Federal Court Cour fédérale

Date: 20220531

Docket: T-1938-19

Citation: 2022 FC 796

Ottawa, Ontario, May 31, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

GRAIN WORKERS' UNION LOCAL 333 ILWU

Applicant

and

VITERRA INC.

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Grain Workers' Union Local 333 ILWU, seeks an order, pursuant to Rules 466 and 467 of the *Federal Courts Rules*, SOR/98-106, holding the Respondent Viterra Inc. in contempt of court.

[2] The alleged contempt arises in the context of an arbitration award finding the Respondent allowed employees to work in excess of 48 hours per week in violation of the overtime provisions of the *Canada Labour Code*, RSC 1985, c L-2 [Code]. The Arbitrator ordered the Respondent cease and desist violating the Code. The Applicant alleges the Respondent has not complied with that Order.

[3] For the reasons that follow, I find the Respondent, Viterra Inc., is guilty of contempt of court, the evidence establishing beyond a reasonable doubt Viterra's failure to comply with the Arbitrator's cease and desist Order.

II. Documents

[4] Documents have been collected and managed using the Court's E-Trial Toolkit. The Toolkit has assigned each document an Applicant or Respondent identification number and a corresponding "FC" number. Where a document has been entered into evidence, the document has also been assigned an Exhibit number.

[5] Where documentary evidence is referenced or cited in these reasons, the documents' Exhibit Number and the "FC" number are both identified.

[6] Exhibit 271 (FC01454) is a Table of Concordance that cross-references the three potential numbers assigned each document and provides a brief title or description of the document.

III. Background

[7] The Respondent operates two grain terminals at the Port of Vancouver: the Pacific Terminal and the Cascadia Terminal. The Applicant is certified under the Code to represent employees at the two terminals.

[8] In July 2017, the Applicant filed two policy grievances alleging the Respondent was allowing employees to work in excess of 48 hours per week in violation of the maximum work hours provisions of the Code.

A. The arbitral award

[9] Arbitrator Sullivan was appointed to arbitrate the two grievances. On October 28, 2019, he issued his Arbitration Decision [the Award] finding the Respondent was in contravention of the statutory overtime provisions contained in the Code (Exhibit 2, FC00001).

[10] In the Award, Arbitrator Sullivan noted the parties are covered by a Collective Agreement, the Collective Agreement does not contain provisions regarding overtime and the following sections of the Code are therefore applicable:

DIVISION I	Section I
Hours of Work	Durée du travail
Standard hours of work	Règle générale
169 (1) Except as otherwise provided by or under this Division	169 (1) Sauf disposition contraire prévue sous le régime de la présente section :

(a) the standard hours of work of an employee shall not exceed eight hours in a day and forty hours in a week; and

a) la durée normale du travail est de huit heures par jour et de quarante heures par semaine;

(b) no employer shall cause or permit an employee to work longer hours than eight hours in any day or forty hours in any week.

b) il est interdit à l'employeur de faire ou laisser travailler un employé au-delà de cette durée.

Averaging

(2) Where the nature of the work in an industrial establishment necessitates irregular distribution of the hours of work of an employee, the hours of work in a day and the hours of work in a week may be calculated, in such manner and in such circumstances as may be prescribed by the regulations, as an average for a period of two or more weeks.

Moyenne

(2) Pour les établissements où la nature du travail nécessite une répartition irrégulière des heures de travail, les horaires journaliers et hebdomadaires sont établis, conformément aux règlements, de manière que leur moyenne sur deux semaines ou plus corresponde à la durée normale journalière ou hebdomadaire.

Duration of averaging

(2.1) The averaged hours of work calculated pursuant to subsection (2) remain in effect

Durée

(2.1) Les horaires journaliers ou hebdomadaires calculés à titre de moyenne conformément au paragraphe (2) demeurent en vigueur :

(a) where the averaging of hours of work is agreed to in writing by an employer and a trade union, for the duration of that agreement or for such shorter period as is agreed to by the parties; or

a) dans le cas où l'employeur et le syndicat s'entendent par écrit sur le calcul de la moyenne, jusqu'à l'expiration de l'entente ou de la période plus courte qu'ils fixent;

(b) where the averaging of hours of work is not agreed to in writing by an employer and a trade union, for no longer than three years.	b) dans le cas contraire, pendant trois ans au maximum.
[…]	[…]
Maximum hours of work	Durée maximale du travail
171 (1) An employee may be employed in excess of the standard hours of work but, subject to sections 172, 176 and 177, and to any regulations made pursuant to section 175, the total hours that may be worked by any employee in any week shall not exceed forty-eight hours in a week or such fewer total number of hours as may be prescribed by the regulations as maximum working hours in the industrial establishment in or in connection with the operation of which the employee is employed.	171 (1) L'employé peut être employé au-delà de la durée normale du travail. Toutefois, sous réserve des articles 172, 176 et 177 et des règlements d'application de l'article 175, le nombre d'heures qu'il peut travailler au cours d'une semaine ne doit pas dépasser quarante-huit ou le nombre inférieur fixé par règlement pour l'établissement où il est employé.
Averaging	Moyenne
(2) Subsection 169(2) applies in the computation of the maximum hours of work in a week prescribed under this section.	(2) Le paragraphe 169(2) s'applique au calcul de la durée maximale hebdomadaire qui peut être fixée aux termes du présent article.

[11] Arbitrator Sullivan noted the parties did not have an averaging agreement, the working of overtime was voluntary and the Collective Agreement contemplates employees working in excess of 48 hours in a week. He further found, based on the evidence, that a number of employees had worked in excess of 48 hours in a week and that this occurred regularly and often,

particularly where two shifts as opposed to three shifts were being run at the employer's two terminals. Arbitrator Sullivan further noted that after implementation of a third shift at both terminals in January 2019, the instances of excessive weekly hours being performed by a number of employees were greatly reduced. Arbitrator Sullivan then concluded and ordered as follows:

> The Union has requested that I issue a cease and desist order. I have considered the payroll data relied on by the Union for the period prior to the filing of the two grievances on July 14, 2017. Based on that data and the stipulations agreed by the parties in their May 10, 2018 correspondence, I have found that the Canada Labour Code has been violated and order the Employer cease and desist violating the Code. Going forward, I leave it to the parties to meet and determine what form of averaging arrangement can be agreed upon in the context of a 6-on/3-off continuous operation schedule that does not operate on a week-to-week basis.
>
> I remain seized with jurisdiction to resolve any dispute that may arise out of the implementation of this decision.

[12] The Respondent subsequently sought clarification of the Award. On November 28, 2019, Arbitrator Sullivan provided the following clarification:

> For clarification, the award was based on stipulated evidence regarding the data and factual circumstances up to the date of the grievance. No evidence of data and/or factual circumstances occurring after the date of the grievance was led at the hearing and the award did not address this matter.

[13] On May 27, 2020, the parties again appeared before Arbitrator Sullivan for the purpose of seeking resolution by way of an averaging agreement as provided for in the Code and contemplated by the Award. The parties were unable to reach an agreement and on May 28, 2020, Arbitrator Sullivan issued a "Letter Decision" confirming his jurisdiction exhausted:

> By video conference on May 27, 2020 we reconvened under my retained jurisdiction for the purpose of seeking a resolution to the outstanding matter of an averaging agreement. No resolution was

> reached and my jurisdiction in relation to the grievance I was appointed by the parties to hear and determine is now exhausted.

B. Procedural history in this Court

[14] As provided for at section 66 of the Code, the Applicant caused a copy of the Award to be filed in the Federal Court on December 6, 2019. Subsection 66(2) of the Code provides that, upon filing, the order or decision of an arbitrator shall be registered and has the same force and effect as if the decision or award were a judgment obtained in the Court. It is on this basis that contempt proceedings have been pursued, pursuant to Rules 466 and 467 of the *Federal Courts Rules*.

[15] On September 14, 2020, Madame Prothonotary Kathleen Ring issued an *ex parte* Order directing the Respondent appear before this Court to hear proof of the Respondent's alleged breach of the Award.

[16] The Respondent raised a number of preliminary issues and the parties proposed that the hearing proceed in two parts. The Court agreed and the Part 1 proceedings addressed a series of objections the Respondent raised to the enforceability of the Award. These objections were considered but dismissed in *Grain Workers' Union Local 333 ILWU v Viterra Inc.,* 2020 FC 1106 [the *November 2020 Order*].

[17] The Respondent then brought separate motions seeking orders quashing *subpoenas duces tecum* (*Grain Workers' Union Local 333 ILWU v Viterra Inc*., 2021 FC 187 [the *February 2021 Order*]) and objecting to the production and admissibility of the records to be produced pursuant

to the *subpoenas duces tecum* (*Grain Workers' Union Local 333 ILWU v Viterra Inc.*, 2021 FC 292 [the *April 2021 Order*]). The motions were dismissed but questions relating to the admissibility of the documents were held to be more properly addressed in the course of the evidentiary hearing.

[18] Part 2 of the proceedings involved the hearing of evidence. The Applicant called seven witnesses over three days: April 27-28 and July 26, 2021. In addition to the witnesses' testimony, the Applicant introduced and relied upon payroll records created by the Respondent in the normal course of business. These records, consisting of Time Card Reports and Exception Reports, were produced pursuant to the *subpoenas duces tecum* and detail employee hours at the Respondent's Cascadia and Pacific Terminals. The Applicant also introduced and relied upon extracts from the personal work diaries or calendars of two of the witnesses, Mr. Craig McFeeters and Ms. Nikki Kerr, both members of the Applicant Union who are employed by the Respondent.

[19] Upon completion of the evidentiary hearing, the Respondent renewed its objection to the admissibility of the Time Card Reports and Exception Reports. The Respondent also contested the admissibility of the diary extracts. The documentary evidence was held to be admissible in *Grain Workers' Union Local 333 ILWU v Viterra Inc.*, 2021 FC 920 [the *September 2021 Order*]. Each of the three categories of documents are briefly described in the *September 2021 Order* at para 5.

[20] As noted above, the Applicant called seven witnesses. The Respondent cross-examined each of the Applicant's witnesses but did not call any additional witnesses.

IV. Witness testimony

[21] All witnesses testified in a forthright and credible manner. The evidence provided was generally consistent on matters of relevance to the issues raised. A brief summary of that evidence follows.

A. Kevin Ling

[22] Mr. Ling testified he has held the position of secretary-treasurer with the Applicant Union since 2003. His evidence focused primarily on the procedural history of the underlying grievance. Exhibits 1 through 10 (FC00001, FC00223, FC00225 - FC00227, FC00230 - FC00232, FC00238, FC00239), which he entered into evidence, detail the history of the Applicant's grievances and the processes engaged by the Applicant subsequent to the Award.

[23] Mr. Ling testified the Applicant represents approximately 200 employees at the Respondent's Pacific and Cascadia Terminals in Vancouver. Mr. Ling stated he is employed as a grain worker at another Vancouver grain terminal, specifically a sheet metal worker, and he has 40 years of experience in the grain industry.

[24] Mr. Ling provided a brief description of the function and operation of a grain terminal and the types of jobs members of the Applicant Union perform. He identified workplace hazards present in any industrial environment and those unique to the grain industry.

[25] Mr. Ling testified he had participated in several collective bargaining rounds since 2005. He stated the most recent round of bargaining between the parties took place in 2018 or 2019. He also testified that in his role as a Union official he was aware of the Applicant's overtime grievance and that:

- In response to a challenge by Viterra, Arbitrator Sullivan ruled that he had jurisdiction to hear the dispute;
- Viterra sought judicial review of Arbitrator Sullivan's jurisdiction decision but was unsuccessful in British Columbia courts;
- Arbitrator Sullivan found Viterra to be in breach of the overtime limitations contained in the Code; and
- The Applicant had filed Arbitrator Sullivan's award with the Federal Court.

[26] Mr. Ling testified he wrote to the Respondent after the issuance of the Award to advise that the Applicant was aware the Respondent was continuing to schedule employees to work in excess of 48 hours per week (contrary to the Award). Mr. Ling also testified Arbitrator Sullivan had left it to the parties to negotiate an averaging agreement, but the parties were unsuccessful in these efforts. He testified the parties had participated in an expedited mediation presided over by Arbitrator Sullivan, but this too was unsuccessful.

[27] Mr. Ling acknowledged in cross-examination that he had no first-hand knowledge of how overtime is assigned at the Respondent's terminals or any first-hand knowledge that the staffing of extra overtime hours was taking place. He also acknowledged there were circumstances where the number of overtime hours paid is not indicative of the hours worked. For example, a worker may be paid an hour of overtime for working five extra minutes. Mr. Ling did note that such situations are rare.

B. Sharon Hong

[28] Ms. Sharon Hong is an employee of the Respondent; she works as an administrative assistant at the Cascadia Terminal and has done so since May 2019.

[29] Ms. Hong was served with a *subpoena duces tecum* requiring she produce two categories of records. She had to produce: (1) records generated after October 29, 2019, disclosing the hours worked by the Applicant's members employed by the Respondent, and (2) any relevant records produced pursuant to the Respondent's obligations under section 24 of the *Canada Labour Standards Regulations*, CRC, c 986.

[30] Although working from the Cascadia Terminal, Ms. Hong testified she completes work that relates to both the Cascadia and Pacific Terminals. Among other things, her tasks involve the review and approval of payroll data once processed to ensure consistency between the payroll numbers and the on-site data. She testified she has access to payroll records and the Respondent relies on a software program interchangeably called "*Time and Attendance*" or *"Attendance Enterprise"* to process payroll data. She testified that the accuracy of these records is extremely

important and that there are checks and balances to verify payroll data. For instance, Ms. Hong verifies data input by other administrative assistants: Ms. Serena Cheung at Cascadia Terminal and Ms. Sarah Olson at Pacific Terminal.

[31] Ms. Hong testified she compiled the documents responding to the *subpoena duces tecum*. She stated the documents consisted of Time Card Reports that list, for each employee, the hours worked in each pay period (Exhibits 143-166, FC00089–FC00112; Exhibits 167-182, FC00166–FC00181; and Exhibits 183-214, FC00191–FC00222) and Exception Reports (Exhibits 11-94, FC00005–FC00088; and Exhibits 95-142, FC00118 – FC00165). She testified the documents produced in response to the *subpoena duces tecum* were true and reliable copies of the Respondent's records.

[32] Ms. Hong described the work schedule for the Respondent's hourly employees. Her evidence was that the Respondent's terminals operate on a 24-hour, seven-day-per-week basis. Each 24-hour period consists of three eight-hour shifts: a day shift, an afternoon shift and an overnight shift. The overnight shift is referred to as the graveyard shift. While some jobs have different rotations, generally the Applicant's members work on a six-day-on, three-day-off cycle and rotate to a different shift after their three days off.

[33] Ms. Hong testified employees clock in and out by swiping an employer-issued access card on a card reader. The Time Card Reports are generated by the *Time and Attendance* software based on employees' daily clock in and clock out times (also referred to in the evidence as punch in and punch out times). Adjustments are made manually based on data taken from the

daily Exception Report. Ms. Hong stated she is responsible for conducting a final check of the payroll data before its submission to the Respondent's payroll office. Her evidence detailing her primary responsibilities for payroll data is summarized in the *September 2021 Order* (paras 17-18).

[34] Ms. Hong also described the content of the Exception Reports. Exception Reports are generated from manually produced paper documents that are completed on a daily basis by the shift supervisors. She confirmed any or all of the shift supervisors input data into the daily Exception Report. She also confirmed that scheduled hours of work for each employee are pre-loaded into the *Time and Attendance* software but employees are still expected to clock in and clock out. The *Time and Attendance* software will flag an employee who clocks in too early or late and this will be reflected in the Exception Report.

[35] Ms. Hong also described the process by which corrections are made to address oversights or errors in payroll data submitted in past pay periods.

[36] Ms. Hong testified certain overtime assignments are paid on the basis of a fixed number of hours regardless of time actually worked: vessel arrival and departures (three hours) and shift extensions where the employee's shift is extended for either one hour or if more than one hour is worked, four hours. She testified the Time Card Reports reflect hours paid, which may be more than the actual hours worked.

C. Serena Cheung

[37] Ms. Serena Cheung testified she works as an administrative assistant at Viterra Cascadia and she has been a Viterra employee for approximately five years. Her responsibilities include importing data from the Exception Reports into the *Time and Attendance* software at the Cascadia Terminal. She occasionally performs the same function for the Pacific Terminal when her counterpart is away. She explained that Exception Report data is entered with the clock in and clock out data to generate the Time Card Reports.

[38] She further described how adjustments to an employee's clock in and clock out times are made where an employee is entitled to a different rate of pay (overtime, for example) and how those changes are reflected on the face of the Time Card Report. Ms. Cheung testified that, as a result of her inputs and the manner in which these changes are tracked, the Time Card Report will reflect how long an employee was at work because employees are expected to clock in and clock out when arriving for and leaving work.

[39] Ms. Cheung testified that when completing a payroll, she makes sure all punch in and punch out times are correct and all exceptions are entered into the payroll spreadsheet. She makes sure there are no missing punches for any employee and follows up with the supervisors if there is a missing punch. She also follows up with supervisors for an explanation if there is a late punch that is not explained on the Exception Report. Adjustments may also be made to clock in and clock out times to allow for pay rates and overtime to be paid to an employee. Any

adjustments to the punch in and punch out times are tracked and recorded on the employee's weekly Time Card Report under the heading "Supervisor Edits."

[40] She testified the information she inputs is reliable and it is important to get this information correct because it is impacting someone else's pay. Ms. Cheung was asked to identify a series of Time Card Reports relating to specific employees. She reviewed entries in the Time Card Reports, including applicable entries contained under the Supervisor Edits heading, and was asked to confirm hours recorded in relation to individual employees during specific Sunday to Saturday work weeks.

[41] In cross-examination, Ms. Cheung testified she did not have first-hand knowledge of how many hours each employee worked. She confirmed that her knowledge of an employee's hours of work is based on punch reports generated when the employee clocks in and out, together with the supervisor-created Exception Reports. Ms. Cheung testified there are errors in punch reports but stated they are not frequent. She also testified employees will often punch in early and punching in early is not necessarily an indication that the employee started working early. Moreover, sometimes a Time Card Report will list eight hours of work even if an employee leaves early. Where this occurs, a supervisor will have instructed that the employee be paid until the end of the shift.

[42] In re-examination, Ms. Cheung testified *Time and Attendance* will identify punch in and punch out times of less than eight hours. She also testified an employee must work at least one full overtime hour to receive a four-hour extension.

D. Steve Larochelle

[43] Mr. Steve Larochelle testified he has worked for Viterra since 2008. He has been an operations supervisor at the Pacific Terminal since January 2017. Before becoming an operations supervisor, he had worked a number of Union jobs, his last one being a shift boss. As an operations supervisor, he is responsible for monitoring and directing employees. One aspect of this work is ensuring employees attend work on time and stay until their shift ends or they are relieved. He confirmed the facility operates on a continuous 24-hour basis, described the shift schedule and confirmed employees are expected to clock in and out for their shifts but stated that he is unable to monitor whether each employee is punching in or out.

[44] Mr. Larochelle also testified he keeps several records: manning sheets, Exception Reports and logs of any unacceptable behaviour. A manning sheet shows who will be working each shift for a given week. They are made months in advance and are changed as needed. Mr. Larochelle stated he is responsible for first approving and then recording any exceptions to an employee's regular hours in an Exception Report. He confirmed this is a daily task and each shift looks after their own exceptions. In an Exception Report, he would record things such as when and why an employee worked less than their scheduled eight hours or when an employee took a day off.

[45] Mr. Larochelle also spoke to the practice of assigning overtime in the case of a shift extension or where an employee is brought in to work a full shift. He noted overtime hours for employees were not tracked and he had received no instructions to track overtime hours until the day of his examination (April 28, 2021). On April 28, 2021, he testified, he received an email

saying that no one should have more than eight hours of overtime in a week. Mr. Larochelle testified this was the first time he had received such an instruction.

[46] Mr. Larochelle clarified that in the past, before assigning an employee overtime, no steps were taken to check how many hours that employee had already worked. Employees who wanted overtime shifts would simply write their names on a sign up sheet and indicate what shifts they wanted.

[47] Mr. Larochelle stated that, for the past few years, it was common for employees to come in on a day off and work an extra eight-hour shift. This practice had become less common within the past few months. Mr. Larochelle confirmed that people had been working more than eight hours of overtime in the past. He testified this was a common occurrence and was still happening on a regular basis after November 2019.

[48] In cross-examination, Mr. Larochelle testified overtime must go to the most senior employee in a particular classification where overtime is available and the Union looks closely at who gets overtime. He stated he has never been told by a Union representative that he cannot assign overtime to a certain employee. He noted if overtime is not given to the most senior employee, a grievance would be filed and the grieving employee would be entitled to a compensatory overtime shift. He also testified employees were limited to working a maximum of four hours of overtime following a shift or two hours of overtime before a shift.

[49] Mr. Larochelle also noted in cross-examination that although an employee with a four-hour extension should work for four hours, the employee will be paid for four hours regardless of whether he actually worked for that length of time. Mr. Larochelle agreed that in referring to hours of overtime, he was referring to hours of overtime paid as opposed to hours worked. However, he did testify it was rare for an employee to be paid for four hours of overtime on a shift extension and not work those four hours.

E. Rosy Montgomery

[50] Ms. Rosy Montgomery stated she has been a Viterra employee since October 1991. She began as a general labourer but has been an operations supervisor at the Cascadia Terminal since December 2016.

[51] Ms. Montgomery spoke to her monitoring of employees. She described the early relief system in place that allows employees to begin a shift early and leave early to avoid traffic. She testified employees are responsible for relieving the person they are replacing and they are to begin working upon punching in, but she cannot monitor every position because of the location of her office. There are many positions where an employee will not be allowed to leave at the end of a shift until they are relieved by the next employee; one employee being late will therefore often affect when another employee can leave. She testified she is responsible for monitoring the tardiness of employees and late arrivals are documented in the Exception Report.

[52] Ms. Montgomery testified she is responsible for record-keeping, including Exception Reports, and she was trained on how to keep records. Ms. Montgomery indicated unanticipated

events are entered into an Exception Report on the day they occur, but she identified several situations where information is entered into an Exception Report in advance. This may occur, for example, when a supervisor knows in advance that an employee is taking a block of days for holidays or that an employee will be sick for several days. She stated that she supposes she would be subject to discipline if she did not perform her record-keeping duties in this regard.

[53] Ms. Montgomery also addressed how overtime is assigned. Her first consideration when choosing an employee to do overtime to fill a vacancy is finding someone who knows the job. If there is an employee on-site who knows the job, she will ask that employee. If no employee on-site knows the job, she will call an employee who is off-site to ask them to come in.

[54] She testified that when looking for an employee who knows the job, she does not know how many hours that employee has worked in a week. She also testified she has never been instructed to consider this when making an overtime assignment. She has been told to follow the overtime selection process agreed upon by the Union and the employer and hours worked is not a consideration. She stated overtime is worked on a volunteer basis and sometimes employees call her on their days off to request overtime hours.

[55] Ms. Montgomery stated she received an email direction close to the beginning of April 2021 from the Respondent's terminal manager stipulating that employees should not work more than 48 hours a week. She noted she was given a method for calculating hours that is difficult and tedious. She testified she has been following this direction but had never followed a procedure like this before as a supervisor.

[56] Ms. Montgomery also testified that in the past, she had seen employees work more than 48 hours a week. She testified this could have happened in 2019, including after November 2019. In that period, she accurately recorded in the Exception Reports when employees came in for eight-hour overtime shifts on their days off.

[57] In cross-examination, Ms. Montgomery stated there are times where employees fail to clock in and out. When she makes corrections due to punching errors and orders that an employee be paid for eight hours of work, the employee would not have actually worked eight hours—the employee would have had lunch and coffee breaks during those eight hours. She also confirmed an employee will be paid for an hour of overtime even where they work an additional five minutes and acknowledged hours paid for a shift extension or the arrival and departure of a vessel is not necessarily indicative of the time the employee worked in performing these duties. Ms. Montgomery clarified that when she stated she has observed employees working over 48 hours in a week, she did not go back and account for how many hours those employees actually worked.

[58] Ms. Montgomery also clarified on cross-examination that overtime is not assigned exclusively on the basis of seniority. It can go first to the person who is performing the task on-site. After asking an on-site worker, the next employee to ask is the one with the most seniority who performs that position.

[59] In re-examination, Ms. Montgomery stated she is responsible for approving all overtime paid and she has never approved an employee to work for just five minutes of overtime. She

stated supervisors are expected only to approve overtime where it is needed. She also clarified it is “not unusual” for employees to make errors punching in and out and she is asked to fix these errors.

F. Craig McFeeters

[60] Mr. Craig McFeeters testified he is a member of the Applicant Union and has worked at the Respondent’s Cascadia Terminal for more than 11 years. He has performed various jobs and is now employed as a panel control operator shipper. He stated while he does not currently hold a position with the Applicant Union, he had previously served as a shop steward for a total of six years.

[61] Mr. McFeeters testified he performs his duties in a control room with four other Union employees. He stated that the shipping supervisor, a non-Union position, also has a desk in the control room. He confirmed the Cascadia Terminal operates on a 24/7 basis and is closed only on Labour Day, Christmas Day, Boxing Day, New Year’s Day and Easter Sunday. He described the six-day-on, three-day-off rotating shift schedule at the Cascadia Terminal, the shift hours and the early relief program that allows employees to report for work and relieve the prior shift worker up to 45 minutes early. He confirmed that employees are required to clock in at the beginning of a shift and clock out at the end of a shift using one of three punch clocks located throughout the work premises.

[62] Mr. McFeeters testified he usually arrives 45 minutes before the scheduled commencement of his shift and upon clocking in he reports directly to his work station and

begins to work. He testified he is required to remain at work until his relief arrives and it is fairly common for him to work more than the scheduled eight hours, noting that to make the early relief system work at least one of the three employees on the three-shift rotation is required to work a few minutes of extra time. He testified that once an employee punches in, the employee is not permitted to leave the job site.

[63] Mr. McFeeters testified he may be asked to work an additional hour at the end of a shift for a variety of reasons or alternatively to remain for an additional four hours. In these situations, he is paid double time for the extra hours. When asked to work an extra four hours, he would often be let go after three and half hours but would be paid the four hours of double time. He also testified he could be asked to work an additional three hours to assist with the arrival or departure of a vessel. He testified that this typically required two to two and a half hours of actual work time but noted sometimes it would be very quick whereas in other circumstances more than three hours would be required.

[64] Mr. McFeeters testified that in a standard eight-hour shift an employee is entitled to two 10-minute coffee breaks and a 20-minute lunch break. Mr. McFeeters noted there are exceptions to this schedule. In the control room, the practice is to provide employees two 20-minute coffee breaks and a 30-minute lunch break. In the receiving department, employees are given two 30-minute breaks during a shift. He further testified that if an employee is missing in the control room, the remaining employees may opt not to take breaks and an additional hour of double time is paid in this instance.

[65] Mr. McFeeters testified he was unaware of any practices or procedures in the workplace that were intended to limit an employee's maximum weekly hours prior to October 29, 2019. He also testified he was unaware of any changes in practices or procedures after that date but explained that in February 2021, Viterra management placed a notice on a bulletin board describing how the Code's 48-hour maximum work week would be followed.

[66] Mr. McFeeters testified he had worked more than 48 hours in a week between November 2019 and January/February 2021 and it was his practice to maintain personal notes or records of his hours in a calendar he completed on a daily basis. Referring to an extract from this calendar (Exhibit 215, FC00183), Mr. McFeeters described his practices in maintaining the calendar and how the annotations made reflect his work activities on a given day. Mr. McFeeters reviewed his calendar entries and hours noted on specific dates and cross-referenced some of the information recorded to that detailed in the employer's Time Card Reports for the same dates.

[67] In cross-examination, Mr. McFeeters confirmed he was not familiar with and had not previously seen the employer's Time Card Reports. Mr. McFeeters further agreed that his calendar entries recorded hours for which he was to be paid, not hours he had actually worked. He acknowledged that when looking at his calendar, one could not determine the hours actually worked in any particular week. In re-examination, Mr. McFeeters confirmed his shift start and end times, including any additional hours, would be reflected in his punch in and punch out times.

G. Nikki Kerr

[68] Ms. Nikki Kerr testified she is a member of the Applicant Union and has been employed at the Respondent's Pacific Terminal since 2006. She has worked in a number of roles; she is currently employed as a Truck Loader and Janitor but also works in a variety of other positions. She testified as to her responsibilities in these various positions. She testified she has also held positions with the Union, including the chief shop steward position.

[69] Ms. Kerr described the 24/7 rotating shift schedule most employees work and the start and stop times for the three standard shifts. She testified that shift start and end times became fluid as a result of the COVID-19 pandemic to avoid employees congregating. When an employee's relief arrived, the departing employee would punch out after "making sure they had eight hours on their clock and that their jobs were covered."

[70] Ms. Kerr testified that as a Truck Loader and Janitor she works day shifts on a six-day-on, three-day-off schedule. She testified that in this role she normally would take three half-hour breaks during an eight-hour shift but would not be compensated for missed breaks.

[71] Ms. Kerr described the possible overtime schedules: a one-hour or four-hour extension at the end of a shift, a two-hour early shift start or an eight-hour shift on an employee's day off. Ms. Kerr testified a four-hour extension normally requires three and half hours of work time, whereas an employee tends to work the full hour in the case of a one-hour shift extension and the full two hours if starting early.

[72] Ms. Kerr described her routine when arriving for her day shift. She reported she would normally punch in about 20 minutes before the start of her shift and would be at her workstation within a few minutes of having punched in. At the end of a shift, she would hand in paperwork and equipment and then punch out. She testified an employee only punches in and out once per day and an employee does not punch in or out to record overtime at the beginning or end of a shift. She testified that once punched in, an employee may leave the premises to purchase lunch or coffee from a facility within walking distance but must first receive a supervisor's permission.

[73] Ms. Kerr testified she was not aware of any measures the employer had in place to ensure overtime was assigned in accordance with the law. She testified that in April 2021, a supervisor told her that work was being done on a computer program to track employees' weekly hours to determine which employees had worked 48 hours in the week.

[74] Ms. Kerr identified a calendar (Exhibit 216, FC00189) that she testified she used to record the days she was scheduled to work, the job she was performing on a given day and any overtime she worked. Ms. Kerr reviewed her calendar entries, interpreted the meaning of those entries in relation to the job she was assigned and explained whether she had worked overtime.

[75] In cross-examination, Ms. Kerr acknowledged the time recorded was for pay purposes. She accepted it was possible an employee would work less time than the hours paid when working overtime on an extension. However, she also testified that based on the overtime jobs she was performing on a four-hour extension, she would have worked three and half hours, her break for that extension period being taken at the end of the overtime extension. Ms. Kerr also

acknowledged punch in and punch out times are not able to disclose actual hours worked as they do not account for break time. Ms. Kerr further testified the late arrival of an employee's relief does not automatically trigger one hour of overtime for the employee ending their shift. She testified that certain categories of employees are notoriously late and that in those instances she is required to stay until her relief arrives, but she is not always compensated with one hour of overtime. The supervisor determines compensation.

[76] Ms. Kerr acknowledged errors were made in the Time Card Reports and these errors were not infrequent but described the errors as relating to the inclusion of authorized overtime.

V. Issues

[77] The Applicant submits that, having addressed the various issues raised by the Respondent, the sole remaining question is whether the Applicant has established the Respondent is guilty of contempt.

[78] The Respondent submits a series of issues are to be considered:

A. Does the Award "clearly and unequivocally" state what should or should not be done to comply? More specifically, is the Award deficient because:

i. it fails to specify a time for compliance; and/or

ii. it incorporates the relevant provisions of the Code by reference and therefore lacks the precision and clarity required, improperly requiring

those compelled to act to look beyond the Order to understand their legal obligations?

B. Do the principles of *stare decisis* and judicial comity require the Court to conclude the Application must be dismissed?

C. In the alternative, does the evidence establish non-compliance with the Award on the "beyond a reasonable doubt" standard?

D. If non-compliance is made out, should the Court exercise its discretion to not make a finding of contempt?

[79] I will address the issues as framed by the Respondent. In doing so, and as is discussed in greater detail below, I am of the view that issues A and B essentially seek to a re-argue or re-litigate matters raised by the Respondent that have already been argued and determined in the course of considering the Respondent's initial objections to the contempt proceeding (*November 2020 Order* at paras 43 to 52). However, in the *November 2020 Order*, I did conclude that the Award's failure to set out an express timeline for performance, while not necessarily fatal, would be more appropriately addressed with the benefit of an evidentiary record. I do return to this issue.

VI. The Law of Contempt

[80] In *Carey v Laiken*, 2015 SCC 17 [*Carey*], Justice Cromwell, speaking on behalf of the Supreme Court of Canada, summarized the common law of civil contempt.

[81] To establish civil contempt, the party alleging the contempt bears the burden of establishing three elements beyond a reasonable doubt: (1) the order or judgment that is alleged to have been breached must state clearly and unequivocally what should be done or not done; (2) the alleged contemptor must have had actual knowledge of the order or judgment; and (3) the alleged contemptor must have intentionally done or omitted to do the act compelled by the order or judgment (*Carey* at paras 32-35; Rule 469 of the *Federal Courts Rules*).

[82] The contempt power is discretionary. Where the three elements have been established, a judge may nonetheless properly exercise his or her discretion and decline to impose a contempt finding where to do so would amount to an injustice in the circumstances (*Carey* at paras 36-37).

VII. Analysis

[83] The Respondent argues the Award fails to satisfy the first and third elements identified in *Carey.*

[84] Actual knowledge of the Award, the second element identified in *Carey*, is not disputed. I am satisfied that the evidence establishes on a "beyond a reasonable doubt" standard that the Respondent did have actual knowledge of the Award. In reaching this conclusion I rely on, among other evidence, the testimony of Mr. Kevin Ling, Exhibits 3 and 7 through 10 (FC00227, FC00225, FC00238, FC00239 and FC00226). Exhibits 3 and 7 through 9 establish the Applicant provided the Respondent written notice of alleged non-compliance in November 2019. Exhibit 10 is Arbitrator Sullivan's November 28, 2019 response to the Respondent's request for a clarification of the Award.

[85] I turn now to the question of whether the Award is sufficiently clear and precise to allow for its enforcement.

A. The Award is enforceable

[86] The Respondent submits that the absence of a reference in the "ultimate disposition portion of the Award" (found at paragraph 11 above) to specific provisions of the Code and the Award's failure to identify a time for compliance are defects that individually and together undermine the clarity and precision of the Award, rendering it unenforceable in this contempt proceeding. The Respondent relies on the privative clause at section 58 of the Code to argue that the Court can neither imply terms nor amend the Award to address these defects. It is submitted that to do so would be contrary to the intent of Parliament and the established jurisprudence, which holds, the Respondent argues, that the above-noted defects are fatal. It is argued the principles of *stare decisis* and judicial comity require the Court to conclude the Award fails to satisfy the first of the three elements necessary for demonstrating civil contempt.

[87] In advancing this argument, the Respondent acknowledges the Court's *November 2020 Order* considered and addressed the arguments that the Award was merely declaratory and lacked the precision necessary to determine, without the benefit of additional evidence, whether contempt has occurred. However, the Respondent submits that when the Court held that the "ultimate disposition" was sufficiently clear and precise when read within the broader context of the Award as a whole, it only determined that the "Award was properly registered for enforcement and that the contempt proceeding should continue."

[88] As I understand the Respondent's position, it is argued that two separate and distinct thresholds are engaged where the clarity and precision of an Arbitrator's award or order, filed pursuant to section 66 of the Code, is in issue. At the time of filing/registration, one threshold is applied. A second, more stringent threshold is to be considered in assessing the issue of enforceability.

[89] In considering the Respondent's arguments, it will be helpful to review the relevant portion of the *November 2020 Order*:

> [43] The Respondent relies on a number of cases to argue that courts have declined to enforce declaratory orders as they lack the precision and specificity needed to allow a court to determine, without the benefit of additional evidence, whether contempt has occurred (*CUPW v Canada Post Corp*, [1987] FCJ No 1021 at page 5 [*CUPW*], *Telus Mobility v Telecommunications Workers Union*, 2002 FCT 1268 at para 39 [*Telus*] upheld on appeal *Telus Mobility v Telecommunications Workers Union*, 2004 FCA 59, *Goela v Via Rail Canada Inc*, 2006 FC 562 at para 30, *Sucker Creek Indian Band v Calliou*, [1999] FCJ No 1715, *Re United Steelworkers of America, Local 663, and Anaconda Company (Canada) Ltd*, [1969] BCJ No 406).
>
> [44] The Respondent submits the Award in this case is declaratory only. The Award declares the Respondent to have violated the Code. It does not conclude the breach is ongoing and it does not direct the Respondent take specific steps to correct the violation. The Respondent argues that before the Court could enforce this Order it would be required to look beyond the Arbitration Award and consider new circumstances and evidence that was not before the Arbitrator. It is argued that this is not the Court's role and the Applicant's remedy is not contempt but a fresh grievance process that is again referred to a labour arbitrator for determination. Again, I disagree.
>
> [45] To be enforceable an award must do more than merely set out an existing legal situation. It must compel the performance of specific actions or impose specific constraints (*CUPW* at page 5).
>
> [46] In this case, the Award details the sections of the Code that establishes maximum weekly hours of work and overtime.

Arbitrator Sullivan concludes "the Employer was in contravention of the statutory overtime hours of work per week," that the "*Canada Labour Code* has been violated," and then orders that the "Employer cease and desist from violating the *Code*." Specific findings have been made based on the evidence and specific future conduct has been ordered. Whether the Respondent's future conduct is consistent with the Order is readily ascertainable by reference to the Code.

[47] The Order, when read within the context of the decision as a whole, as it must be, is clear, precise, and specific (*Warman v Tremaine*, 2011 FCA 297 at para 57). The Order does not suffer from a lack of precision that would prevent the Respondent from taking the action required to comply or to explain a failure to comply in the course of a contempt proceeding (*Telus* at para 39).

[48] I am also not convinced that consideration of the alleged contempt would require the Court to look beyond the Arbitration Award or to consider new circumstances. In pursuing civil contempt an Applicant must satisfy a high evidentiary burden to succeed. It is trite to note that this requires presenting evidence to establish the Respondent's non-compliance with an order. In doing so an Applicant may seek to place evidence before the Court that goes beyond that relevant to non-compliance, but these are evidentiary matters relating to relevance that are to be addressed in the course of the evidentiary hearing. This possibility does not render an otherwise enforceable order unenforceable.

[49] The Respondent further argues that failure of the Award to specify a timeline for compliance should result in the Court refusing to enforce the Award. The Respondent relies on *Telus* in submitting that the courts have routinely refused to enforce orders or awards in this circumstance (at para 43).

[50] A specific time for compliance was not provided for in *Telus*. The Court held that this left open two possible interpretations, that the Order was immediately applicable and therefore incapable of being complied with or that it was to be complied with within a reasonable time. The Court then proceeded to consider whether there had been timely compliance with the Order based on the evidence.

[51] The failure to specify a timeline for compliance in this instance may prove to be a reason not to enforce the Order. However, *Telus* does not teach that a contempt proceeding should fail simply on the basis that a time for compliance has not been

> specified. Instead, *Telus* recognizes that in the absence of a specified timeline, two interpretations are available to the Court and that those alternative interpretations are to be considered in light of the evidence. The significance or impact of the absence of a specified timeline for compliance in the Award is not a question to be considered in the absence of evidence.
>
> [52] In summary, I find the Award is not declaratory; it is sufficiently specific and precise to allow its enforcement. Concerns relating to evidence and the Order's failure to set out a specified timeline for compliance are more properly addressed, should they arise, in the course of the evidentiary hearing.

[90] The *November 2020 Order* specifically concludes that the Award is not solely declaratory and that it is sufficiently specific and precise to allow for its enforcement. It also concluded the absence of a specified timeline for compliance was not, in the absence of an evidentiary record, fatal to enforcement. The question of time to comply was to be more appropriately addressed, should it arise, in the course of the evidentiary hearing.

[91] The Respondent has cited no authority in support of the view that precision and clarity are to be assessed against different thresholds at different procedural points in a contempt proceeding. Nor did the Respondent's written submissions in the Part 1 proceedings advance the view that this was the case. Instead, the Respondent's written submissions on these issues were advanced under the heading "The Arbitration Award is declaratory and not <u>enforceable</u> in the Federal Court" (emphasis added).

[92] The Respondent is seeking to re-argue the very issues addressed in the *November 2020 Order*. In doing so, the Respondent not only revisits and reiterates arguments previously made but also advances fresh arguments. This includes an argument made in the course of oral

submissions that *Warman v Tremaine*, 2011 FCA 297, cited in the *November 2020 Order* (para 47) can be distinguished on the basis that a different statutory regime applied and that the Court erred in its treatment of *Telus Mobility v Telecommunications Workers Union*, 2002 FCT 1268 [*Telus*] (*November 2020 Order* at paras 49 – 51).

[93] The question of the Award's enforceability has been considered and decided. The parties had the opportunity to provide written submissions and advance oral argument on the question of whether the Award clearly and unequivocally set out what should or should not be done to comply. I am not in a position to return to or reconsider these previously decided matters. Should the Respondent take issue with the conclusions reached, the proper recourse is by way of appeal.

[94] The *November 2020 Order* held that, the Award was not simply declaratory; it was sufficiently specific and precise to allow for enforcement, thereby satisfying the first element identified in *Carey*. I now turn to the third element: whether the evidence establishes on the "beyond a reasonable doubt" standard that the Respondent has intentionally failed to comply with the Award.

B. The Applicant has established that the Respondent is in breach of the Award

(1) The standard of proof

[95] The parties agree, and as I have previously noted, each of the elements required to establish civil contempt must be established on a "beyond a reasonable doubt" standard. The parties both rely on *R v Lifchus*, [1997] 3 SCR 320 [*Lifchus*], where the Supreme Court

addressed, in the context of providing instructions to a jury in a criminal proceeding, how the expression “reasonable doubt” should be explained.

[96] In *Lifchus*, Justice Cory states that the “beyond a reasonable doubt” standard of proof is inextricably linked to the premise that an accused in a criminal proceeding benefits from a presumption of innocence and that the burden of proof is with the prosecution and does not shift (*Lifchus* at paras 27 and 36). In the context of a civil contempt proceeding, and again as previously noted, the burden is on the party alleging the contempt.

[97] A reasonable doubt is one that is based on reason and common sense and that is logically connected to the evidence or the absence of evidence. Although more is required than proof of probable guilt, the standard does not require proof to an absolute certainty or proof beyond any doubt. An imaginary or frivolous doubt is not a reasonable doubt (*Lifchus* at para 36).

(2) Are break periods to be included in the calculation of work hours?

[98] The Applicant argues that in considering hours worked, break times are to be included in the calculation of an employee’s work hours. The Applicant submits the objects of Part III of the Code include the protection of individual workers and the creation of certainty in the labour market by providing for minimum labour standards (*Instinct Trucking Ltd v Jacknisky*, 2003 FC 1027 at para 28). The Applicant relies on section 169.1 of the Code, which provides every employee is entitled to a 30-minute break during every consecutive five hours of work. The provision further provides the employee must be paid if the employer requires they remain at the employer’s disposal.

[99] The Applicant relies on the evidence that establishes the Respondent's employees are paid for their breaks and employees are required to remain in the workplace subject to the direction of their supervisors during break periods. The Applicant acknowledges the evidence that employees may depart the workplace to obtain lunch or coffee over a break but notes the evidence that this requires the employer's permission.

[100] The Applicant argues that to interpret section 169.1 as excluding break periods in circumstances where an employee must remain at the employer's disposal would undermine the provisions in Part III of the Code establishing maximum daily and weekly work hours. It would also be inconsistent with section 12 of the *Interpretation Act*, RSC 1985, c I-21, which requires section 169.1 be given a large and liberal interpretation that best ensures the attainment of the objects of the legislation.

[101] The Respondent submits it is non-controversial that breaks are not included as hours worked under the Code. The Respondent relies on an interpretation, policies and guidelines document that has as its aim the interpretation of the scope of section 169.1 of the Code (*30 Minute Breaks – Canada Labour Code, Part III – Division 1 – 802-1-IPG-100* [IPG-100]). IPG-100 defines breaks as "a short period of time during the work period when an employee is released from [their] obligations to the employer…and may freely attend to personal matters in or near the work place" and further states "[g]iven that the employee is not under the control of [their] employer during [their] 30-minute break, that break is not considered work time. Consequently, the 30-minute break is not paid. However, if the employer requires the employee to remain available during the break, for example if the employer asks the employee to remain at

the work place during the break to answer the phone, then the employee must be paid for the break."

[102] IPG-100 does not assist the Respondent. This document addresses the question of work hours in a situation where an employee "is released from [their] obligations to the employer [and]… may freely attend to personal matters in or near the work place." This is not reflective of the evidence in this matter. Mr. McFeeters' evidence was that an employee is not permitted to leave the job site once punched in for a shift. Ms. Kerr's evidence was more nuanced in that she acknowledged an employee could be authorized to leave the work premises to obtain a meal from a nearby fast food restaurant, but this nonetheless required supervisor authorization. There is no evidence before me to indicate employees may freely attend to personal matters in or near the workplace during a break.

[103] The Respondent also relies on a second interpretation document (*Hours of Work – Canada Labour Code, Part III – Division 1 – 802-1-IPG-002* [IPG-002]). Among other things, this document addresses "waiting time." IPG-002 states "waiting time" applies mostly in the trucking industry and explains work hours for a vehicle operator usually accounts for the period from the beginning of a shift until an employee is relieved of their job responsibilities. The document then goes on to describe exceptions, which include time for authorized meal or rest breaks and other wait times while en route or at a destination. The Respondent suggests the breaks taken by the Applicant's members are akin to "waiting time."

[104] IPG-002 also states that "[i]n general, an employee is performing 'work' when the employee … is on a break granted by the employer but is required to remain at the employer's disposal (for example, respond to clients or answer the telephone)." In my opinion, this latter circumstance aligns more closely with the evidence presented in this matter.

[105] The jurisprudence is not consistent on the issue of whether break periods are to be considered in assessing work hours. The Applicant argues that faced with the unsettled jurisprudence, an interpretation consistent with the objects of Part III of the Code is to be preferred. I agree.

[106] The cases relied upon by the Respondent do hold that break periods are not to be counted as work hours (*Transport Drivers Local 106 v S.G.T 2000 Inc.*, 99 CLLC para 220-055, *Union of Bank Employees, Local 2104 v Canadian Imperial Bank of Commerce*, 85 CLLC para 16,021). However, these cases arise in the context of union certification activities, a circumstance where the Code seeks to achieve objects that differ from those engaged in this instance.

[107] *Reimer Express Lines Ltd. v Teamsters, Local 938*, [2000] C.L.A.D. No 762 at paragraph 20 [*Reimer*] also holds that break periods are not to considered work hours. *Reimer* and *Hao v Canadian Imperial Bank of Commerce*, [2008] CAD No. 368 [*Hao*] were later cited in *Fresco v Canadian Imperial Bank of Commerce*, 2010 ONSC 4724 at paragraph 67 [*Fresco*], in support of the conclusion that break hours are not to be considered work hours. The Applicant argues, however, that *Fresco* is not persuasive, it having been overturned on appeal (on other grounds)

and because *Hao* stands for the opposite proposition. In *Hao,* break hours were treated as work hours.

[108] *Fresco* is not persuasive in this circumstance for the reasons highlighted by the Applicant. Furthermore, *Fresco* and *Reimer* can be distinguished because neither case involves a circumstance where employees are not released from their obligations to the employer during their break periods.

[109] Where, as here, employees are expected to remain on the employer's premises and, as contemplated by section 169.1 of the Code, are paid for their break periods, I am of the opinion that those break periods are to count as work hours. That the employees are paid double time in some instances where breaks are not provided does not change the underlying circumstance; the employee does not have the freedom to attend to personal matters in or outside the workplace while on breaks.

[110] For all these reasons, I prefer and have adopted the Applicant's position. On these facts, break periods are to be included in the calculation of work hours.

[111] It is important to note that had I concluded the Respondent's position should prevail on this issue, this would not change my conclusion on the ultimate issue. As is explained below, the evidence establishes numerous instances of employees having worked in excess of 48 hours on a weekly basis even when break periods are excluded from work hours.

(3) The Respondent has been non-compliant

[112] The Respondent submits the Applicant has not met its burden. The evidence, at best, demonstrates hours paid as opposed to hours worked and is therefore not probative to the question of hours worked. The evidence adduced cannot satisfy the Applicant's burden to demonstrate the Respondent has failed to comply with the Award by intentionally allowing or scheduling employees to work in excess of 48 hours in a week as alleged.

[113] The Respondent relies on the testimony of Mr. McFeeters and Ms. Kerr in submitting that the information these individuals recorded in their respective calendars and placed before the Court is similarly limited to a recording of hours paid, not hours worked. The Respondent also points to the testimony of a number of the witnesses stating that Time Card Reports have contained inaccurate information requiring adjustments and corrections and that employees make errors in punching in or punching out.

[114] The Applicant's submissions summarize and tabulate a representative sample of hours worked by Ms. Kerr and Mr. McFeeters during a selection of weeks following the issuance of the Award, based on their punch times. The Applicant has undertaken a similar summary in respect of a small number of additional employees at both the Pacific and Cascadia Terminals. The summaries were prepared based on Time Card Reports, Exception Reports and, in the case of Ms. Kerr and Mr. McFeeters, data contained in their individual calendars. The Applicant reviewed this tabulated data in the course of oral submissions. Although the Respondent takes issue with the probative value of the evidence as it relates to the issue of work hours, the

Respondent has not objected to or identified any specific concerns with the accuracy or completeness of the Applicant's summaries.

[115] I have relied on the Applicant's summaries in my assessment of the evidence and reproduce those summaries below. I have also reviewed the Applicant's charts detailing the evidence underpinning the summaries. In doing so, a number of citation errors were noted. In the interest of completeness, Schedule 1 to these reasons reproduces the Applicant's charts. The document references in the charts are to the Applicant's document numbers in the E-trial Toolkit. The Table of Concordance at Exhibit 271 (FC01454) may be of assistance in this regard.

(a) *Samples of weekly hours*

(i) Ms. Kerr

[116] The Applicant submits Ms. Kerr worked, at least, the following hours during the identified weeks in 2020:

Week	**Time Worked**
January 12-18	58 hours, 30 minutes
February 23-29	56 hours, 10 minutes
March 1 – 7	52 hours, 30 minutes
March 22-28	50 hours, 45 minutes
April 26 – May 2	51 hours, 30 minutes
August 2-8	59 hours, 30 minutes
December 6-12	54 hours, 30 minutes

[117] The evidentiary basis for the above chart is set out in Appendix A to the Applicant's submissions, which, as I note above, has been reproduced at Schedule 1 of these reasons.

[118] The Applicant submits the evidence has been interpreted conservatively to account for the Respondent's position that evidence demonstrating hours paid cannot establish hours worked:

A. The hours identified have been consistently recorded or reported in Ms. Kerr's calendar, the Exception Reports, the Time Report Cards and Ms. Kerr's punch in and punch out times;

B. The weekly totals exclude breaks taken;

C. The weekly totals also exclude missed breaks if the missed break was not reported in both Ms. Kerr's calendar and on the applicable Exception Report or Time Card Report; and

D. Any time Ms. Kerr remained punched in that exceeded the time for her scheduled shift was excluded from the calculation of hours worked unless Ms. Kerr was actually paid for overtime.

(ii) Mr. McFeeters

Week	**Time Worked**
July 19-25, 2020	56 hours
December 6-12, 2020	51 hours, 10 minutes
January 17-23, 2021	49 hours, 40 minutes

[119] The Applicant again submits that the evidence has been interpreted conservatively:

A. Hours have only been included where they have been consistently recorded in Mr. McFeeters' calendar, the Exception Reports and the Time Card Reports and are also consistent with punch in and punch out times;

B. The weekly totals exclude breaks taken;

C. The weekly totals also exclude missed breaks if the missed break is not reflected in the payroll records; and

D. Punch in times that exceeded eight hours were excluded unless Mr. McFeeters was paid overtime.

[120] The evidentiary basis for the above chart is set out in Appendix B to the Applicant's submissions, reproduced at Schedule 1.

(iii) Pacific Terminal Employees

Employee	**Week**	**Hours worked**
Saul Bermudes Varela	August 2 – 8, 2020	57 hours, 50 minutes
Ed Bruschinsky	August 9 –15, 2020	60 hours, 30 minutes
Bryan Chatt	August 9 – 15, 2020	64 hours, 30 minutes
Zachary Twolan	August 2 – 8, 2020	55 hours

[121] Hours reported exclude the maximum break time per shift. The evidentiary basis for the above chart is set out in Appendix C to the Applicant's submissions, reproduced at Schedule 1.

(iv) Cascadia Terminal Employees

Employee	**Week**	**Hours worked**
Esteban Acedo	August 16 – 22, 2020,	66 hours, 40 minutes
Michael Bauer	August 16 – 22, 2020	53 hours
James Brunskill	August 16 – 22, 2020	50 hours, 50 minutes
Colton Schock	November 29 – December 5, 2020	52 hours

[122] Hours reported exclude the maximum break time per shift. The evidentiary basis for the above chart is set out in Appendix D to the Applicant's submissions, reproduced at Schedule 1.

(b) *Punch times reflect hours worked*

[123] The evidence establishes that punch in and punch out times accurately reflect the hours that employees are on the employer's premises (see, for example, Transcript Volume 3, page 66, lines 8 -15). Mr. McFeeters testified he starts work upon arriving at the workplace ("Yeah, after punching in I'm two floors up to my desk, so 30 seconds to a minute or so": Transcript Volume 3, page 12, lines 12 -13), as did Ms. Kerr (Transcript Volume 3, page 82, lines 7 – 24).

[124] The Respondent argues that hours worked cannot be determined because overtime worked as a shift extension or to assist with a vessel arrival or departure is paid and recorded based on fixed time periods (one- or four-hour extensions and three hours for a vessel) regardless of the time actually worked. However, the evidence establishes employees commence work very shortly after punching or clocking in. Similarly, they punch out upon being released from work. There is no evidence indicating employees remain in the workplace after being released from work.

[125] Witnesses did acknowledge that punch in and punch out times were not representative of hours worked, but only on the basis that employees do not punch out for break periods (Transcript Volume 3, page 123, lines 11-26). Where break periods are either counted as work hours, or alternatively excluded from the calculation of work hours, the evidence establishes the elapsed time between employees punching in and punching out is an accurate reflection of hours worked.

[126] The evidence does demonstrate that there may be errors in the punch in and out data and errors in the Exception Report and Time Card Report that arise in the process of generating these documents. However, the evidence indicates errors arise from human mistake or oversight. This is to be both anticipated and expected in any data collection process reliant on human inputs. There is no evidence of systemic defects nor is there evidence that the data as a whole is inherently unreliable.

[127] I am satisfied that the punch in and punch out data is reliable. I am also satisfied that the evidence establishes an employee's actual work hours can be accurately inferred from this data by calculating the time that passes between an employee punching in at the employer's premises on a given day and later punching out. The punch in and punch out data dispels any reasonable doubt that might arise in relying on data generated for pay purposes to determine hours worked.

[128] I have concluded that break times are to be counted for the purpose of determining work hours in this circumstance. However, as is disclosed in the summaries set out above, the evidence

discloses work weeks exceeding 48 hours even if break times are excluded from the calculation of hours worked.

(c) *Evidentiary burden has been satisfied*

[129] The charts set out above disclose numerous instances where the data indicates an employee worked in excess of 48 hours in a week. The Applicant submits, and I agree, that to conclude in the instances relating to Ms. Kerr and Mr. McFeeters that the employee worked less than 48 hours one would have to dismiss data that was consistently recorded in both payroll documentation and the employee's personal record or calendar. The Applicant also persuasively notes in reference to the hours worked by Ms. Kerr during the week of August 2 to 8, 2020 - 59 hours and 30 minutes, excluding break times - that one would have to accept Ms. Kerr spent 11 hours and 30 minutes in the workplace punched in and paid but not required for work to conclude she worked no more than 48 hours that week.

[130] I am satisfied the evidence does establish on a "beyond a reasonable doubt" standard that after October 28, 2019, the Respondent persisted, at both its Cascadia and Pacific Terminals, to have employees work in excess of 48 hours per week, thereby violating the Code and failing to comply with the Award.

[131] In so concluding, I having considered: (1) the calculation of weekly hours in the sampling set out above; (2) the Applicant's conservative approach to the calculation of weekly hours in that sampling; (3) my conclusion that the punch in and punch out data is reliable and reflective of hours worked; (4) the evidence of numerous witnesses to the effect that the Respondent did not

implement any changes to its practices or procedures to the assignment of overtime after the issuance of the Award and prior to April 2021; (5) the testimony of Mr. McFeeters and Ms. Kerr to the effect that they had personally worked in excess of 48 hours in a week after the issuance of the Award, testimony that is consistent with the documentary evidence; (6) the testimony of Mr. Larochelle to the effect that it was a common occurrence for employees to have worked in excess of eight hours of overtime in a week from November 2019; and (6) the evidence of Mr. Larochelle and Ms. Montgomery to the effect that as supervisors they neither tracked nor considered weekly hours worked in the assignment of overtime before April 2021.

(d) *Intent is established*

[132] Turning to the question of intent, Justice René Leblanc notes in *Canada (National Revenue) v Chi*, 2018 FC 897, that in a contempt proceeding "there is no need to prove *mens rea* as it is understood in a criminal context. What must be established is that the alleged contemptor had both knowledge of the order and was knowingly disobeying it" (para 14). Intent to disobey can be inferred where the alleged contemptor has knowledge of the order (*Canada (National Revenue) v Gray*, 2018 FC 549 at para 58; *Asics Corp v 9153-2267 Quebec Inc.*, 2017 FC 5 at paras 34 and 54).

[133] The Respondent's knowledge of the Award is not disputed. The evidence also establishes that the Respondent was provided notice of non-compliance in November 2019 (Exhibit 3, FC00227; Exhibit 7, FC00225). The intention not to comply with the Award can be readily inferred on these facts.

(e) *Time for compliance*

[134] As discussed at paragraph 79 above, the *November 2020 Order* held that the failure of the Award to set out an express timeline was not necessarily fatal to the enforcement of the Award. It was held that the issue of timely compliance with the Award could only be addressed after evidence had been heard.

[135] The Respondent has maintained in its submissions that the failure to set out an express time for compliance in the Award renders it incapable of enforcement without more. This argument, as I have previously stated, has been considered and decided and will not be re-visited. The question to be addressed at this stage is whether there has been a reasonable opportunity to comply.

[136] Timely compliance requires a consideration of the surrounding circumstances (*Sound Contracting Ltd. v Comox Strathcona (Regional District)*, 2005 BCCA 167 at para 11; *Telus* at paras 46-47; also see *Berge v Hughes Properties (BCCA)*, [1988] BCJ No 353, 24 BCLR (2d) 1 [*Skybound*], where the contempt finding was overturned due to the order being found to be imprecise as to time – in a concurring judgment, Justice Esson, speaking only for himself, states that he would not want the decision to be understood as meaning a finding of contempt could never be made without a specific date being set in an order).

[137] The above-cited jurisprudence indicates that the question of timely compliance may engage several factors, including an alleged contemptor's compliance efforts, the passage of time and obstacles to compliance.

[138] In this instance, the evidence indicates that the Respondent made little, if any, effort to comply with the Order prior to April 2021. Similarly, there is nothing in the evidence to suggest the Applicant's action have prevented or delayed the Respondent's ability to comply. The unsuccessful efforts undertaken to negotiate an averaging agreement are noted. However, those efforts ended in May 2020 and they did not prevent compliance through other means.

[139] Having concluded the Award is enforceable by way of this proceeding, the Respondent failed to comply with the Award, intent not to comply can be inferred and the Respondent has had a reasonable time to comply, contempt has been established.

C. Decline to make a finding of contempt

[140] In *Carey,* the Supreme Court affirmed that the contempt power of the court is discretionary and that courts have consistently discouraged routine use of the power as a mere means of obtaining compliance with an order or judgment. The power should be used cautiously and with restraint (*Carey* at para 36).

[141] Having concluded that the Applicant has established contempt, I must now consider whether to exercise the Court's discretionary authority to not hold the Respondent in contempt.

The Respondent submits that the interests of justice weigh in favour of an exercise of the Court's discretion not to do so.

[142] The Respondent argues the intent of the Award was to provide an impetus for the parties to work together to consider a scheduling agreement as contemplated by the Code. Efforts were made to come to an agreement and the failure, to date to do so should not result in a consequence being directed only at the Respondent. In this respect, the Respondent points to Mr. Larochelle's testimony where he states that the Applicant Union monitors what employees are given overtime and has never objected to a grant of overtime on the basis that an employee cannot be assigned more overtime.

[143] In *Carey*, the Supreme Court cites *Morrow, Power v Newfoundland Telephone Co.*, [1994] NJ No 197 (QL), 121 Nfld. & P.E.I.R. 334 (Nfld. C.A.) as an example of the court exercising its discretion on the basis that the alleged contemptor acted in good faith and took reasonable steps to comply with the order. The Court in *Carey* does not attempt to delineate what circumstances might warrant the exercise of the discretion, instead leaving open the possibility for its exercise in any instance where the finding would work an injustice in the circumstances (*Carey* at para 37).

[144] I agree with the Respondent's view that the circumstances surrounding the failure of the parties to enter into an averaging agreement and the Applicant's approach to the issue of overtime are certainly factors, among others, that are relevant to the exercise of the discretion. However, the weight to be given these factors must flow from the evidence and there is little on

the record to allow the factors to be assessed. In making this observation, I am in no way suggesting the Respondent was under any obligation to call evidence in response to the contempt allegation. Because the Respondent has chosen not do so and in the absence of evidence having been led by the Applicants or having been elicited on cross-examination on these issues, the Court is left to speculate as to the reasons the negotiation of the averaging arrangement and subsequent intervention of Arbitrator Sullivan, were not successful.

[145] Mr. Larochelle's evidence that he was unaware of any instance of the Union having intervened in workplace overtime decisions on the basis of the number of hours an employee worked may, as the Respondent submits, suggest some shared responsibility. However, the evidence also demonstrates numerous efforts on the part of the Applicant to have the Respondent comply with the Award after it issued, including the bringing of this Application.

[146] There is also some evidence on the record indicating the Respondent made some effort as of April 2021 to comply with the Award. Mr. Larochelle and Ms. Montgomery both testified they received direction to consider weekly hours before awarding overtime, Mr. Larochelle on the date he appeared to testify in this proceeding and Ms. Montgomery early in April 2021. While this evidence suggests an effort to comply was made, the witnesses also testified they had received no prior instructions to consider weekly hours. The limited evidence does not allow the Court to draw any conclusions as to the motivation behind this effort. It does however, suggest obstacles to compliance, if any, were not insurmountable.

[147] In asking the Court to exercise its discretion, the Respondent has pointed to little evidence on the record that would suggest good faith efforts have been made to comply, compliance was an impossibility or there has been some form of technical (if not actual) compliance with the Award. All of these are factors that, if supported by an evidentiary foundation, might support a conclusion that a contempt finding would work an injustice in the circumstances.

[148] In this instance, I am unconvinced that an injustice would result from the Court's failure to exercise its discretion not to hold the Respondent in contempt. I therefore decline to exercise the discretion.

VIII. Conclusion

[149] For the above reasons, the Applicant has demonstrated beyond a reasonable doubt that the Respondent is guilty of contempt, it having failed to comply with the October 28, 2019 Award of Arbitrator Sullivan filed with the Court.

[150] The Court will receive submissions from the parties on an appropriate penalty for the established contempt, as well as the appropriate disposition of costs resulting from this proceeding.

ORDER IN T-1938-19

THIS COURT ORDERS that:

1. The Respondent is guilty of contempt, it having been found beyond a reasonable doubt that the Respondent, having actual knowledge of the October 28, 2019 Award of Arbitrator Sullivan filed and registered in the Federal Court pursuant to section 66 of the *Canada Labour Code*, RSC 1985, c L-2, failed to thereafter cease and desist in violating the Code;

2. The parties shall contact the Federal Court Judicial Administrator to schedule a date for a hearing on penalty not later than twenty (20) days from the date of this order. In doing so, the parties shall propose a timeline for the service and filing of any written submissions; and

3. Costs shall be addressed at the hearing on penalty.

"Patrick Gleeson"
Judge

Schedule 1

Appendix "A" – Nikki Kerr

January 12-18, 2020: 58.5 hours

	Sunday (12)	Monday (13)	Tuesday (14)	Weds (15)	Thursday (16)	Friday (17)	Saturday (18)
Diary[1]	Janitor	Shift Boss (OT)	Shift Boss (OT) +2 hours OT as PQC	PCO (OT) + 2 hrs	Ship PCO + 2 hrs double	Ship PCO + 2 hrs double	Ship PCO
Breaks as per testimony	1h30	No break	No break	1 hour break	1 hour.	1 hour.	1 hour.
Time Card[2]	**6:16 – 14:30**	**6:08 – 14:35**	**4:14 - 14:24**	**4:21 – 13:59**	**5:09 – 15:19**	**5:05 – 15:30**	**6:58 – 15:25**
Exception Reports	No exceptions to report	8 hours OT[3]	2 hours; 8 hours[4]	8 hours; 2 hours[5]	2 hours extra, no break[6]	2 hours extra, no break[7]	No exceptions to report
Hours Excluding Breaks	**6.5 hours**	**8 hours**	**10 hours**	**9 hours**	**9 hours**	**9 hours**	**7 hours**

See the following relevant notes under "Supervisor Edits":

DEL PUN Mon Jan-13 6:08 (Overtime)
DEL PUN Mon Jan-13 14:35 (Overtime)
ADJ TRANS TIME FROM Tue Jan-14 4:14 TO Tue Jan-14 5:00 (Overtime)
DEL PUN Tue Jan-14 5:00 (Overtime)
DEL PUN Tue Jan-14 14:24 (Overtime)
ADJ TRANS TIME FROM Wed Jan-15 4:21 TO Wed Jan-15 5:00 (Overtime)
DEL PUN Wed Jan-15 5:00 (Overtime)
DEL PUN Wed Jan-15 13:59 (Overtime)

[1] A189, pp. 4-5.
[2] A167, pp. 67-9.
[3] A121
[4] A122
[5] A124
[6] A258; missed break was not recorded in the Diary. As a result, extra hour that Ms .Kerr would have been working is not included in the total.
[7] A259; missed break was not recorded in the Diary. As a result, extra hour that Ms .Kerr would have been working is not included in the total.

Feb 23-29, 2020 – 56h10 total.

	Sunday Feb 23	Monday Feb 24	Tues Feb 25	Weds Feb 26	Thurs Feb 27	Friday Feb 28	Sat Feb 29
Diary[8]	Ship PCO + 4 hrs janitor	Janitor + 2 PQC	Janitor	Janitor	Shift Boss (OT)	Shift Boss (OT)	Shift Boss (OT)
Standard break	1 hr during 8 hr shift, 20 minutes during extension	1h30	1h30	1h30	None	None	None
Time Card[9]	**6:06-18:06**	**4:18 – 14:38**	**6:15 – 14:31**	**6:13 – 14:33**	**6:12 – 14:30**	**6:08 – 14:18**	**6:06 – 14:34**
Exception Report	Confirms 8+4[10]	Confirms extra 2[11]	No exceptions	No exceptions	Confirms 8 hrs shift boss[12]	Confirms 8 hrs shift boss[13]	Confirms 8 hrs shift boss[14]
Hours Excluding Breaks	**10h40**	**8.5 hours**	**6.5 hours**	**6.5 hours**	**8 hours**	**8 hours**	**8 hours**

See the following relevant notes under "Supervisor Edits":

ADJ TRANS TIME FROM Mon Feb-24 4:18 TO Mon Feb-24 5:00 (Overtime)
DEL PUN Thu Feb-27 6:12 (Overtime)
DEL PUN Thu Feb-27 14:30 (Overtime)
DEL PUN Fri Feb-28 6:08 (Overtime)
DEL PUN Fri Feb-28 14:18 (Overtime)
DEL PUN Sat Feb-29 6:06 (Overtime)
DEL PUN Sat Feb-29 14:34 (Overtime)

[8] A189, pp. 7-8.
[9] A169, pp. 62-63.
[10] A271
[11] A272
[12] A127
[13] A128
[14] A129

March 1 – March 7, 2020 – 52h30 total.

	Sun March 1	Mon March 2	Tues March 3	Weds March 4	Thurs March 5	Friday March 6	Sat March 7
Diary[15]	Shift Boss	Trucks 3 hrs Union Business	Trucks	Ship PQC + 2 hrs	Ship PQC + 2hrs	Ship PQC + 2 hrs	Ship PQC (OT)
Standard break	None	1h30	1h30	1 hr	1 hr	1 hr	1 hr
Time Card[16]	**6:10 – 14:43**	**6:14 – 11:31**	**6:11 – 14:56**	**5:21 – 15:32**	**5:20 – 15:28**	**5:15 – 15:29**	**6:52 – 15:29**
Exception Report	Confirms shift boss[17]	Confirms 3 hrs union business[18]	No exceptions to report	Confirms 8hrs + 2 hrs[19]	Confirms 2 hr extension[20]	Confirms 2 hr extension[21]	Confirms 8 hr OT shift[22]
Hours Excluding Breaks	**8 hrs**	**3.5 hours**	**6.5 hrs**	**9 hrs**	**9 hrs**	**9 hrs**	**7 hrs**

See the following relevant notes under "Supervisor Edits":

DEL PUN Sat Mar-07 6:52 (Overtime)
DEL PUN Sat Mar-07 15:29 (Overtime)

---

[15] A189, pp. 8-9
[16] A170, pp. 62-63
[17] A264
[18] A265
[19] A267
[20] A268
[21] A269
[22] A130

March 22-28, 2020 – 50h45 hours

	Sun March 22	Mon March 23	Tues March 24	Weds March 25	Thurs March 26	Fri March 27	Sat March 28
Diary[23]	Janitor	Ship PQC + 1 hr	Ship PQC	Ship PQC (OT) + 2 hr	Ship PQC (OT)	Ship PQC (OT)	Truck Loader
Standard break	1h30	1 hour	1 hour	1 hour	1 hour	1 hour	1h30
Time Card[24]	**6:12 – 14:16**	**6:08 – 15:17**	**7:02 – 15:15**	**4:58 – 15:18**	**7:07 – 15:26**	**7:14 – 15:15**	**6:11 – 13:55**
Exception Report	No exceptions to report	Confirms extra hour[25]	No exceptions to report	Confirms 8 + 2[26]	Confirms 8 hrs OT[27]	Confirms 8 hrs OT[28]	No exceptions to report
Hours Excluding Breaks	**6.5**	**8**	**7**	**9**	**7**	**7**	**6h15[29]**

See the following relevant notes under "Supervisor Edits":

DEL PUN Wed Mar-25 4:58 (Overtime)
DEL PUN Wed Mar-25 15:18 (Overtime)
DEL PUN Thu Mar-26 7:07 (Overtime)
DEL PUN Thu Mar-26 15:26 (Overtime)
DEL PUN Fri Mar-27 7:14 (Overtime)
DEL PUN Fri Mar-27 15:15 (Overtime)

[23] A190, pp. 11-12.
[24] A171, pp. 71-73.
[25] A271
[26] A136
[27] A137
[28] A138
[29] Subtracted 15 minutes for early punch out.

April 26 – May 2, 2020 – 51.5

	Sunday April 26	Monday April 27	Tuesday April 28	Weds April 29	Thurs April 30	Friday May 1	Sat May 2
Diary[30]	Trucks + 2 hr Ship PCO	Trucks + 4 hrs relief extension	Trucks	Trucks + 1 hr	Trucks (OT)	Trucks (OT)	Trucks (OT)
Standard break	1h30	1h30, plus 30 or 60 for relief[31]	1h30	1h30	1h30	1h30	1h30
Time Card[32]	**4:14 – 14:19**	**6:01 – 18:12**	**5:57 – 14:17**	**5:58 – 15:08**	**6:02 – 14:17**	**6:02 - 14:13**	**6:05 – 14:10**
Exception Report	Confirms 2 hrs OT[33]	Confirms 4 hr relief extension[34]	No exception to report	Confirms 1 hr extension[35]	Confirms 8 hrs OT shift[36]	Confirms 8 hr OT shift[37]	Confirms 8 hr OT shift[38]
Hours Excluding Breaks	**8.5**	**9.5**	**6.5**	**7.5**	**6.5**	**6.5**	**6.5**

See the following relevant notes under "Supervisor Edits":

ADJ TRANS TIME FROM Sun Apr-26 4:14 TO Sun Apr-26 5:00
DEL PUN Thu Apr-30 6:02 (Overtime)
DEL PUN Thu Apr-30 14:17 (Overtime)
DEL PUN Fri May-01 6:02 (Overtime)

---

[30] A189, pp. 15-16.
[31] as per testimony, p. 106.
[32] A173, pp. 49- 51.
[33] A274
[34] A275
[35] A277
[36] A141.
[37] A142.
[38] A143.

DEL PUN Fri May-01 14:13 (Overtime)
DEL PUN Sat May-02 6:05 (Overtime)
DEL PUN Sat May-02 14:10 (Overtime)

August 2-8, 2020: 59.5 hours

	Sunday, Aug 2	Monday, Aug 3	Tuesday, Aug 4	Weds, Aug 5	Thurs Aug 6	Friday, Aug 7	Saturday Aug 8
Diary[39]	Ship PCO	Ship PCO +1 (explained in testimony as missed break)	Ship PCO +1 (explained in testimony as missed break)	Ship PCO +2 hrs, + 1	Ship PCO + 4 hrs Ship PCO, +1	Ship PCO (OT) + 4 hrs Ship PCO, +1	Ship PCO (OT) +1
Standard break	1 hr	1 hr	1 hr	1hr	1 hr	1 hr	1 hr
Time Card[40]	**6:54 – 15:02**	**6:40 – 15:27**	**5:51 – 15:06**	**5:01 – 15:16**	5:54 – 19:03	**14:44 – 2:51**	**14:56 – 22:29**
Exception Report	No exceptions to report	Does not include missed break.[41]	Does include missed break.[42]	2 hours overtime. Does not include missed break.[43]	8 hours OT shift, 4 hr as Ship PCO. No missed break.[44]	8 hrs OT, 4 hr Ship PCO. Doesn't show missed break.[45]	8 hrs OT, doesn't show missed break[46]
Hours Excl. Breaks	**7 hours**	**7 hours**	**8 hours**	**9 Hours**	**11 hrs**	**11 hrs.**	**6.5 hrs**[47]

See the following relevant notes under "Supervisor Edits":

DEL PUN Fri Aug-07 14:44 (Overtime)
DEL PUN Sat Aug-08 2:51 (Overtime)
DEL PUN Sat Aug-08 14:56 (Overtime)
DEL PUN Sat Aug-08 22:29 (Overtime)

[39] A189, pp. 22-23.
[40] A175, pp. 49-51.
[41] A279
[42] A280
[43] A281
[44] A282
[45] A153
[46] A154
[47] Subtracted 30 minutes for early punch out.

December 6-12, 2020: 54.5 hours

	Sunday, Dec. 6	Mon, Dec. 7	Tues, Dec. 8	Weds, Dec. 9	Thurs, Dec. 10	Friday, Dec. 11	Sat, Dec. 12
Diary[48]	PCO + 2 hr + 1 no break	Trucks	Janitor	Janitor +1	Janitor + 2hrs	Ship PCO (OT)	Ship PCO (OT) + 2 hrs
Standard break	1 hour	1h30	1h30	1h30	1h30	1 hour	1 hour
Time Card Punches[49]	**4:54 – 14:47**	**5:55 – 14:08**	**5:55 – 14:37**	**5:52 – 14:57**	**4:49 – 14:13**	**6:47 – 15:21**	**4:46 – 14:44**
Exception Report	Extra 2 hrs, missed break[50]	No exceptions to report	No exceptions to report	+1 Trucks[51]	+ 2 ship PCO[52]	8 hr ship pco[53]	8 hr ship pco, +2 OT [54]
Hours Excluding Breaks	**10 hours**	**6.5 hours**	**6.5 hours**	**7.5 hours**	**8 hours**	**7 hours**	**9 hours**

See the following relevant notes under "Supervisor Edits":

ADJ TRANS TIME FROM Sun Dec-06 4:54 TO Sun Dec-06 6:00 (Overtime)
ADJ TRANS TIME FROM Thu Dec-10 4:49 TO Thu Dec-10 5:00 (Overtime)
DEL PUN Fri Dec-11 6:47 (Overtime)
DEL PUN Fri Dec-11 15:21 (Overtime)
DEL PUN Sat Dec-12 4:56 (Overtime)
DEL PUN Sat Dec-12 14:44

---

[48] A189, pp. 24-5.
[49] A180, pp. 75-6.
[50] A283
[51] A285
[52] A286
[53] A287
[54] A289

Appendix "B" – Craig McFeeters

July 19-25, 2020: 56 hours

	Sun July 19	Mon July 20	Tues July 21	Weds July 22	Thurs July 23	Fri July 24	Sat July 25
Diary[1]	8, Night shift, no breaks	8 Night (OT), no breaks	8 (OT)	8 Night (OT),	8, Afternoon, no breaks, boat	8, Afternoon, boat	8, Afternoon, no break, extension
Standard Breaks for post / shift	1h10	1h10	1h10	1h10	1h10	1h10	1h10
Time Card[2]	22:13 – 6:31	22:23 – 6:26	22:22 – 6:32	22:29 – 6:26	X[3] - 23:05	14:10 – 23:06	14:11 – 2:11
Exception Reports	No breaks[4]	8 hours OT, no relief[5]	8 hours OT, no breaks[6]	8 hours OT[7]	Missed punch, pay 8 (for regular shift), no breaks, boat.[8]	Vessel[9]	No breaks, 4 hours PCO/Ship OT[10]
Hours Excluding Breaks	**6h30**	**8**	**8**	**6h50**	**8 + 1 hr for boat**	**6h50 + 1 hour for boat**	**9h50**

[1] A183, p. 8.
[2] A101
[3] Craig missed swiping in, but the exception report at A58 confirms that he was present for his full shift.
[4] A53
[5] A55
[6] A56
[7] A57
[8] A58
[9] A59
[10] A60

See the following relevant notes under “Supervisor Edits”:

DEL PUN Jul-19 2020 22:23 (Overtime)
DEL PUN Jul-20 2020 6:26 (Overtime)
DEL PUN Jul-20 2020 22:22 (Overtime)
DEL PUN Jul-21 2020 6:32 (Overtime)
DEL PUN Jul-21 2020 22:29 (Overtime)
DEL PUN Jul-22 2020 6:26 (Overtime)
ADD PUN Jul-23 2020 15:00 (Missed Punch)

December 6-12, 2020: 51:10

	Sun Dec. 6	Mon Dec. 7	Tues Dec. 8	Weds, Dec. 9	Thurs Dec. 10	Fri, Dec 11	Sat, Dec 12
Diary[11]	8 Afternoon	8 Afternoon	8 Afternoon, no breaks	8 Afternoon	8 Afternoon	8 (OT), no breaks	8 Afternoon (OT), no breaks
Standard Breaks for post / shift	1h10	1h10	1h10	1h10	1h10	1h10	1h10
Time Card[12]	14:01 – 22:21	14:13 – 22:14	14:17 – 22:19	14:12 – 22:57	14:14 – 22:41	14:00 – 22:27	14:39 – 22:34
Exception Reports	No exception to report	No exception to report	No breaks[13]	No exception to report	No exception to report	8 hours OT, no breaks[14]	8 hours OT[15]
Hours Excluding Breaks	**6h50**	**6h50**	**8**	**6h50**	**6h50**	**8**	**6h50 No breaks not included**

The Time Card Report contains the following relevant notes under "Supervisor Edits" containing edits to the original punch times:

DEL PUN Dec-11 2020 14:00 (Overtime)
DEL PUN Dec-11 2020 22:27 (Overtime)
DEL PUN Dec-12 2020 14:39 (Overtime)
DEL PUN Dec-12 2020 22:34 (Overtime)

[11] A183, p. 9.
[12] A108, p. 82-83.
[13] A242
[14] A245
[15] A246

January 17-23, 2021: 49h40

	Sun Jan 17	Mon Jan 18	Tues Jan 19	Weds Jan 20	Thurs Jan 21	Fri Jan 22	Sat Jan 23
Diary[16]	8 (OT)	8 (OT), No breaks	8 Night	8 Night	8 Night	8 Night, no breaks	8 Night, no breaks
Standard Breaks for post / shift	1h10	1h10	1h10	1h10	1h10	1h10	1h10
Time Card[17]	**X** – 6:23am	21:53 - 6:46	22:17 – 6:19	22:13 – 6:18	22:05-6:10	22:16 - 6:39	22:12 – 6:18
Exception Reports	8 (OT)[18]	8 (OT), no breaks[19]	No exceptions to report	No exceptions to report	No exceptions to report	No breaks[20]	No breaks[21]
Hours Excluding Breaks	**5h10**	**8 hours**	**6h50**	**6h50**	**6h50**	**8 hours**	**8 hours**

The Time Card Report contains the following relevant notes under "Supervisor Edits" containing edits to the original punch times:

DEL PUN Jan-17 2021 6:23 (Overtime)
DEL PUN Jan-17 2021 21:53 (Overtime)
DEL PUN Jan-18 2021 6:46 (Overtime)

[16] A183, p. 10.
[17] A111, p. 79
[18] A87
[19] A88
[20] A255
[21] A256

Appendix "C" – Pacific Terminal

Saul Bermudes Varela

August 2 – 8, 2020: 57 hours and 50 minutes

	Sun Aug 2	Mon Aug 3	Tues Aug 4	Weds Aug 5	Thurs Aug 6	Fri Aug 7	Sat Aug 8
Breaks at Pacific	0 - 90 minutes per 8 hour shift 0 – 60 minutes per 8 hour shift, depending on position (see testimony of Ms. Kerr, Transcript July 26, 2021, p. 81).						
Time Card Punches[1]	5:46 – 14:08	5:46 – 14:09	13:47 – 2:06	13:45 – 2:06	13:43 – 2:00	13:43 – 2:04	13:49 – 22:07
Time Card: Hours Compensated	8 hours	8 hours	12 hours	12 hours	12 hours	12 hours	8 hours
Hours excluding maximum breaks	6h30	6h30	9h30	9h30	9h30	9h30	6h30

[1] A107 at p. 7. See "Supervisor Edits" for punches for August 2-3, 2020.

Ed Bruschinsky

August 9 – 15, 2020: 60 hours and 30 minutes

	Sun Aug 9	Mon Aug 10	Tues Aug 11	Weds Aug 12	Thurs Aug 13	Fri Aug 14	Sat Aug 15
Breaks at Pacific	0 - 90 minutes per 8 hour shift 0 – 60 minutes per 8 hour shift, depending on position (see testimony of Ms. Kerr, Transcript July 26, 2021, p. 81).						
Time Card Punches[2]	6:07 – 18:10	6:08 – 14:20	6:10 – 18:15	6:13 – 18:18	6:11 – 14:20	6:13 – 18:11	6:13 – 15:55
Time Card: Hours Compensated	12 hrs	8 hrs	12 hrs	12 hrs	8 hrs	12 hrs	12 hrs
Hours excluding maximum breaks	9h30	6h30	9h30	9h30	6h30	9h30	9h30

[2] A107 at pp. 11-13. See "Supervisor Edits" for punches for August 9, 2020.

3

Bryan Chatt

August 9-15, 2020: 64 hours and 30 minutes

	Sun Aug 9	Mon Aug 10	Tues Aug 11	Weds Aug 12	Thurs Aug 13	Fri Aug 14	Sat Aug 15
Breaks at Pacific	0 - 90 minutes per 8 hour shift 0 – 60 minutes per 8 hour shift, depending on position (see testimony of Ms. Kerr, Transcript July 26, 2021, p. 81).						
Time Card Punches[3]	5:59 – 18:19	6:05 – 18:12	5:53 – 18:13	5:57 – 18:13	5:58 – 18:11	6:04 – 18:13	6:01 – 16:24
Time Card: Hours Compensated	12	12	12	12	12	12	12
Hours excluding maximum breaks	9h30	9h30	9h30	9h30	9h30	9h30	7h30

[3] A107 at pp. 20-21. See "Supervisor Edits" for punches for August 13-15.

4

Zachary Twolan

August 2 – 8, 2020: 54 hrs

	Sun Aug 2	Mon Aug 3	Tues Aug 4	Weds Aug 5	Thurs Aug 6	Fri Aug 7	Sat Aug 8
Breaks at Pacific	0 - 90 minutes per 8 hour shift 0 – 60 minutes per 8 hour shift, depending on position (see testimony of Ms. Kerr, Transcript July 26, 2021, p. 81).						
Time Card Punches[4]	13:48 – 21:45	13:51 – 21:48	5:49 – 14:00	5:52 – 14:01	5:54 – 15:08	4:27 – 14:00	5:53 – 18:00
Time Card: Hours Compensated	8 hours	8 hours	8 hours	8 hours	9 hours	10 hrs	12 hrs, +1 (worked through break)
Hours excluding maximum breaks	6h30	6h30	6h30	6h30	7h30	8h30	12

[4] A107 at p. 103. See "Supervisor Edits" for punches for August 4-7.

Appendix "D" – Cascadia Terminal

Esteban Acedo, Cascadia Terminal

August 16-22, 2020: 66 hours and 40 minutes

	Sun Aug 16	Mon Aug 17	Tues Aug 18	Weds Aug 19	Thurs Aug 20	Fri Aug 21	Sat Aug 22
Max breaks at Cascadia	1h10 per 8-hour shift 40 minutes per 4-hour extension						
Time Card Punches[1]	6:55 – 14:29 16:37 – 19:06	2:29 – 3:20 6:52 – 18:27	6:53 – 18:24	6:46 – 18:22	6:45 – 18:24	6:48 – 18:18	6:46 – 14:33
Time Card: Hours Compensated	8 hours; 3 hours	8 hrs 3 hrs 4 hours	12 hours	12 hours	12 hours	12 hours	8 hours
Hours Excluding Breaks	**8h50** (6h20 for regular shift because he left early; plus 2h30 for vessel)	**11 hours** (50 minutes for vessel; 10h10 for regular shift and extension minus breaks)	**10h10**	**10h10**	**10h10**	**10h10**	**6h10**

[1] A103, pp. 1-2. See "Supervisor Edits" for punch times for August 16, 17, and 18.

Michael Bauer, Cascadia Terminal

August 16-22, 2020: 53 hours

	Sun Aug 16	Mon Aug 17	Tues Aug 18	Weds Aug 19	Thurs Aug 20	Fri Aug 21	Sat Aug 22
Max breaks at Cascadia	1h10 per 8-hour shift 40 minutes per 4-hour extension						
Time Card Punches[2]	6:33 – 14:52	6:28 – 18:17	6:26 – 17:56	6:29 – 14:39	6:29 – 18:50	6:30 – 17:52	N/A
Time Card[3] Hours Compensated	8 hours	12 hours	12 hours	8 hours	12 hours	12 hours	N/A
Hours Excluding Breaks	**6h50**	**10 hours**	**9h40**	**6h50**	**10h10**	**9h30**	

[2]

[3] A103, p. 6.

James Brunskill, Cascadia Terminal

August 16-22, 2020: 50 hours and 50 minutes

	Sun Aug 16	Mon Aug 17	Tues Aug 18	Weds Aug 19	Thurs Aug 20	Fri Aug 21	Sat Aug 22
Max breaks at Cascadia	1h10 per 8-hour shift 40 minutes per 4-hour extension						
Time Card Punches[4]	n/a	6:46 – 18:30	6:37 – 18:28	6:45 – 18:17	6:27 – 18:24	6:36 – 18:20	6:41 – 18:09
Time Card[5] Hours Compensated	n/a	12 hrs	12 hrs	12 hours	12 hours	12 hours	12 hours
Hours Excluding Breaks	**n/a**	**9h50**	**10h00**	**9h40**	**10h10**	**9h50**	**9h40**

[4]

[5] A103, p. 6.

Colton Schock, Cascadia Terminal

November 29 – December 5, 2020: 52 hours

	Sun Nov 29	Mon Nov 30	Tues Dec 1	Weds Dec 2	Thurs Dec 3	Fri Dec 4	Sat Dec 5
Max breaks at Cascadia	1h10 per 8-hour shift 40 minutes per 4-hour extension						
Time Card Punches[6]	14:28 – 2:21	14:27 – 2:42	14:33 – 22:54	14:33 – 23:09	14:35 – 2:24	14:28 – 22:56	N/A
Time Card: Hours Compensated	12 hours	12 hours	8 hours	11 hours "AM Boat for Dec 3"	12 hours	8 hours	0 hours
Hours Excluding Breaks	**10h10**	**10h10**	**6h50**	**6h50**	**11h10[7]**	**6h50**	**N/A**

[6] A201, p. 135.

[7] Both the Exception Report and the Time Card Report indicate that on the morning of December 3rd, Mr. Schock came in before his shift for a let-go/tie-up. However, we do not have any punches for this. As a result, I have added only an hour, based on Ms. Rosy Montgomery's testimony that the majority of the time, it takes more than one hour to complete a let-go and tie-up of a vessel.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1938-19
STYLE OF CAUSE:	GRAIN WORKERS' UNION LOCAL 333 ILWU v VITERRA INC.
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	SEPTEMBER 28, 2021
ORDER AND REASONS:	GLEESON J.
DATED:	MAY 31, 2022

APPEARANCES:

William Clements Lily Hassall	FOR THE APPLICANT
Donald J. Jordan, Q.C. Natalia Tzemis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Koskie Glavin Gordon, LLP Vancouver, British Columbia	FOR THE APPLICANT
Harris & Company, LLP Vancouver, British Columbia	FOR THE RESPONDENT