Case Name:

Seaspan ULC v. International Longshore and Warehouse Union, Local 400 (O'Keefe Grievance)

IN THE MATTER OF an Arbitration under the Canada Labour Code, R.S.C. 1985 c. L-2
Between
Seaspan ULC (the "Employer"/ "Seaspan"), and
International Longshore & Warehouse Union, Local 400 (the "Union")
(Re: Max O'Keefe Grievance)

[2015] C.L.A.D. No. 197

Arbitration Decision No. C-006/14(a)

Canada
Labour Arbitration
Vancouver, British Columbia

Panel: Stan Lanyon, Q.C. (Arbitrator)

Heard: June 15, 2015; written submissions, June 26, July 10, 2015.
Award: August 21, 2015.

(95 paras.)

Labour Arbitration -- Discipline and discharge -- Grounds -- Failure to attend work.

Labour Arbitration -- Awards -- Reinstatement.

The union filed a grievance challenging the termination of the grievor for non-culpable absenteeism. The grievor worked as a cook on vessels that were at sea for two to three weeks at a time. He had a history of illnesses and injuries that resulted in lengthy absences from work. The grievor last worked for the employer in January 2004. Since that time he had been off work due to gastroenteritis. On October 17, 2013, the grievor's long term disability benefits (LTD) ceased. He contacted the employer stating that he was able to return to work. However, the employer had terminated the grievor on November 7, 2006 because of his continued inability to maintain a regular work schedule and fulfill his side of the employment contract. The employer was not prepared to reinstate the grievor. The union argued that the employer has in effect condoned the grievor's excessive absen-

teeism from 1990 to 2006. Further, the employer had failed to provide proper notice to the grievor that his absenteeism could lead to his dismissal.

HELD: Grievance allowed. The employer did not condone or acquiesce in the grievor's absenteeism for the period 1990 to 2006. The employer provided the grievor with adequate notice that his absenteeism may result in the termination of his employment. The grievor's absenteeism record was excessive. The arbitrator accepted that the grievor had the ability to return to work. The employer was, however, entitled to an independent medical examination to determine the grievor's fitness for work. If the grievor was fit to work, he was to be reinstated. However, the employer was able to rely on the totality of the grievor's absences and was entitled to do so in the future. That meant that should the grievor's attendance on a year to year basis deviate substantially and unduly from the norm, he may once again face the issue of his non-culpable termination due to his innocent absenteeism.

Statutes, Regulations and Rules Cited:

Canada Labour Code, R.S.C. 1985, c. L-2, s. 60(1.1), s. 239

Appearances:

Charles G. Harrison, for the Employer.

G. James Baugh, for the Union.

Award

I. Introduction

1 On December 19, 2014, I issued an award that dealt with the Employer's preliminary objection as to the timeliness of the Union's grievance. I concluded that the Employer was estopped from relying on the timeline set out in the collective agreement. In the alternative, I extended the timeline under the collective agreement pursuant to Section 60(1.1) of the *Canada Labour Code*.

2 This current decision concerns the merits of the Grievor's non-culpable termination due to his innocent absenteeism that arises from the above grievance.

3 I will review my Preliminary Award. The parties differ in respect to both its interpretation and its effect.

4 I will then deal with the merits of the Grievor's non-culpable termination for innocent absenteeism. The parties have arrived at an Agreed Statement of Fact in respect to the Grievor's non-culpable termination.

II. Preliminary Award

5 There was also an Agreed Statement of Facts in respect to the issues of timeliness; in addition, however, the parties each called two witnesses in respect to this preliminary issue.

6 There has arisen a dispute in respect to both the interpretation and the effect of my finding of estoppel in the Preliminary Award. This dispute, therefore, requires more than a simple summary of the Preliminary Award.

7 The Employer transports logs, chips, petroleum and pulp and paper products by way of its tug and barge fleet. The Grievor, Max O'Keefe, worked as a Cook on vessels that are at sea for 2 to 3 weeks at a time -- "continuous vessels". Mr. O'Keefe has a history of illnesses and injuries that resulted in lengthy absences from work. Mr. O'Keefe last worked for Seaspan in January 2004. Since that time he has been off work due to gastroenteritis.

8 On October 17, 2013, the Grievor's Long Term Disability benefits (LTD) ceased. (paragraph 42) He contacted the Employer stating that he was able to return to work. However, the Employer had on November 7th, 2006, terminated Mr. O'Keefe because of his "... continued inability to maintain a regular work schedule and fulfill your side of the employment contract" (paragraph 27).

9 On October 24, 2013, Captain Thompson, Manager, Marine Operations Dispatch and Personnel, wrote Terry Engler, President of the Union, stating that the termination letter of November 7th, 2006, to Mr. O'Keefe, was "very clearly" a termination letter, and that Seaspan was not prepared to reinstate Mr. O'Keefe (paragraph 45).

10 The Employer has implemented a very distinctive policy of "soft" and "hard" terminations of employees (paragraphs 7 - 19). A soft termination is when an employee, who is on long term disability benefits, is paid out all outstanding monies owed to them. Mr. Siemens, former Assistant Manager of Marine Personnel, described this as essentially a "payroll function" (paragraph 8). However, if an employee, either during their receipt of LTD benefits, or at the cessation of their benefits, is capable of returning to work, they are then reappointed to their former position with their full seniority. The Employer has a standard form letter in respect to these soft terminations that sets out this practice.

11 A hard termination letter expressly states that an employee has been terminated. For example, the Grievor's hard termination letter, dated November 7th, 2006, stated that the Employer was not able to "accommodate an indefinite absence", and that, "After careful consideration we have decided to terminate your employment with Seaspan International Ltd. effective immediately" (paragraph 27).

12 Mr. Engler had testified that he had never received copies of the Employer's soft termination letters. Mr. Engler stated that he understood that when an employee went on LTD the Employer's practice was to terminate them. However, these employees always had the "possibility of going back to work in the future" (paragraph 13).

13 Mr. Engler had previously dealt with the hard termination of a Mr. Peter Miller, a Cook/Deckhand, similar to the Grievor. Mr. Miller had received a hard termination letter, dated September 27, 2004 (paragraph 15). In response to this hard termination letter Mr. Miller had forwarded to the Employer a short note from his family doctor, dated September 30, 2004, which stated that Mr. Miller was fit to return to work (paragraph 17). As a result of Mr. Miller's family doctor's note, Mr. Miller underwent a "functional capacity evaluation", which was completed on October 27, 2004. It concluded that Mr. Miller was capable of returning to work with full duties. Mr. Miller went back at work in November 2004 (paragraphs 21 and 22). Thus, Mr. Engler concluded that if an employee was able to return to work when his LTD benefits ceased, this was consistent

with the Employer's soft termination policy, notwithstanding that an initial hard termination letter had been sent (paragraph 20).

14 At the time of his hard termination, on November 7th, 2006, the Grievor was on LTD benefits due to his gastroenteritis. The Union had been copied on the November 7th, 2006 termination letter to the Grievor. Mr. Engler gave evidence that he saw this letter as another "soft termination" similar to Mr. Miller's in 2004. The reason for this was that within a short period of time he had received a letter from Mr. O'Keefe's family doctor stating that Mr. O'Keefe would be able to return to work. As a result, he thought that this medical note covered off the termination letter, thus making it a soft termination because of the "real expectation of his [the Grievor's] return to work" (paragraph 32).

15 As stated, Mr. Engler, similar to Mr. Miller, had received a copy of Mr. O'Keefe's termination letter dated November 7th, 2006. Because of the advice of Mr. O'Keefe's family doctor that he was capable of returning to work he concluded that his hard termination was in fact a soft termination. He advised the Grievor that he would be referred to a functional capacity evaluation to see if he was capable of returning to work, and that if he was able to return to work, he would then be reinstated to his former position, with his full seniority - in fact, the application of the soft termination policy (paragraph 33).

16 Mr. Engler stated that the Employer did not respond to the Grievor's family doctor's note. He explained that this lack of response led him to believe that the Grievor's termination was actually a soft termination. Both Captain Thompson and Mr. Siemens acknowledged receiving the Family Doctor's note but stated that this note changed nothing. In their view, Mr. O'Keefe had been hard terminated. (paragraphs 33 and 34)

17 A third Deck Hand, PW Niven, was issued a hard termination letter on January 15, 2013. Mr. Niven filed a grievance, dated January 21, 2013. On February 4, 2013, Captain Thompson reaffirmed Mr. Niven's hard termination (paragraphs 35 - 37). Mr. Niven, at that time, had applied for LTD benefits. Although these benefits had been initially denied his claim was ultimately successful. Captain Thompson subsequently issued a soft termination letter to Mr. Niven (paragraphs 38 - 41).

18 Mr. Niven's circumstances in January to May 2013, predated by a few months, the Grievor's current circumstances in September -- November 2013. It confirmed Mr. Engler's understanding that notwithstanding a hard termination, if a person on LTD was capable of returning to work, they had, in fact, been soft terminated.

19 I concluded that in respect to both Mr. Miller and Mr. Niven, notwithstanding, the initial hard termination letters each had received, the Employer's subsequent reinstatement of both of them conformed to the Employer's soft termination policy. Each of them were off work due to illness or injury, each had received Long Term Disability or weekly indemnity, and consistent with the soft termination policy, each had the right to return to work if they were physically able to do so, and to be reinstated to their former positions, with their full seniority. Each had their family doctors write the Employer after having received a hard termination letter, stating that they had the ability to return to work (paragraph 78).

20 Further, I found that when the Employer had failed to respond to the Grievor's family doctor's letter it was reasonable for Mr. Engler to conclude that the Employer had accepted the Grievor's doctor's conclusion that at some future point the Grievor would be physically capable of returning to work. As a result, the Union understood the Grievor's hard termination to be in fact a

soft termination. It was for this reason that Mr. Engler did not file a grievance contesting the Grievor's hard termination in November 2006 (paragraph 74).

21 In this case, the Employer's decision not to address the medical conclusion of the Grievor's doctor, or to affirm its hard termination letter at that time, did not require an intention to induce reliance in order to establish an estoppel. Its failure to act was sufficient (paragraphs 50 and 69). Thus, when the Employer failed to respond to the Grievor's family doctor's note, it was reasonable for Mr. Engler to conclude that the Grievor had been soft terminated. The detrimental reliance was the Union's conclusion not to file a grievance in November 2006 because it determined at that time that the Grievor had been soft terminated. If the Union had, in fact, wrongly construed the nature of the Grievor's termination, it would have been precluded from filing such a grievance seven years later. The result would be that the Grievor would have no opportunity to demonstrate that he was capable of returning to work. This clearly amounted to an inequitable detriment. (paragraph 75)

22 I therefore concluded the Employer was estopped from relying on the timeline set out in a collective agreement. When the Employer did in fact confirm its hard termination of the Grievor on October 24, 2013, the Union filed a timely grievance. (paragraphs 83 and 84)

23 In the alternative, I exercised my discretion under Section 60(1.1) of the *Canada Labour Code* to extend the timelines under the collective agreement. (paragraph 96)

III. Analysis and Decision

24 As stated, there is a dispute between the parties over the interpretation and effect of the finding of estoppel in my Preliminary Award. I will first cite the law relied upon and then address the arguments of the parties.

25 From paragraphs 49 - 84 of the Award I deal with the issue of estoppel. At paragraphs 49 and 50 I set out the British Columbia Labour Relations Board Decision in *B.C. Rail Limited*, IRC No. 152/92, and its adoption of what is termed the "modern doctrine of estoppel" set out in the British Columbia Court of Appeal decision *Litwin Construction (1973) Ltd.*, (1988), 29 B.C.L.R. (2d) 88. This modern doctrine collapsed many prior equitable doctrines into one broad principle whose basic purpose is the prevention of "inequitable detriment":

> Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.
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> Thus, as to knowledge, Mr. Justice Oliver in Taylor Fashions [reported at [1981] 1 All ER 897] said "it would be unreasonable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment ..." (emphasis added".)

> This is now the proper test to be used in British Columbia with respect to the modern doctrine of estoppel. The purpose of the doctrine is to prevent inequitable detriment. On this point, the Court of Appeal in Litwin adopted the following passage from Grundt v. Great Boulder Proprietary Gold Mines Ltd. (1937), 59 C.L.R. 641 (Aus. H.C.):. ...
>
> (page 25)

26 At paragraph 50 I cite a passage from *B.C. Rail Limited, supra* that there is no requirement to find an intention to induce reliance, nor must there be a positive act upon which reliance may be reasonably said to have arisen; it is sufficient that there be a failure to act:

> There is no requirement that the conduct relied upon by a party who seeks to raise an estoppel have been intentionally designed to induce reliance. Nor is it essential that there be any positive acts upon which the reliance may reasonably be said to have arisen; the conduct may, in fact, be a failure to act in circumstances so as to give rise to an inference upon which reliance is founded: see Bowen v. O'Brian Financial Corp., (1991), 62 BCLR (2d) 328 (BCCA). The requirement that there be "unequivocal conduct" is a question of fact. In Revell v. O'Brian Financial Corp. (unreported; December 13, 1991; BCCA), one finds the following at page 14:
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> Whether the respondent's conduct was sufficient for the purpose of this test to constitute an unequivocal affirmation is a question of fact. The test is similar to the test of whether conduct is sufficient to constitute waiver or estoppel. It is a question of fact in each case. ... This Court will not reverse findings of facts or substitute its assessment for the findings of a trial judge, unless the trial judge has made some palpable or overriding error which affected his assessment of the facts.
>
> Finally, in considering the notion of reliance based upon unequivocal conduct, the perspective from which the application of the doctrine must be viewed is that of the party who seeks to raise the estoppel: see Bowen, supra, at page 338.
>
> (page 26)

27 As previously set out, I concluded in paragraphs 74 - 84, that when the Employer failed to respond to the Grievor's family doctor's note, it was reasonable for Mr. Engler to conclude that the Employer had accepted the Grievor's doctor's conclusion that at some future point the Grievor would be capable of returning to work. As a result, the Union understood the Grievor's termination to be a soft termination. Thus, in these circumstances, the Employer was estopped from relying on the November 7th, 2006 hard termination of the Grievor. When the Employer did affirm its hard termination of the Grievor in October 2013, the Union filed a timely grievance.

28 The Union argues that the relevant period for determining the issue of the Grievor's non-culpable termination for innocent absenteeism is October 24, 2013, when the Employer affirmed its view that the Grievor had been terminated on November 7, 2006. Further, it argues that the effect of the finding an estoppel is to prevent the Employer from relying entirely on its hard

termination letter. This is because the effect of the estoppel is to change the very nature of the dismissal; it is to completely change or convert the Grievor's hard termination to a soft termination.

29 Therefore, consistent with the conclusion that Mr. O'Keefe's termination is a soft termination, Mr. O'Keefe is only required to show that he is capable of returning to work; and if he is capable of returning to work, he is then simply reinstated to his position with his full seniority.

30 In addition, the Union argues that the finding of estoppel in this case permits it to make arguments regarding the actual or effective date of the termination of Mr. O'Keefe. It says that the notice given to the Grievor on November 7th , 2006, failed to clearly communicate its intention to terminate the Grievor. This results from the lack of understanding by either the Grievor or the Union that he had actually been hard terminated. Therefore, the notice to terminate is ineffective. There was no clear notice to terminate until October 24th, 2013.

31 The Employer replies that the finding of estoppel in the Preliminary Award was made solely in respect to the enforceability of the time limits under the Collective Agreement. It says that because the Union and the Grievor did not understand the nature of the dismissal, due to the Employer's past conduct, this explained the failure of the Union to file a grievance in 2006. Thus the effect of the estoppel was to permit the grievance to proceed in spite of the passage of seven years.

32 The Employer further argues that the effect of the finding of estoppel did not "deem" that the November 7th, 2006 hard termination had, in fact, never occurred. It says there is no issue that the Grievor received an actual hard termination letter on November 7th, 2006. Therefore it claims that the only issue before this Arbitration Board is whether the Employer had "just cause for non-culpable dismissal as of November 7, 2006" (emphasis added).

33 The parties have diametrically opposed views as to the interpretation and effect of the finding of estoppel in my Preliminary Award. The Union argues that in effect there continues to be a soft termination, and that the Grievor, if he is fit to return to work, is entitled to be reinstated with his full seniority. The Employer argues that there was a hard termination on November 7th, 2006, and that is the date on which a determination must be made in respect to the Grievor's non-culpable termination due to his innocent absenteeism. Each party relies on different aspects of the Award.

34 I assume, of course, full responsibility for any ambiguity which may arise due to my Award. In this case, perhaps some of the confusion may be explained by the fact that the finding of estoppel is inextricably linked to the Employer's soft and hard policy of termination. This, in turn, formed the basis upon which the issue of timeliness was resolved.

35 First, it is clear that the letter issued by the Employer on November 7th, 2006 is a hard termination letter. Mr. Siemens stated in that letter "After careful consideration we have decided to terminate your Employment with Seaspan International Ltd. effective immediately". The basis for the dismissal was the Grievor's "continued inability to maintain a regular work schedule and fulfill your side of the employment contract" (paragraph 27). The Grievor's dismissal is a non-culpable termination for innocent absenteeism.

36 Second, on October 24, 2013, the Employer reaffirms this hard termination in a letter from Captain Thompson to Mr. O'Keefe. He writes that Mr. Siemen's letter is "very clearly" a termination letter, and in that he is not prepared to reinstate Mr. O'Keefe (paragraph 45).

37 Third, I found an estoppel arose from the Employer's conduct, notwithstanding the express wording of the hard termination letter dismissing the Grievor, because another Deck Hand/Cook,

Mr. Miller, who had also received an initial hard termination letter, had been, consistent with the soft termination policy, reinstated to his former position with his full seniority. When the Employer affirmed its hard termination of the Grievor on October 24th, 2013, the Union filed a timely grievance (paragraph 75).

38 Thus, I agree with the Employer's initial argument that one of the primary purposes of the estoppel was to extend the timelines under the collective agreement in order to make the Union's grievance in November 2013 timely. I also agree with the Employer that the October 24, 2013 letter affirmed its hard termination letter of November 7th, 2006.

39 Therefore, I do not accept the Union's argument that the effect of the estoppel was to irrevocably convert, the November 7th, 2006, hard termination into a soft termination.

40 I do agree, however, with the Union that the *effect* of the estoppel was to estop the Employer from relying on the *hard termination* during the period November 7, 2006 to October 24, 2013. This was the result of the Employer's conduct. The Employer could have, at any time, after it received the Grievor's family doctor's note, affirmed its hard termination. It chose not to do this until the Grievor's LTD ceased, and he had informed the Employer that he was able to return to work. The Employer's conduct, therefore, had the effect of modifying the hard termination into a soft termination during the time he remained on long term disability benefits. This also resulted in extending the time limits under the Collective Agreement for the filing of a grievance in respect to the Grievor's hard termination.

41 Thus, I decline to accept the Union's argument that the current matter involves only a soft termination. As a result, I do not accept the Union's conclusion that once the Grievor has produced the required medical evidence to show that he is fit to return to work he is, consistent with the soft termination policy, simply to be reappointed to his former position with full seniority.

42 Rather, I conclude that what is at issue is the hard termination of the Grievor -- a non-culpable termination for innocent absenteeism. This involves an examination of the Grievor's absenteeism and the likelihood of his being able to sustain regular attendance at work in the future.

43 However, the Employer then argues that notwithstanding this finding of an estoppel, the date for the non-culpable termination for innocent absenteeism of the Grievor should be the date of the original termination, November 7th, 2006. It further says that it can rely on the "totality" of the Grievor's record from 1988 - 2006. In addition, it can also rely on the post-discharge evidence from 2006 to 2013, which demonstrates the reasonableness and appropriateness of the non-culpable discharge based on innocent absenteeism on November 7th, 2006. Moreover, it says that the estoppel decision related only to the enforceability of the collective agreement timelines. It did not conclude that there had been no termination on November 7th, 2006.

44 The estoppel resulted from the Employer's conduct. It converted a hard termination into a soft termination for the period of time the estoppel was in effect -- November 7th, 2006 (the original hard termination letter) until October 24, 2013 (the affirmation of the original hard termination letter). However, the Employer had the right to resurrect its hard termination letter any time during the period the Grievor was on LTD. It now argues that when its hard termination was reaffirmed on October 24th, 2013, its effect was retroactive. In other words, the Employer is able to go back to November 7th, 2006, and have its hard termination adjudicated as of that time. The effect of this interpretation is to in fact eliminate not only the estoppel, but also its own conduct.

45 The estoppel has two aspects. The first is in regard to the nature of the termination -- modifying a hard termination into a soft termination for the period of the estoppel; and secondly, to extend the time limits under the collective agreement. The Union tries to transform the effect of the first, to permanently convert the very nature of the termination, whilst the Employer tries to limit the estoppel to only the issue of timelines. I have rejected both arguments. Both aspects of the estoppel are, as I said at the outset, inextricably linked.

46 I therefore conclude that what is before me is a hard termination -- a non-culpable discharge for innocent absenteeism as of October 24, 2013.

IV. Non-culpable Discharge for Innocent Absenteeism

47 The following is the Agreed Statement of Facts:

> Collective Agreement
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> 1. A copy of the grievance dated November 19, 2013 (the "Grievance") is Attachment "A" to this Agreed Statement of Facts.
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> 2. A copy of the Employer's response to the Grievance dated February 5, 2014 is Attachment "B" to this Agreed Statement of Facts.
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> 3. As of November 19, 2013, the date the Grievance was filed, the parties were subject to a collective agreement, which had a term from October 1, 2010 to September 30, 2013 and that remained in force at that time (the "Collective Agreement"). A copy of the Collective Agreement is Attachment "C" to this Agreed Statement of Facts.
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> The Employer's Operations
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> 4. The Employer transports log, chip, petroleum and pulp and paper products via its tug and barge fleet.
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> 5. The Employer requires that employees working on board its vessels have Transport Canada medical certifications of fitness.
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> 6. The Employer's marine transportation division is federally regulated.
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> The Union
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> 7. Mr. O'Keefe (the "Grievor") is a member of the International Longshore & Warehouse Union Local 400, Marine Section (the "Union").
>
> The Grievor
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> 8. The Grievor was born on February 6, 1955.

9. The Grievor was trained as a cook while serving in the Navy from 1976 to 1981.

10. In the spring of 1987, the Grievor applied for and was hired by the Employer as a cook on its tug boat fleet.

11. As a cook, Mr. O'Keefe worked on continuous vessels, which are vessels that are normally at sea for two weeks at a time and on occasion are at sea up to three weeks.

The Grievor's Work history and Termination

12. The Grievor commenced employment with the Employer in or around May 1987 in the position of Cook on board the Employer's vessels.

13. On or about April 9, 1988, the Grievor injured his leg as a result, was away from work for 78.5 days due to a work-related illness or injury. The Grievor returned to work on or about June 30, 1988.

14. On or about December 23, 1988, the Grievor injured his back and as a result, was away from work for 444 days due to a work-related illness or injury. The Grievor returned to work on or about March 11, 1990.

15. On or about April 2, 1990, the Grievor again went off work due to his back and as a result, was away from work for 72 days. The Grievor returned to work on or about June 12, 1990.

16. In or around May 1990, the Employer warned the Grievor that "if [his] current treatment under Crown fails, [the Employer] will have to let him go." The Employer's note of May 7, 1990 recording this conversation is Attachment "D" to this Agreed Statement of Facts.

17. On or about June 10, 1991, the Grievor again went off work due to his back and as a result, was away from work for 10 days. The Grievor returned to work on June 19, 1991.

18. On or about October 8, 1991, the Grievor again went off work due to his back and as a result was away from work for 26 days. The Grievor returned to work on or about November 7, 1991.

19. On or about October 30, 1991, the Employer sent the Grievor a letter expressing its concern in respect of the Grievor's suitability to the industry. A copy of the Employer's October 30, 1001 letter is Attachment "E" to this Agreed Statement of Facts.

20. On or about June 18, 1992, the Grievor was laid off from his employment with the Employer.

21. On or about August 20, 1992, the Grievor was recalled to work for the Employer.

22. On or about March 16, 1993, the Grievor went off work due to his neck, and as a result was absent from work for 14.5 days due to a work-related illness or injury. The Grievor returned to work on or about March 30, 1993.

23. On or about July 9, 1993, the Grievor went off work due to his neck and as a result was absent from work for 17 days due to a work-related illness or injury. The Grievor returned to work on or about July 25, 1993.

24. On or about January 12, 1995, the Grievor was laid off from his employment with the Employer.

25. On or about March 14, 1995, the Grievor was recalled to work for the Employer.

26. On or about April 8, 1995, the Grievor went off work due to his back and leg. The Grievor was cleared to return to work and went on the Spare Lists on or about July 17, 1995. At that time, he had been absent from work for 99 days. The Grievor returned to work on or about August 10, 1995.

27. On or about October 7, 1995, the Grievor went off work due to his back and leg, and as a result was absent from work for 59 days. The Grievor was ready to return to work on or about December 4, 1995 and went back to work on December 11, 1995.

28. On or about October 26, 1995, the Employer notified the Grievor and others that a number of its vessels had been converted to Cook/Deckhand vessels and advised the Grievor to contact the Employer if he desired an opportunity to become a Cook/Deckhand.

29. On or about February 24, 1996, the Grievor was laid off from his employment with the Employer.

30. On or about July 3, 1996, the Grievor was recalled to work for the Employer.

31. On or about January 8, 1997, the Grievor went off work due to his eye, and as a result was absent from work for 5 days. The Grievor returned to work on or about January 12, 1997.

32. On or about July 27, 1997, the Grievor was laid off from his employment with the Employer.

33. On or about September 30, 1997, the Grievor was recalled to work for the Employer.

34. On or about March 8, 1998, the Grievor was laid off from his employment with the Employer.

35. On or about November 13, 1998, the Grievor was recalled to work for the Employer.

36. On or about June 8, 1999, the Grievor went off work due to his leg, and as a result was absent from work for 30 days. The Grievor returned to work on or about July 7, 1999.

37. On or about October 15, 1999, the Grievor went off work due to his head, and as a result was absent from work for 126.5 days due to a work-related illness or injury. The Grievor returned to work on or about February 18, 2000.

38. On or about April 7, 2000, the Grievor went off work due to his head, and as a result was absent from work for 73 days due to a work-related illness or injury. The Grievor returned to work on or about June 18, 2000.

39. On or about November 11, 2000, the Grievor went off work due to his elbow, and as a result was absent from work for 11.5 days due to a work-related illness or injury. The Grievor returned to work on or about November 22, 2000.

40. On or about January 9, 2001, the Grievor went off work due to his leg, and as a result was absent from work for 55 days. The Grievor returned to work on or about March 4, 2001.

41. On or about July 15, 2001, the Grievor went off work due to Hepatitis, and as a result was absent from work for approximately 685 days.

42. On or about March 20, 2003, the Grievor remained off work and the Employer sent the Grievor a letter to advise that, "[s] ince it is unlikely that you will be returning to work in the near future, we are paying out all wages owing to you as per the enclosed statement. These dollars have been deposited directly to your bank account." The Employer's letter of March 20, 2003 is Attachment "F" to this Agreed Statement of Facts.

43. The Grievor returned to work on or about May 31, 2003.

44. On or about January 17, 2004, the Grievor went off work due to gastroenteritis, an illness that was not work-related.

45. On or about March 24, 2004, the Employer wrote to the Grievor requesting information about his medical condition which is Attachment "G" to this Agreed Statement of Facts.

46. On or about April 14, 2004, the Grievor's doctor wrote to the Employer to provide his opinion that the Grievor would likely be able to return to work in 1 1/2 to 2 1/2 months, but that "Max needs to get free of this nagging and acute abdominal problem to be fit for sea duties or other sort of work". Dr. Winsby's letter of April 14, 2004 is Attachment "H" to this Agreed Statement of Facts.

47. On or about August 31, 2004, the Grievor's doctor wrote to the Employer to provide his opinion that the Grievor "can return to work in safety". Dr. Winsby's letter of August 31, 2004 is Attachment "I" to this Agreed Statement of Facts.

48. On or about September 14, 2004, the Grievor's doctor wrote to the Employer to advise that the Grievor had suffered a relapse in his condition and that the Grievor would not be able to return to work. Dr. Winsby's letter of September 14, 2004, is Attachment "J" to this Agreed Statement of Facts.

49. On December 29, 2004, the Grievor's doctor wrote to the Employer to advise that the Grievor could return to work on January 1, 2005. Dr. Winsby's letter of December 29, 2004 is Attachment "K" to this Agreed Statement of Facts.

50. The Grievor did not return to active service on January 1, 2005. The Grievor advised the Employer that he would be re-applying for his long term disability benefits.

51. On January 7, 2005, the Employer wrote to the Grievor setting out the Grievor's numerous time losses and advised the Grievor that if the Grievor could not attend work on a regular basis due to his medical conditions, "the Company may have no alternative but to consider [the Grievor] unsuitable for continued employment with Seaspan International." The Employer's letter of January 7, 2005 is Attachment "L" to this Agreed Statement of Facts.

52. On or about February 7, 2005, the Grievor remained off work and the Employer sent the Grievor a letter to advise that, "[s] ince it is unlikely you will be returning to work in the near future, we are paying out all wages owing to you as per the enclosed statement. These dollars have been de-

posited directly to your bank account." The Employer's letter of February 7, 2005, is Attachment "M" to this Agreed Statement of Facts.

53. On or about January 19, 2006, the Employer requested information from the Grievor concerning his medical condition. The Employer's letter of January 19, 2006 is Attachment "N" to this Agreed Statement of Facts.

54. On or about February 24, 2006, the Grievor's doctor advised the Employer that he believed that the Grievor could return to work by April 15, 2006. Dr. Winsby's letter of February 24, 2006 is Attachment "O" to this Agreed Statement of Facts.

55. On or about March 29, 2006, the Grievor's doctor wrote to the Employer to advise that due to a relapse, there was no longer any possibility that the Grievor would be able to return to work by April 15, 2006. Dr. Winsby's letter of March 29, 2006 is Attachment "P" to this Agreed Statement of Facts.

56. On or about April 26, 2006, the Employer sent a letter to the Grievor to give to his doctor to ask whether the Grievor's return to work was imminent and to provide the Employer with a prognosis by May 10, 2006. The Employer's letter of April 26, 2006 is Attachment "Q" to this Agreed Statement of Facts.

57. On or about May 11, 2006, the Employer wrote to the Grievor to advise that his doctor had not responded to the Employer's letter of April 26, 2006 and requested that a response be provided to the Employer by May 31, 2006. The Employer's letter of May 11, 2006 is Attachment "R" to this Agreed Statement of Facts.

58. On or about June 7, 2006, the Grievor's doctor wrote to the Employer to advise that the Grievor's "full return to work" was "imminent", but that the Grievor was still experiencing symptoms. Dr. Winsby's letter of June 7, 2006 is Attachment "S" to this Agreed Statement of Facts.

59. On or about June 26, 2006, the Employer wrote to the Grievor to request further information about his condition from his doctor. Among the information requested was the doctor's opinion on whether "vocational retraining and placement [would] be more medically appropriate than a return to regular duties". The Employer's letter of June 26, 2006 is Attachment "T" to this Agreed Statement of Facts.

60. On or about July 18, 2006, due to no response from the Grievor's doctor, the Employer sent a letter to the Grievor reiterating its request of June 26, 2006. The Employer's letter of July 18, 2006 is Attachment "U" to this Agreed Statement of Facts.

61. On or about July 20, 2006, the Grievor's doctor wrote to the Employer to advise that the Grievor was "improving with abdominal distress" and that "we have decided that Sept. 2006 he will return to work at regular duties." Dr. Winsby's letter of July 20, 2006 is Attachment "V" to this Agreed Statement of Facts.

62. On or about October 27, 2006, the Grievor's doctor wrote to the Employer to advise that the Grievor was still experiencing "frequent episodes of illness". Accordingly, the doctor advise, "[the Grievor] is unfit for his work as I understand it." Dr. Winsby's letter of October 27, 2006 is Attachment "W" to this Agreed Sttatement of Facts.

63. From January 17, 2004 through to November 7, 2006, the Grievor was unavailable for work 1,025 consecutive days.

64. [*Facts not fully agreed due to incomplete and/or inconsistent records and information*]

    (a) [Per Employer] As of March 2006, the Employer's seniority lists for unlicensed personnel, including the Grievor but excluding individuals on Union leave, totaled 229 employees. The Employer's payroll system indicates that, as a group, those employees were absent due to non-work-related illness or injury (on Weekly Indemnity or LTD claims), a total of 5,318 days in 2006 producing an average absenteeism of 23.2 days per employee for the year.

    (b) Although not on the seniority list, the Employer payroll records also show William Purchase was on an LTD claim throughout 2006. Including him in the calculation above produces average absenteeism in 2006 of 24.7 days per employee.

    (c) [Per Union] Union records indicate that, in addition to the employees above, the following members were on LTD claims throughout 2006: Gregory Fors, Barry Mastin and Terry Owen. Including these individuals in the calculation above produces average absenteeism of 29 days per employee.

    (d) The Union believes that there may have been additional members employed by Seaspan who had been "soft-terminated" prior to 2006, and which would have the effect of increasing the calculation of average absenteeism higher.

65. On or about November 7, 2006, the Employer wrote to the Grievor to advise that it had decided to terminate his employment as, based on his doctor's latest opinion and other medical information that the Employer had on

file, it did not appear that the Grievor would be able to "return to work on a regular and consistent basis performing [his] normal duties as a cook." Terry Engler of the Union was copied on this letter. The Employer's letter of November 7, 2006 is Attachment "X" to this Agreed Statement of Facts.

66. A copy of the collective agreement in effect in November 2006 is attached as Attachment "Y".

67. On or about November 22, 2006, the Grievor's doctor wrote to the Employer to verify his expectation that the Grievor would regain his health and be able to return to work. Dr. Winsby's letter of November 22, 2006 is Attachment "AA" to this Agreed Statement of Facts.

68. On or about September 16, 2013, the benefit administrator, Great West Life, determined that the Grievor no longer satisfied the definition of disability under the LTD Plan, with the result that his LTD benefits and waiver of life insurance premiums were terminated on October 17, 2013. Great West Life's letter of September 16, 2013 is Attachment "BB" to this Agreed Statement of Facts.

69. Shortly after receiving a copy of the September 16, 2013 letter from Great West Life, the Employer received a phone call from the Grievor upon which the Grievor advised that he was ready to come back to work.

70. On or about September 23, 2013, the Employer received a note from the Grievor's doctor verifying that the Grievor was physically capable of returning to work. Dr. Winsby's note of September 23, 2013 is Attachment "CC" to this Agreed Statement of Facts.

71. On or about October 2, 2013, the Grievor obtained an updated medical certification of fitness from Transport Canada. The Transport Canada medical certification of October 2, 2013 is Attachment "DD" to this Agreed Statement of Facts.

72. On or about October 24, 2013, the Employer sent a letter to the Union indicating the Employer's view that the Grievor's employment had been terminated in 2006. The Employer's letter of October 24, 2013 is Attachment "EE" to this Agreed Statement of Facts.

73. On or about November 19, 2013, the Union filed the Grievance on behalf of the Grievor, Attachment "A" to this Agreed Statement of Facts.

74. The Preliminary Award in these proceedings was issued on or about December 19, 2014. On January 6, 2015, the Union requested that Seaspan arrange a functional capacity evaluation for Grievor to assess whether he was physically capable of doing the job of cook at Seaspan. The Union's

January 6, 2015 email to the Employer is Attachment "FF"" to this Agreed Statement of Facts.

75. Arrangements for a functional capacity evaluation were finalized on February 24, 2015, and the Employer sent the Union an email confirming those arrangements. The email is Attachment GG to this Agreed Statement of Facts.

76. By agreement of the parties, Mr. Worthington-White assessed the Grievor on April 7 - 8, 2015, issuing his report to the Employer on or about April 24, 2015. Mr. Worthington-White concluded that the Grievor presented "as capable of the typical duties and related physical/functional demands of work as a cook as outlined in the Seaspan Job Demands Analysis on a full-time basis." Mr. Worthington-White's April 24, 2015 Report is Attachment "HH" to this Agreed Statement of Facts.

77. Since Mr. Worthington-White's April 24, 2015 report, the Employer has not reinstated the Grievor but has maintained that he was terminated in November 2006.

Employer's Argument:

48 The Employer argues that it is the "totality" of Mr. O'Keefe's employment record that is at issue in respect to his non-culpable discharge for innocent absenteeism. It states that from April 2nd, 1990, through to November 7th, 2006, Mr. O'Keefe has had ten episodes of non-work related absences that amount to an accumulated 2,066 days that he was unavailable for work. This is more than one third (1/3) of the 6,063 calendar days during this period. Moreover, the Employer claims that if one expands the dates from November 7th, 2006 to October 24th, 2013, there are approximately an additional 2,500 days that the Grievor has missed in terms of his availability for work. This results, the Employer says, in the Grievor being absent for well over one half of the calendar days from April 2nd, 1990, until his termination on October 24th, 2013.

49 Further, the Employer argues if one simply takes the period between April 2nd, 1990 through to January 17th, 2004, the date the Grievor went off work due to his gastroenteritis, there has been an accumulation of 1,025 days in which Mr. O'Keefe was unavailable for work due to non-work related injuries. It says this amounts to an average of 74 days per year over that 14 year period. In paragraph 64 of the Agreed Statement of Facts the Employer states that the average maximum absenteeism rate for other employees was 24.7 days; thus, the Grievor's absenteeism is excessive in comparison to other employees.

50 In respect to the second part of the test, the Employer asserts that the issue is not simply the Grievor's current fitness to return to work but rather whether or not he is capable of sustaining regular attendance at work in the future. The Employer claims that the Grievor's history of excessive absenteeism creates a clear and compelling inference that Mr. O'Keefe will be unable to sustain regular attendance at work in the future. And, more specifically, the Grievor's past record in respect to his gastroenteritis demonstrates that it has prevented his regular attendance at work because of repeated "flare ups and relapses".

Union's Argument:

51 The Union argues that Mr. O'Keefe is fit to return to work. The Benefits Administrator has determined that the Grievor no longer satisfies the definition of disability under the Long Term Disability Plan and his benefits were terminated on October 17th, 2013. The Grievor at that point contacted the Employer to advise that he was ready to come back to work. On or about September 23rd, 2013 the Employer received a note from his family doctor verifying that he was physically capable of returning to work. Further, on October 2nd, 2013, the Grievor obtained an updated medical certificate of fitness from Transport Canada. Finally, on April 24th, 2015 a Functional Capacity Evaluation found that the Grievor was capable of performing the duties of Cook at Seaspan.

52 In respect to the Employer's argument that it is entitled to rely on the totality of the Grievor's non-work related absences, the Union argues that the Employer has in effect condoned his excessive absenteeism for approximately 16 years, (April 1990 to November 2006). Further, it has failed to provide proper notice to the Grievor that his absenteeism could lead to his dismissal.

V. Arbitral Law and Policy

53 Absences from work due to illnesses or injury are categorized as innocent absenteeism. They are characterized as non-culpable (innocent absenteeism) because they are beyond an individual's control, and therefore that person is blameless. However, excessive absenteeism may still be subject to termination on a non-culpable basis. In the text *Collective Agreement Arbitration Canada*, 4th Edition, Snyder (Lexis-Nexis) 2009, the criteria justifying non-culpable dismissal for innocent absenteeism are set out:

> CONSIDERATIONS JUSTIFYING DISMISSAL
>
> 13.18 Initially, to justify dismissal for innocent (non-culpable) absenteeism, an employer had to establish the following two criteria:
>
> 1) that there was undue absenteeism; and
>
> 2) that the employee was incapable of future regular attendance.
>
> While these two factors remain the principal focus, arbitrators additionally examine the following longstanding considerations:
>
> 3) was the grievor notified that his or her absence was excessive and warned that a failure to improve could result in discharge; and
>
> 4) if the absenteeism was caused by an illness or disability, did the employer attempt to accommodate the employee to the point of undue hardship prior to dismissal.

54 I will address the first three factors; the fourth issue was not argued.

Undue Absenteeism

55 First, in the circumstances of this matter, I accept the Employer's argument that it is entitled to rely on the "totality" of the employee's absentee records. I include in this record the period of

time the Grievor was off due to his gastroenteritis -- January 17, 2004 to October 17, 2013. These past records give an objective basis upon which to measure the employees' absenteeism and the reasons for that absenteeism. Many employers have management attendance programs and these provide a comparative tool for measuring the attendance record of one employee against all other employees. The test is whether a particular employee attendance deviates "substantially and unduly from the average level of attendance" (13.19 *Collective Agreement Arbitration Canada, supra*.)

56 However, the Union argues that even if one accepts that the Employer is entitled to rely on the totality of the Grievor's absenteeism record, it has nonetheless acquiesced or condoned Mr. O'Keefe's excessive absenteeism for a period of 16 years (1990 - 2006). Further, the Employer has failed to give notice to the Grievor that his absenteeism may affect his employment status.

57 All subsequent references to paragraph numbers will be those set out in the Agreed Statement of Facts cited at paragraph 47 of this Award, unless otherwise stated.

58 As early as May 1990 the Employer warned the Grievor that his absenteeism may result in his termination (paragraph 16). In March 2003, the Grievor was issued a soft termination letter (paragraph 42). Further, while the Grievor was on long term disability for gastroenteritis, January 2004 to October 2013, the Employer, from March 2004 to July 2006, made six different inquiries in respect to obtaining further information in regard to the Greivor's medical condition (paragraphs 45, 53, 56, 57, 59 and 60). However, most important, was a letter dated January 7, 2005, where the Employer set out the totality of the Grievor's absences from April 13, 1988 to January 1, 2005, and concluded that letter with the following notice:

> Therefore, please understand that while this letter is non-disciplinary, if you suffer further time loss due to your medical conditions and cannot attend work on a regular and reliable basis and fulfill your part of the employer/employee relationship, the Company may have no alternative but to consider you unsuitable for continued employment with Seaspan International.
>
> (paragraph 51)

59 On November 7th, 2006 the Employer terminated the Grievor for his innocent absenteeism because, as the letter stated, for his "continued inability to maintain a regular work schedule and fulfill your side of the employment contract". It stated further "Please understand the Company cannot accommodate an indefinite absence". I therefore find that the Employer has not condoned or acquiesced in the Grievor's absenteeism for the period 1990 to 2006; and further, that the Company had provided the Grievor with adequate notice that his absenteeism may result in the termination of his employment.

Absenteeism Record

60 I have produced the following two charts that convert the facts set out in the Agreed Statement of Fact into two separate tables. The first sets out the Grievor's *work-related* injuries and illnesses. The second sets out the Grievor's *non-work* related injuries or illnesses. These charts set out the date of the injury or illness, the number of days that the Grievor was off work, and the corresponding paragraph number of the Agreed Statement of Facts. The Grievor works on a "continuous vessel" (paragraph 11) which are vessels that are normally at sea for two weeks at time, and on occasion, up to three weeks at a time.

Work Related Injuries or Illness – Days off Work			
April 9, 1988	Leg	78.5 days	Paragraph 13
December 23, 1988	Back	444 days	Paragraph 14
March 16, 1993	Neck	14.5 days	Paragraph 22
July 9, 1993	Neck	17.0 days	Paragraph 23
October 15, 1999	Head	126.5 days	Paragraph 37
April 7, 2000	Head	73.0 days	Paragraph 38
November 11, 2000	Elbow	11.5 days	Paragraph 39
Total Days Off for Work-Related Injuries or Illness		765 days	

Non-Work Related Injuries or Illness – Days off Work			
April 2, 1990	Back	72.0 days	Paragraph 15
June 10, 1991	Back	10 days	Paragraph 17
October 8, 1991	Back	26 days	Paragraph 18
April 8, 1995	Back/leg	99 days	Paragraph 26
October 7, 1995	Back/leg	59 days	Paragraph 27
January 8, 1997	Eye	5 days	Paragraph 31
June 8, 1999	Leg	30 days	Paragraph 36
January 9, 2001	Leg	55 days	Paragraph 40
July 15, 2001	Hepatitis	685 days	Paragraph 41
Total to January 17, 2004		1,041 days	
January 17, 2004 to October 17, 2013	Gastroenteritis	3,558 calendar days	Paragraph 44 & 68
Total Days Off for Non Work-Related Injuries or Illness			

61 First, both parties acknowledge Section 239 of the *Canada Labour Code*, which protects employees who have been injured in the course of their employment from dismissal or discipline because of any absences due to work related injury or illness. Section 239 reads as follows:

> 239(1) Subject to subsection (1.1) no employer shall dismiss, suspend, lay off, demote or discipline an employee because of absence due to illness or injury if
>
> (a) the employee has completed three consecutive months of continuous employment by the employer prior to the absence;
>
> (b) the period of absence does not exceed twelve weeks or the period during which an employee is undergoing treatment and rehabilitation at the expense of a workers' compensation authority; and
>
> (c) the employee, if requested in writing by the employer within fifteen days after his return to work, provides the employer with a certificate of qualified medical practitioner certifying that the employee was incapable of

working due to illness or injury for a specified period of time, and that that period of time coincides with the absence of the employee from work.

(1.1) An employer may assign to a different position, with different terms and conditions of employment, any employee who, after an absence due to illness or injury, is unable to perform the work performed by the employee prior to the absence.

62 In *Canada Post Corporation and Canadian Union of Postal Workers*, [1996] C.L.A.D. No. 416, Arbitrator Kelleher, (now Mr. Justice Kelleher of B.C. Supreme Court), reviewed Section 239 of the Canada Labour Code, and made the following remarks in regard to the interpretation of that section:

> 40 Section 239.1 must be read as a whole. It provides important protection to employees who have been injured in the course of employment. The prohibition against dismissal based on absence due to work-related illness or injury appears not to be an absolute one. It is made subject to two exceptions, subsection (4) and the Regulations. First, subsection (4) permits an employer to assign an employee to a different position where the employee can no longer perform the work of the position he or she formerly held. Second, the only Regulations are found in Section 34, quoted above. They address an employee's right to return to work pursuant to subsection (3).
>
> 41 Neither of those exceptions, then, has any application to a case of dismissal. Subsection (4) permits what is arguably a demotion in certain circumstances. The Regulations are silent with respect to subsection (1).
>
> 42 Counsel for the Employer argues that subsection (10) refers to the terms and conditions "... in the event of any termination of employment layoff or discontinuance of a function in an industrial establishment ..." He argues that this contemplates termination of employment. I agree that the possibility of termination is expressly contemplated. But I do not accept that this is a reference to termination because of absence from work due to work-related illness or injury. Rather it appears to address the possibility of termination for some other reason, such as the cessation of the employer's undertaking.
>
> 43 Counsel for the Employer takes the position that the absence must be an ongoing one. That is to say, there is no prohibition for dismissing an employee based on the employee's past attendance record.
>
> 44 The provision does not by its terms limit itself to "current" absence. In fact, it would be curious if it did. If that were the case, an employer would be entitled to avoid the operation of this provision by simply returning the employee to work and then dismissing him.

63 As a result, I have not included any of the days lost by the Grievor in respect to any injuries or illnesses that resulted at the workplace in the calculation of his absenteeism (Chart 1).

64 Paragraph 64 of the Statement of Facts sets out the position of the Union and the Employer with respect to the average number of days lost per employee of unlicensed personnel employed by the Employer, as of March 2006. The Employer states that the average absenteeism in 2006 is approximately 24.7 days per employee. It has an alternative figure of 23. 2 days.

65 The Union, at paragraph 64, lists the average absenteeism in 2006 as 29 days per employee. It later amended this at the hearing, stating that the average absenteeism rate for 2006 amounted to 33.4 days per year.

66 The Employer states that the amount of time the Grievor was unavailable for work due to non-work related injuries or illnesses between April 2nd, 1990 and January 17th, 2004 was 1,025 days. This is an average of approximately 74 days each year over this 14 year period. The Union does not dispute this figure. If the period of time the Grievor was on LTD for gastroenteritis is added, in respect to the totality of his attendance record, (from January 17th, 2004 to October 17th, 2013, a total of 3,558 calendar days) the number of working days he would have been absent would increase substantially. The average of approximately 74 days lost per year (April 2nd, 1990 to January 17th, 2004) is more than twice the number of days lost by comparable employees as calculated by the Union -- 33.4 days. I therefore have no hesitation in concluding that the Grievor's absenteeism record is excessive -- in other words, it deviates substantially and unduly from the average level of attendance of other comparable em ployees.

Future Regular Attendance

67 The Employer argues that notwithstanding the Grievor's present ability to return to work, there is no medical evidence to support the conclusion that he can reasonably be expected to sustain regular attendance at work in the future.

68 The Union replies that the onus is on the Employer to demonstrate the Grievor is not capable of returning to work on a regular basis in the future. It claims that it is sufficient that the Grievor simply demonstrate that he is capable of returning to work.

69 I agree that the Employer has the onus of demonstrating the two elements of non-culpable discharge due to innocent absenteeism: first, that it must show that the Grievor has a record of undue absenteeism; and second, the Grievor in incapable of sustaining regular attendance in the future. However, once that initial onus has been met there may be, in some circumstances, a shifting evidentiary onus to the Grievor to adduce medical evidence to demonstrate that he is capable of sustaining regular attendance at work in the future. This is consistent with the Grievor's rights of privacy in respect to his medical history and records, and also consistent with human rights legislation, especially the duty to accommodate (See discussion in *Collective Agreement Arbitration of Canada, supra*, pages 602 - 605, paragraphs 13:27 - 13:35).

70 Consistent with my determination in respect to estoppel I conclude that the Grievor's non-culpable dismissal due to innocent absenteeism is to be determined from 2015 forward, and not 2006.

71 There are four basic elements that the Union states demonstrates the Grievor's present ability to return to work: on September 16th, 2013, the Benefit Administrator, Great West Life, determined the Grievor no longer satisfied the definition of disability under the LTD plan and his benefits were terminated as of October 17, 2013. (paragraph 68); on September 23rd, 2013, the Grievor's doctor verified that the Grievor was physically capable of returning to work (paragraph 70); on October

2nd, 2013, the Grievor obtained an updated medical certification for fitness from Transport Canada (paragraph 71). And by agreement of the parties, the Grievor underwent a functional capacity evaluation, dated April 24th, 2015, that states that the Grievor is capable of performing the duties of a Cook at Seaspan (paragraph 76). The conclusion reached in that report reads as follows:

> Based on results of functional testing, Mr. O'Keefe presents as capable of the physical demands typically required of common duties of work as a cook on a vessel. He demonstrated that ability to perform HEAVY [sic] strength demands, which are typically only required on an occasional basis. As well, he presents as capable of the mobility, postural and upper extremity demands typically required of cook duties. Overall, Mr. O'Keefe presents as capable of the typical essential duties and related physical/functional demands of work as a cook as outlined in the Seaspan Job Demands Analysis on a full-time basis.

72 I therefore accept that the Grievor has the present ability to perform the physical duties of a Cook.

73 The Employer replies that between April 2, 1990 and November 7, 2006, Mr. O'Keefe had ten episodes of non-work related absences, amounting to 2,066 days that he was unavailable for work. The causes for these absences varied from back injuries, to leg injuries, to an eye injury, to an elbow injury, to hepatitis and finally to gastroenteritis. These absences, in themselves, the Employer argues, creates a "clear and compelling inference" that the Grievor is incapable of sustaining regular attendance at work in the future.

74 I agree with the Union that I should not rely solely on the absenteeism records from 1990 - 2001 to draw the adverse inference that the Grievor would be incapable of sustaining regular attendance at work in the future. Thus, on this basis alone I would conclude that the Employer has not met its initial onus.

75 More specifically, however, the Employer points to the most recent illness of the Grievor, his gastroenteritis, and argues that there are serious concerns about the Grievor's ability to attend work regularly in the future. It states that it took almost a "decade" for the Grievor to obtain control of his gastroenteritis, and that in spite of the conclusion in the functional capacity evaluation that his gastroenteritis is now under control, there is evidence to demonstrate that there have been repeated reoccurrences and relapses in respect to his gastroenteritis that have prevented him from returning to work on a regular basis. It points to a number of examples between 2004 - 2006.

76 On August 31st, 2004, the Grievor's doctor wrote the Employer to say that the Grievor could return to work safely (paragraph 47). However, some two weeks later, September 14th, 2004, the Grievor's doctor wrote to advise that he had suffered a relapse and would not be able to return to work (paragraph 48).

77 On December 29th, 2004, the Grievor's doctor wrote the Employer stating that the Grievor could return to work as of January 1st, 2005. (paragraph 49) However, the Grievor did not return to active service on January 1st, 2005 and reapplied for LTD benefits (paragraph 50).

78 On February 24th, 2006 the Grievor's doctor advised the Employer that he believed the Grievor could return to work by April 15th, 2006 (paragraph 54). However, on March 29th, 2006, the Grievor's doctor wrote the Employer to advise that due to a relapse the Grievor was not available to return to work on April 15th, 2006 (paragraph 55).

79 On June 7, 2006 the Grievor's doctor wrote to the Employer advising that the Grievor full return to work was "imminent" (paragraph 58). On July 20th, 2006, the Grievor's doctor wrote the Employer to advise that the Grievor's abdominal distress was improving and that he would be able to return to work by September 2006 (paragraph 61). However, on October 27th, 2006 the Grievor's doctor wrote to advise that the Grievor was still experiencing "frequent episodes of illness" and that he was unfit to return to work (paragraph 62).

80 On November 7th, 2006 the Employer terminated the Grievor for innocent absenteeism (paragraph 65). On November 22nd, 2006, the Grievor's doctor wrote to the Employer to state that there was an expectation that the Grievor would regain his health to return to work (paragraph 67). The Grievor remained on LTD until October 17th, 2013 (paragraph 68).

81 I conclude that this evidence does meet the initial onus placed on the Employer to demonstrate that there is a serious concern about the Grievor's ability to regularly attend work in the future due to his gastroenteritis. It is a chronic condition that has flared up in the past, and when he has suffered these relapses, they did not permit him to return to work despite his family doctor's written reports that he would be able to return to work in the near future. Therefore, the Employer does have a reasonable concern that this chronic condition may flare up and re-occur once the Grievor is back at work.

82 Does the current medical evidence before me provide any prognosis of the Grievor's ability to sustain regular attendance at work in the future? This requires a closer examination of the medical evidence relied upon by the Grievor in respect to his present ability to return to work.

83 Great West Life's letter of September 16, 2013 informed the Grievor that his LTD benefits would cease as of October 17, 2013 because the Grievor "no longer satisfied the definition of disability". No other explanation is given. There is no evidence as to his gastroenteritis or to his ability to sustain regular attendance at work in the future.

84 On September 23, 2013 the Grievor's family doctor, Dr. Brian Winsby, wrote the following brief note:

> Mr. Max O'Keefe
>
> This verifies that Mr. O'Keefe, off on disability for some time, is physically capable of returning to work. He is likely to return to working on tow boats.
>
> Thank you
>
> Brian Winsby, M.D.

85 As is evident there is no reference to gastroenteritis or his ability to attend work regularly in the future.

86 On October 2, 2013, Transport Canada issued one of its standard form certificates in which the examining doctor checked off one of the boxes contained on the certificate "Fit with limitations". There is no other medical information on the certificate that either explains this category, or addresses the Grievor's gastroenteritis, or his ability to sustain regular attendance at work in the future.

87 On October 24, 2013, a Functional Capacity Evaluation Report was issued by Gary Worthington-Wright, an Occupational Therapist for Orion Health, a rehabilitation and assessment centre. The purpose of the referral to Mr. Worthington-Wright was to assess the Grievor's functional abilities. The report is thorough in this respect. It does not of course provide any medical evidence in respect to the Grievor's gastroenteritis, or his ability to sustain regular attendance at work in the future. However, in the appendices entitled, Data Appendix, Interview Findings, there is recorded the statements of the Grievor in respect to his current symptoms, his current treatment and medication, and his medical history. The Grievor in that statement says that he has been able to control his gastroenteritis ("IBS") with proper medication. This section of the report is reproduced:

> Data Appendix
>
> Interview Findings
>
> Current Symptoms: Mr. O'Keefe denied any notable symptomology at the time of this evaluation.
>
> Current Treatment: Mr. O'Keefe denied any treatment at this time.
>
> In terms of exercise, at the current time Mr. O'Keefe reports exercising 3 - 4 times per week for periods of 2 - 3 hours at a time. This involves riding a bike for approximately 45 minutes followed by performing circuit training for an "hour or so".
>
> Mr. O'Keefe uses the following medications:
>
> 1. Allopurinoh 300 mg -- Taking daily for gout.
>
> 2. Diltiazem 240 mg -- Taken daily for blood pressure.
>
> 3. Pantoprazole 40 mg -- Taken once every 3 - 4 days for heartburn.
>
> He stated that his blood pressure is under control with medication. He denies having any medical restrictions.
>
> Medical History: Mr. O'Keefe reports having experienced the "odd back injury" with work demands on the boats. He also reported sustaining a head injury at work, when walking up the stairs on a boat, and when the boat hit a barge, he fell back, hitting his head on the stairs. He was reportedly off work for "a couple of months" and then returned to his cook position. He stated that he was diagnosed with Hepatitis C in the early 2000s, after which he stopped working. He received treatment including interferon, which was successful and he is now free of Hepatitis C. He was then diagnosed with IBS. Mr. O'Keefe did report a period of time when he had been cleared to attempt a return to work; however, he was continuing to experience episodes of IBS, which impacted such an attempt. With proper medication, he has been able to control the IBS. Mr. O'Keefe stated that in Octo-

> ber of 2013, he was provided with medical clearance to return to work by both his family doctor and a Transport Canada physician.
>
> He denied any significant medical or health issues impacting his function at the time of this evaluation.
>
> (emphasis added)

88 Thus, in reviewing the medical evidence in respect to the Grievor's present ability to return to work, there are no medical conclusions in respect to either his gastroenteritis or his ability to sustain regular attendance at work in the future. The only statement that addresses his gastroenteritis, and the fact that it is under control through medication, are statements by the Grievor himself. No issue of credibility has been raised in respect to the Grievor's statement.

89 However, the Employer is correct that the Grievor's statement is not sufficient in itself. I refer to paragraph 13.25 (pages 601 - 602) in *Collective Agreement Arbitration of Canada, supra*, which addresses the shifting evidentiary onus to the Union/Grievor in such circumstances, and the requirement of objective evidence in addition to the Grievor's subjective statements:

> 13.25 The union's evidence to rebut the employer's adverse inference of regular future attendance is to be objectively considered without mere reliance on the grievor's subjective statements. Where the absenteeism has been caused by medical problems, the union will be obliged to tender medical evidence to support the conclusion that the grievor can reasonably be expected to "give proper attendance at work in the foreseeable future". If an employee cannot demonstrate a reasonable prospect for improved attendance, which may be due to a lack of willingness to embrace rehabilitation efforts, or an unwillingness to advise the employer of the problem and seek out assistance, discharge has been found to be warranted.

90 This is not a case where the Grievor has shown any lack of willingness to advise the Employer of his medical problems or of any efforts by him to frustrate disclosure of medical evidence or history. He has cooperated in all requirements to date. However, the Employer has serious legitimate concerns in respect to the Grievor's ability to return to work regularly given his gastroenteritis. The Grievor from 2004 - 2006 was unable to control the gastroenteritis, notwithstanding his family doctor's optimism that he would be able to return to work. The Greivor suffered relapses and reoccurrences that prevented him from attending work at all, and indeed, a reasonable inference for the period of time in which he was off due to his gastroenteritis, some 9 1/2 years, demonstrated as the Employer states, that it took almost a decade to bring his gastroenteritis under control. It is also a reasonable inference that from 2006 forward, when he made no attempts to return to work, it was because he did not have his gastroenteritis under control.

91 An Employer is entitled to medical disclosure when an employee is returning to work after having been on LTD for some period of time. Therefore, I conclude that the Grievor shall be required to attend an Independent Medical Examination (IME). It shall be with a specialist in respect to gastroenteritis. This specialist shall address not only his present ability to return to work but also address the issue of whether the Grievor can be reasonably be expected to return to work regularly in the foreseeable future due to his gastroenteritis. It should address the issue of potential flare-ups

and the fact that he works on continuous vessels. The expense of this is to be borne by the Grievor and/or the Union.

92 Upon receipt of this report the Employer is entitled to retain its own specialist, and the Grievor must attend, at the request of the Employer, to any medical specialist it requires to conduct any medical examinations of the Grievor or to assess any of the documents provided by the Grievor. The Employer bears the expense of these examinations. The parties are able of course to agree on any medical experts and share the costs of those experts. If the Grievor refuses to participate in these medical examinations, or disclose relevant medical information, the Employer may dismiss him.

93 The result of this medical evidence may well be determinative as to whether or not the Grievor is reinstated or dismissed. However, the Grievor should understand that any such potential reinstatement may be quite precarious. I have accepted that the Employer is able to rely on the totality of his absences and is entitled to do so in the future. This means that should the Grievor's attendance on a year to year basis deviate substantially and unduly from the norm, he may well for some period of time, once again face the issue of his non-culpable termination due to his innocent absenteeism.

94 It is so Awarded.

95 Dated this 21st day of August, 2015.

Stan Lanyon, Q.C.