10. In preparing for a return to the bargaining table, the Guild added two more employees to its committee, including Captain Paul McDonald, who is a Master. From their side, the Employer's representatives made it clear to the Guild that they had reached the end of their financial mandate, and that any additional money for Masters would need to be found within what had already been proposed. The Guild was not surprised by this message.

The proposal tabled by the Guild at 1950 hours on November 17 reflected these realities (see para. 17 of the Agreed Facts). Among other things, the proposal reduced the number of Masters at the top rate from eight to seven, and introduced the 1% rate increase (instead of 2%) for Masters. Of more direct relevance to the grievance, this was the initial proposal regarding additional tugs; i.e., "One (1) Master will be added to the highest rate of pay for each additional tug added in the Class 10 category".

Captain Armstrong was the Employer's spokesperson in the negotiations. He was asked at arbitration if he recalled any discussion when the "additional tug" language was tabled. He stated there was discussion about how you add a tug and about "how we move boats around". In terms of the latter, he recalled the Employer saying it did not want moving tugs around to trigger an additional Master; the "overall theory" was that it had to come from the growth of work given the longterm nature of the Collective Agreement. There was discussion in particular over what would happen if the Employer received new work from Kinder Morgan. Captain Armstrong was not sure if "swaps" were discussed at this stage, but said the subject "certainly came later".

Ms. Vlassopoulos was part of the Employer's negotiating committee. She recalled discussion at this point along the line that, if the Class 10 fleet in Vancouver increased in size, then another Master would be entitled to the Pay Group 10 rate.

As recorded at paragraph 6 of the Agreed Facts, Saam Smit occasionally moves boats between its three British Columbia operations which are under separate collective agreements with the Guild. The parties referred to these exchanges during the arbitration as "swaps". The various circumstances were described by Captain Armstrong in his testimony, and the practice is well known to the Guild. Indeed, it was readily acknowledged in cross-examination by Captain van der Gracht, and Captain McDonald likewise agreed "it's a known thing that we do".

In relation to the Guild's November 17 proposal, Captain van der Gracht did not recall Captain Armstrong asking questions about what was meant by an "additional tug added", but said he was sure there was a discussion. Captain McDonald similarly did not recall Captain Armstrong asking questions about how the clause would work; nor did he recall any discussion about moving tugs around between the three Saam Smit operations.

The Employer's proposal at 2345 hours on November 17 included qualifying language in Article 21.2 for an additional Master to be added to Pay Group 10, and also provided a mechanism for removal (see para. 18 of the Agreed Facts). Both Captain Armstrong and Ms. Vlassopoulos testified that the Employer went through the entire proposal "one by one" to explain the changes. Article 21.2 in particular was discussed, and the four month period for removing a tug was a response to concerns the Guild had raised about "gamesplaying" at Seaspan. Captain Armstrong stated he would not do that, but said he did not want to be targeted if a boat was just transferring through Vancouver and was at the dock, or was on its way to drydock. When asked whether anything was said about swaps, Captain Armstrong testified that Geordie Fournier (a member of the Guild's bargaining committee) acknowledged "this was not about swaps" and said the four month period helped to address the Guild's concerns.

Ms. Vlassopoulos provided similar evidence. The Guild was concerned that the Employer's language regarding utilization was too vague, and there was talk of Seaspan playing games. Although she did not know about those circumstances, Captain Armstrong understood what the Guild was talking about. Her notes from the time record Captain van der Gracht saying "needs to be tightened up", and "Geordie doesn't want Seaspan type games and using it and saying underutilized".

Captain van der Gracht was unable to say at arbitration whether the "mischief" problem at Seaspan was raised at the table at any stage of the negotiations, although he said it was discussed in the Guild's caucus. He also stated that swapping "never came up". He recalled the Employer "walked through" its November 17 proposal with respect to Article 21.2. He was "definitely unhappy with the second sentence and definitely did not like the word 'underutilized'". Captain McDonald did not recall what the Employer said when it explained the second sentence in Article 21.2. He testified further that there was never any discussion about Seaspan "at [his] end of the table" during negotiations, and did not recall anything being said about swaps. Mr. Fournier was not called by the Guild to testify in this proceeding.

It is plain from the evidence that the Guild was completely disenchanted with the Employer's proposal overall. After a short caucus, it returned and served 72 hours' strike notice.

As recorded above, Captain Armstrong's email of November 18 led to an exploratory meeting the next day at the Guild's office. In regard to Article 21.2, the Guild made it very clear that the Employer's last proposal was not acceptable. The Employer recognized the Guild's concern over the vagueness of the "underutilization" aspect, but wanted to ensure a "two way street"; i.e., there had to be a mechanism for removing a Master if a Class 10 tug was removed from the Vancouver fleet.

Ms. Vlassopoulos sent an email on the afternoon of November 19 to senior Saam Smit executives summarizing the meeting at the Guild's office. The relevant portion regarding Article 21.2 stated:

They don't want our added wording on the posting 1 additional Master to Class 10 with each additional Class 10 tug. We explained that we need wording to it to work both ways, but that we'll consider revised wording to tighten it up a bit.

The parties met with the mediator at the FMCS offices the next afternoon (Sunday, November 20). The Guild's proposal at 1900 hours included this language:

Currently there are four (4) Class ten (10) vessels including the SST Orleans.

One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category. If these tugs are taken out of service for more than six (6) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed.

As noted earlier, this language removed the second sentence from the Employer's last-tabled position. Captain van der Gracht testified that the Guild removed the second sentence in the Employer's proposal because the language "opened the door to all kinds of 'what ifs'". He could not recall in direct examination what was said when the Guild tabled its proposal on November 20. He presumed the Guild's reasoning was discussed, but candidly acknowledged he could not recall "what, if anything, was said" and did not recall if there was any discussion. He likewise did not recall whether the Employer said anything when the Guild's proposal was tabled. Captain McDonald's recollection was that there was no discussion over the effect of removing the second sentence.

Captain Armstrong testified that he asked questions about the impact of removing the second sentence, including in relation to swaps. The response was that the Guild understood this happens and that it was not what the clause was about; further, it would only apply if a boat was added for a longer term. Ms. Vlassopoulos recalled that Captain

Armstrong “spent a fair bit of time” asking questions. The parties talked about tugs in drydock and about swaps. She testified “every time it came up, [the Guild] said ... it was not about swaps”. Based on the entire discussion, the Employer understood the language as tabled would not apply in those circumstances.

The Employer’s response at 2345 hours on November 20 made only one amendment to the portion of Article 21.2 now in issue, and reduced the “out of service” period from six to four months:

Currently there are four (4) Class ten (10) vessels including the SST Orleans.

One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category. If these tugs are taken out of service for more than four (4) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed. (italics added)

There is no evidence about any discussion over this change. The language was incorporated into the Memorandum of Agreement reached at 0010 hours on November 21 (i.e., less than 30 minutes later).

It was suggested to Captain Armstrong in cross-examination that the Guild never agreed to an established period of time that a vessel had to be in Vancouver before the new Article 21.2 would be triggered. He replied: “It was at least some time -- [it] had to be there and do something. If there was a swap, and the other boat was gone, that would not count”. When it was next suggested that the Guild had not agreed to “some time”, Captain Armstrong added: “It was more than nothing”, and made reference to the vessel “working”.

Although it was common knowledge that the Salish would be joining the Vancouver fleet, there was apparently no discussion during the negotiations about whether it would be an “additional tug” within the meaning of the new Article 21.2 regarding Masters. It was also anticipated that another Class 10 vessel, the Sun, would

move to the Fraser River operation when the Salish arrived. Captain van der Gracht acknowledged in cross-examination that this was “the rumour”, and Captain McDonald agreed “that was the narrative we were getting”. Thus, had matters unfolded in accordance with the Employer’s plans, there would not have been any change to the number of Class 10 vessels in Vancouver.

For reasons which need not be fully recounted, and as set out in paragraph 31 of the Agreed Facts, there were five Class 10 vessels in Vancouver for a period of time in late 2016 and early 2017. The primary cause was an accident in September 2016 which necessitated repairs to the Sun and delayed its planned departure. In fact, due to other developments, the Sun has never been removed from the Vancouver fleet.

The Employer accepted delivery of the Salish with deficiencies on December 20, 2016 and it began revenue producing jobs (see para. 31 of the Agreed Facts). According to Captain Armstrong, between December 21, 2016 and January 10 or 11, 2017, there were about 12 days where the Employer had access to five Class 10 vessels in the Vancouver Harbour (the exact dates were December 20, 2016 to January 11, 2017 based on para. 33 of the Agreed Facts). He stated further that, on six occasions, the Employer had “all five boats working”. When it was suggested in cross-examination that the Salish was not a swap, Captain Armstrong agreed, saying: “No [it wasn’t], the Salish was *an add* for those 12 times due to extenuating circumstances [but] it wasn’t intended as a fifth boat forever” (italics added).

#### IV. SUMMARY OF THE PARTIES’ POSITIONS

The Guild submits the language in issue (i.e., “One (1) Master will be added [etc.] ...”) could not be clearer, and the grievance should succeed based on the plain wording of Article 21.2. Alternatively, the Guild maintains the extrinsic evidence supports its position. During negotiations, the Employer’s attempt to add qualifying words such as “underutilized” was firmly rejected, and the Employer should not be permitted to achieve

at arbitration what it failed to accomplish in collective bargaining. The Guild accordingly says the Salish was an “additional tug”, such that one Master should have been added to Pay Group 10 until a Class 10 tug had been out of service for four consecutive months.

The Employer contends the phrase “additional tug added” is ambiguous, and argues that removal of the second sentence from its proposal for Article 21.2 (i.e., “For this to apply [etc.] ...”) cannot be considered in a vacuum. It submits the context reveals the parties’ mutual intention, which was that the Employer’s usual practices regarding swapping tugs between operations would not trigger the clause. For Article 21.2 to apply, the Employer submits there must be a “true addition to the Vancouver fleet”. That is, the number of Class 10 tugs must increase from the four that were listed when the Collective Agreement was ratified.

The Employer concedes there were five Class 10 tugs in Vancouver for a period of time. However, it says this was “unique” and due to extenuating circumstances. The Salish was never intended to be an addition to the fleet and, but for the damage to other tugs and the timing of drydock repairs, it would not have performed revenue producing work before another tug left Vancouver as originally planned.

The Employer argues in the alternative that, if the language of Article 21.2 is triggered by a tug swap, then an estoppel exists on the facts because it relied on the Guild’s representations during negotiations. The Guild submits in response that there was no clear representation, and that persons other than Captain van der Gracht (in particular, Mr. Fournier) did not have authority to bind the Guild.

## V. ANALYSIS

The resolution of the present grievance requires an interpretation of Article 21.2 and, more specifically, the following language:

Currently there are four (4) Class ten (10) vessels including the SST Orleans. *One (1) Master will be added to Pay Group ten (10) for each additional tug added in the Class ten (10) category.* If these tugs are taken out of service for more than four (4) consecutive months, then one (1) Master will be removed from Pay Group ten (10) for each of the additional tug(s) removed. (italics added)

I have approached the task at hand in accordance with the principles articulated in *Pacific Press -and- GCIU, Local 25-C*, [1995] BCCAAA No. 647 (Bird), at para. 27; and *Nanaimo Times Ltd. -and- GCIU, Local 525-M*, BCLRB No. 40/96. Although emanating from the British Columbia case law, the same principles have been adopted in the federal sector. See *Seaspan International Inc. -and- CMSG*, [2007] CLAD No. 56 (Steeves).

When read in isolation, the second sentence of Article 21.2 appears to be relatively straight-forward. However, as is often the case, challenges and ambiguities arise when the language is applied to specific facts. That is precisely the situation here, and I find resort to the extrinsic evidence is both necessary and appropriate. In that regard, I prefer the testimony of the Employer's witnesses due to their more extensive recollections of the material exchanges during the negotiations.

As the Employer submits, removal of the sentence containing the contentious qualifying language which it had tabled at 2345 hours on November 27 cannot be assessed in a vacuum. When the entire course of the bargaining is considered, the Employer's acceptance of the wording proposed later by the Guild is not fatal to its position regarding the proper interpretation of Article 21.2. The mischief which the Guild sought to eliminate was the potential for "gamesplaying" as had occurred at Seaspan if "vague" wording remained in the Collective Agreement. This is what led to the revision. I find the Employer relied on representations made by the Guild's negotiating committee to the effect that the usual practices of moving vessels between Saam Smit operations would not be affected by removal of the second sentence from the clause.

I do not accept the Guild's arguments based on the assertion that only Captain van der Gracht had authority to bind the Guild during negotiations. There is no evidence of such a limitation ever being communicated to the Employer. If it existed, Captain Armstrong should have been advised expressly at the table that he could not rely on statements being made by other members of the Guild's committee in response to his questions. The negative implications for good faith collective bargaining should be obvious if responsibility for statements made by committee members during negotiations could be disavowed later on this basis.

In short, I find the Employer sought and received assurances on more than one occasion during collective bargaining that the phrase "additional tug added to the Class ten (10) category" was not intended to capture its usual practices of moving boats between operations and, in particular, did not apply to "swaps". Article 21.2 must therefore be interpreted in light of this mutual understanding.

The Employer proceeds to argue that the present facts do not constitute "any additional tug added to the Vancouver fleet" for these reasons:

... But for the six days, this was a true tug swap. It was never the mutual intention of the parties to have the Employer incur the additional cost of adding another Class 10 Master for a true tug swap. The Salish was never intended to be added to the Vancouver fleet. If not for damage to other tugs, and issues with timing of drydock repairs, the Salish would never have performed any revenue-producing work in Vancouver Harbour. Capt. Armstrong testified, and was uncontradicted in this, that a new tug does perform some limited actual work during its commissioning as part of its shakedown. This limited work does not make it a tug added to the Vancouver fleet. (written submission at p. 3)

I am unable to agree that the addition of the Salish was a "true swap". Nor am I persuaded by the Employer's submissions that Article 21.2 was not triggered due to the "extenuating circumstances".

In response to questions in final argument, the Employer's counsel maintained that a Class 10 tug brought to the Vancouver Harbour and tied to the dock in anticipation of being sent to drydock or being moved to another location would not trigger the clause. However, if there was an overlap of even one day of work, then Article 21.2 would apply, and the Employer would be "stuck" with the four month out of service period before the additional Master could be removed.

I believe those scenarios reflect a proper application of the language. And, while none of them occurred here, they inform the actual circumstances.

It will be recalled that the Employer accepted delivery of the Salish with deficiencies on December 20, 2016 (December 21 was also referred to in the evidence but this has no bearing on the outcome). The vessel performed revenue producing work on at least six days though the period ending January 10 or 11, 2017. I acknowledge the Employer's original plan to retain four Class 10 tugs in Vancouver, and accept that complications developed. But the unavoidable fact is that the Employer chose to operate five Class 10 vessels on several occasions. Unlike the out of service period of four months, there is no time period stipulated for how long a tug must be in service before it becomes an "additional tug added". Failing to draw a "bright line" on utilization would potentially open the door to the Seaspan "games" which both parties agreed should not take place.

I find some of Captain Armstrong's answers in cross-examination accord with the foregoing interpretation. He stated a tug "had to be there [at least some time] and do something", which he described as "working". He candidly acknowledged the Salish was not a swap, and was "an add for those 12 times due to extenuating circumstances". While Captain Armstrong went on to explain that the Salish was not intended "as a fifth boat forever", this is not the test. Rather, and as just noted, there is no threshold period during which an additional Class 10 vessel may work in Vancouver before becoming an "additional tug" for purposes of the relevant language. The six days on which the Salish

worked as a fifth tug were more than sufficient to require an additional Master in accordance with the new language.

Given the above determinations, there is no need to address the Employer's alternative argument based on estoppel.

VI. CONCLUSION

The grievance succeeds. I have concluded that the Salish was an "additional tug added" within the meaning of Article 21.2 of the Collective Agreement, such that one Master should have been added to Pay Group 10. I reserve jurisdiction to determine the resulting remedial consequences should the parties be unable to agree on any issues, including the effective end date of the four month out of service period.

DATED and effective at Vancouver, British Columbia on March 26, 2018

A handwritten signature in black ink, appearing to read "J. Hall", written over a large, loopy circular flourish.

JOHN B. HALL  
Arbitrator