IN THE MATTER OF AN ARBITRATION

BETWEEN:

DOMINION DIAMOND EXATI CORPORATION

(The "Employer")

AND:

PUBLIC SERVICE ALLIANCE OF CANADA

(The "Union")

(Overtime Article 17.01 Grievance)

ARBITRATOR:	RICHARD COLEMAN
FOR THE EMPLOYER:	DREW DEMERSE
FOR THE UNION:	ABUDI AWAYSHEH
DATE OF HEARING:	APRIL 26, 27, 2017
DATE OF AWARD:	MAY 4, 2017

This arbitration concerns a policy grievance filed by the Union alleging that the Employer has misapplied or ignored overtime provisions contained in the collective agreement related to the sharing and distribution of overtime. The clause in question is 17.01:

> Each department has its own system for allocation of overtime. Overtime work shall be distributed as equitably as possible amongst employees who normally perform the work. It is understood, that in most cases the incumbent in a position will be asked to work overtime first. The Employer agrees to discuss overtime allocations at least quarterly with Union representatives in each department.

Parsing the clause into its constituent parts, the Union alleges that the Employer has failed to set up department systems for the allocation of overtime to ensure equitable distribution; that it is not distributing overtime "as equitably as possible amongst employees who normally perform the work"; that it has failed to schedule meetings with Union representatives in each department; and has failed to provide necessary information such as the content of each department's system for allocating overtime and actual allocation numbers.. As part of the allegation that the overtime is not being distributed as equitably as possible, the Union objects to the Employer's consideration of factors such as seniority, discipline, attendance, and performance, and the use of contractors to do work which would otherwise be overtime for a bargaining unit employee. The Employer denies the allegations, contending that it apportions overtime within its management rights, and within the bounds of "as equitably as possible" given the nature of the workplace. It also maintains that the collective agreement does not inhibit the Employer from using contractors rather than bargaining unit members on overtime.

Evidence:

By way of background and uncontested facts, the Employer operates a diamond mine in the Northwest Territories approximately three hundred kilometres northeast of Yellowknife. The location is isolated and far from any communities, requiring workers to be flown in and out for tours on a two weeks on/two weeks off rotation. Bargaining unit employees come from several different communities in the north, and are flown back and forth to the mine directly from those communities. There are four flights a week from Yellowknife, and one flight a week to each of seven smaller communities. As will be seen below, this geographical circumstance is relevant in that it has an effect on the availability of particular workers to perform some assignments of overtime.

There are approximately 400 bargaining unit employees and approximately 700 contractors spread over all shifts. Shifts are twelve hours in duration, on a two and two rotation, which I take to mean two days followed by two nights and so on, for two weeks.

There are five separate mine departments: Process and Asset Optimization, Production, Supply Chain, Infrastructure and Site Services, and Maintenance. As recorded in article 17.01, each department has its own system for the allocation of overtime.

Moving to the issue of overtime, in a pre hearing decision related to disclosure of information and documents, I ordered the Employer to produce a copy and description of the systems employed for the allocation of overtime for each of the Employer's departments as of October 8, 2015; and the total overtime hours distributed for the one year from April 1, 2016 to March 31, 2017, for each department, plus the distribution of overtime between bargaining unit members in the Processing Plant from January 1, 2016. Informationdisclosed as to departmental overtime allocation systems, in Employer Counsel's letter of April 14, 2017, is set out below:

> (a) Mining
> If the employer determines that overtime is required, then the Team Leaders of each crew will post an overtime sign-up sheet in the lineup room where the employees start their shifts. Overtime sign-up sheets are then reviewed by the senior team leader. In allocating overtime credibility, the employer considers a number of criteria, including the qualifications of the applicant (e.g., haul truck driver will not be granted over time to operate a production loader, if not signed off). Individuals are then notified if they have been selected for overtime and their flights are changed accordingly. Team leaders also consider an employee's attendance and discipline record prior to granting overtime.
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> (b) Supply chain (Warehouse)
> If the employer determines that overtime is required, then the team leaders send out an email to the team inquiring if anyone is interested in working overtime. The team leader will then review the responses and allocate the overtime equitably. They utilize seniority and previous OT history as a tool to assist in selecting individuals.
>
> (c) Maintenance
> If the employer determines that overtime is required, then the team leaders of each crew will post an overtime sign-up sheet in the lineup room where the employees start their shifts. Generally, there is more overtime available than employees sign up.
>
> During process plant maintenance shutdowns, when there are not enough maintenance employees to do the overtime work, then the Employer will solicit assistance from other departments. The skillset of those who sign-up is then considered in order to match overtime with employees qualifications.

(d) Processing

If the Employer determines that overtime is required, then the Team Leaders of each crew will post an overtime sign-up sheet in the lineup room where the employees start their shifts. If there is no specification from the requesting Team Leader on what position is being filled (e.g. Technician or Assistant), then there is no minimum requirement for the overtime. In order to distribute overtime as equitably as possible amongst the employees who normally perform the work, the employer will typically first offer overtime to those employees who sign up and who have worked the least number of hours. Team leaders also consider an employee's attendance record, any recent and relevant safety infractions, and the employees discipline record.

(e) Infrastructure and engineering

If the employer determines that overtime is required, then the Team Leaders inform the crew of this during the start of shift and employees can then put their name on a whiteboard in the Team Leaders office if they are interested n working overtime. Overtime is rare in this department.

Blank copies of signup sheets were appended to the above descriptions.

The numbers provided by the Employer were summarized by the Union in several tabular and graphical forms to demonstrate overtime distribution between employees. The Union's Director of Membership Services, Ms. Anne Marie Thistle, was called to explain the Union's calculations, which included the distribution of overtime to employees in the Processing Department from January 1, 2016 to March 31, 2017, which showed graphically that nine of fifty nine employees worked 2498 of the department total of 5780 hours of overtime, representing 43% of all overtime work in the department going to 15% of the workforce.

The Union also called Ivan Landry, the Union's Regional Vice President, who is employed at the mine as a Millwright in the Maintenance Department. Mr. Landry said that in his department, "they ask us first, then the contractor. Other departments are not the same. I do not know how overtime is distributed in other departments". He confirmed that the the Maintenance Department utilizes a sign-up sheet for specific shutdowns where, I understand, the overtime runs for several shifts; but not for independent days and sudden overtime offerings. He said that "for short term overtime they come to us. If we can't do it, they go to a contractor. If a longer period, for example two months, they will use a contractor."

He also explained some of the logistical problems arising for workers residing in the smaller communities with only one flight per week, who cannot be kept for a day or two of overtime, whereas a Yellowknife resident has access to more (four) flights per week. With respect to the Employer applying particular

criteria when assigning overtime, he said he was aware that an employee, Mike Taggart, was denied overtime because of his attendance.

In cross examination Mr. Landry agreed that sometimes where there is an immediate and urgent need to get someone to work overtime, or to backfill a shift. there are no extra workers available. He also agreed that in the Maintenance Department there is more overtime then there are work maintenance workers to do it.

In addition to the above, I was provided with several email strings and other correspondence between the parties and related to overtime, overtime systems and the quarterly meetings.

Submissions:

Union Submission

The Union's submission reiterated the complaints made in their opening. They argue that the overtime systems described in the pre hearing disclosure letter, fail to meet the requirements implied in article 17.01 and include extraneous considerations such as seniority, attendance, discipline and safety record. 17.01 speaks only of equitable distribution, which does not leave room, they say, for qualifiers such as seniority, discipline record, safety or attendance. *McManaman v. Canada (Treasury Board - Correctional Service),* 2012 PSLRB 75, and *Bunyan et al v. Treasury Board (Dept. of Human Resources and Skills Development),* 2007 PSLRB 85 are cited in support of that proposition.

With respect to the quarterly meetings to discuss overtime allocation, it is the Union's interpretation of the wording of article 17.01, that it is the Employer's responsibility to arrange for and schedule quarterly meetings. Hence, the failure to hold such meetings prior to the grievance, is their fault. In that respect I am urged to give a plain and ordinary meaning to the word "agrees" which Counsel argues, makes quarterly meetings both mandatory and the Employer's responsibility. With respect to the purpose of the meetings, Counsel argues that a given quarterly meeting must discuss how overtime has been distributed looking backwards, so as to deal with any imbalances into the next quarter. It it, therefore, the Employer's responsibility, says the Union, to amass sufficient information to make a determination as to whether the overtime has in fact been distributed equitably, which in turn, means that departmental systems for distributing overtime must have a means of tracking which employees have declined offers (*McManaman v. Canada (Treasury Board - Correctional Service), supra).*

In terms of whether departmental overtime is actually distributed equitably, Mr. Awawsheh relied on the unequal distribution shown in the numbers presented by Ms. Thislte in her evidence, as showing sufficiently large discrepancies as to reasonably domonstrate inequitable distribution. Counsel referred to the few members shown as having worked a great deal of overtime, as having been awarded that work "at the expense" of their colleagues. So unequal, he argued, that 9 of 59 employees (15%) got 43.2% of overtime in the Processing department. Counsel referred to the following definition of "equitable", found in *Worthington Pump Division, Dresser Canada Inc. v. I.A.M. Local 1673*, (1989), L.A.C. (4th) 399.

> 10. According to the first sentence, the company must attempt to distribute over time "equitably" and do this "among employees who normally perform the work". "Equitably" means "fairly", it does not necessarily mean "equally". The company must do what is fair. And this fairness must prevail among like employees. If two or more employees normally perform similar work, then it is fair that the overtime done by these employees should be roughly the same…

Finally, they maintain that the language of 17.01, and in particular that overtime opportunities must be "distributed…amongst employees who normally perform the work", necessarily means that work that would represent an overtime opportunity to a bargaining unit employee cannot be offered to a non bargaining unit employee or a contractor's employee.

Employer Submission:

The Employer maintains that the Union has not proved that the Company has violated 17.01 in any manner, in particular, that no direct or reliable evidence has been provided to demonstrate any inequitable distribution of overtime opportunities. In that respect, Counsel argues that the numerical analysis provided by the Union is of no value in determining equitable or inequitable distribution because it does not show any of the circumstances which led to particular offers and assignments, including whether legitimate consideration of skills or availability were determining factors, or whether overtime offers were made and refused. (*Northern Telecom Canada v. U.A.W. Local 1830,* (1983) O.L.A.A. No. 56.) It is also argued that there is no evidence of denial on the basis of seniority, discipline history, performance record or absenteeism record, or safety record; and in any case, there are circumstances were it would be contractually appropriate to consider those factors.

They agree that no quarterly meetings have been held, but maintain that their role is to "agree" to meet when asked to do so by a departmental Union representative, and there is no evidence that such a request has ever been refused. In that respect I am directed to the *Oxford Dictionary* which, in part, defines "agree" as "say that one will do something which has been suggested by another person." On the subject of any obligation to provide the Union with information or documents for quarterly meetings, the

Employer's submission is that "Art. 17.01 only requires that there be discussions. Art. 17.01 does not create a requirement that the Employer provide the Union with anything. Had the parties intended Art. 17.01 to create a disclosure obligation, the parties could have easily captured such an intention in the language of the agreement."

With respect the assignment of work to individuals other than as overtime to bargaining unit employees, Counsel points to a line of jurisprudence standing for the proposition that in the absence of a contracting out clause, it is a management right to determine whether or not to offer work to bargaining unit members as overtime; and that articles such as 17.01, including those containing the words "normally perform the work", do not come into play until a decision is made to have the work done by a bargaining unit employee(s). From the Employer's submission: "Nothing in article 17.01 fetters the employer's right to determine whether in the first place, to assign the "work" to the bargaining unit as "overtime", or not." *University of Guelph v. USW, Local 4120,* [2014] O.L.A.A. No. 102, *B.C. Hydro v. IBEW, Local 258*, 2015 B.C.C.A.A.A. No. 103, *Compwood Products Ltd. v. I.W.A. Local 4-417*, 2000 B.C.C.A.A.A. NO. 225, *Quintette Operating Corp. and U.S.W. Local 9113*, 1998 B.C.C.A.A.A. No. 151.

Finally, Counsel asked that I apply the doctrine of estoppel against the Union's right to challenge the overtime distribution systems in any particular department because those practices have been in place and unchallenged for a number of years.

Analysis and Decisions

(*1) Departmental Overtime Distribution Systems.*

It is apparent on the face of the grievance, that when it was filed, the Union was unaware that there were any formalized departmental overtime distribution systems, and if there were, what they entailed. The Employer's subsequent April 14, 2017 letter in response to the order for disclosure of document, answers these questions. Therefore, there can be no finding that the Employer has failed to set up systems. (I note parenthetically that Mr. Landry testified that the sign up sheets supplied by the Employer for this hearing, while very similar, are not the same as the one he signs in his department. I accept this evidence but conclude that the incompleteness of the disclosure is likely an administrative error and in any case, is immaterial to the evidence that Maintenance too has a sign up sheet and a system for allocating overtime.)

The Union also argues that the overtime systems described in the pre hearing disclosure letter, fail to meet the requirements stated or implied in article 17.01 and instead include extraneous considerations such as seniority, attendance, discipline and safety record. I agree with the Union on this point.

Brown and Beatty, sec. 5:3224 includes the following comment regarding non listed considerations applied to contractual overtime allocation schemes:

> …Furthermore, unless the agreement specifically permits the employer to consider skill and ability in effecting the assignment, choosing the most capable employee will not be justified. Likewise, unless the employer is given that discretion, it will not permit a concern for an employee's stamina or the fact that an employee is on light duties assignment.

Consistent with that line of arbitral thinking, the Arbitrator in *Bunyan et al v. Treasury Board, supra,* concluded that adding modifiers to contractual overtime allocation commitments represented a modification of the collective agreement, and would have to be achieved at the bargaining table. The contract language in that case read, at para. 1:

> Subject to the operational requirements, the Employer shall make every reasonable effort to avoid excessive overtime and to offer overtime work on an equitable basis among readily available qualified employees.

Instead of following the letter of that language, the employer in *Bunyan et al* added a minimum office productivity qualifier. The Arbitrator's conclusions are set out at para. 88:

> 88 To support the proposition that it would be fair to add restrictive provisions to collective agreement provisions such as office production is a slippery slope. For if one can add an arbitrary modifier such as minimum acceptable office productivity to create an entitlement to individual overtime, one could also add such notions as being discipline free, having one or more fully satisfactory appraisals, being at or below the average use of sick leave, etc. As the employer well knows, any such change to existing collective agreement terms can only be achieved at the bargaining table.

McManaman v. Treasury Board, supra, reaches a similar conclusion with respect to applying additional qualifiers. The contract language and conclusions from that case are contained in the following excerpts, paras. 2 and 36:

> 2 Clause 21.10(a) of the collective agreement reads as follows:
>
> 21.10 Assignment of Overtime:
>
> (a) The Employer shall make every reasonable effort:

> (a) to allocate overtime work on an equitable basis among those readily available qualified employees…
>
> 36 The employer did not make every reasonable effort to equitably allocate overtime to the grievor on January 7, 2011. In fact, that day, it deliberately denied him an overtime shift for a reason that had nothing to do with equitability, qualifications, availability, or readiness to work. If the employer wants to have the flexibility to offer overtime on the basis of cost, regardless of any equitable distribution issues that it may create, it must obtain the bargaining agent's agreement and amend the collective agreement. In the meantime, it cannot do so if it results, as in this case, in an employee not being treated in accordance with the terms of the collective agreement.

I concur with these cases. Art. 17.01 speaks of distribution "as equitably as possible amongst *those who normally perform the work*". That does not leave room for qualifiers/modifers such as seniority, discipline record, safety record or attendance. Sufficient skill and qualifications are applicable qualifiers, but not seniority, discipline record, safety record or attendance. I respectfully disagree with the suggestion that there may be particular circumstances where those kinds of consideration may be appropriate and legitimately applied. To deny an overtime opportunity to an employee who otherwise would be amongst those who "normally do the work" because of an attendance problem or disciplinary record, etc., would violate the clear wording of the clause.

In the result, I find that those parts of departmental systems which allow for factors such as an employee's attendance, discipline record, seniority, or safety infractions, contravene art. 17.01 and must be removed; and order the Employer cease and desist from their use in the allocation of overtime.

(2) Quarterly meetings.

The operative line of article 17.02 reads: "The Employer agrees to discuss overtime allocations at least quarterly with Union representatives in each department."

It is common ground that quarterly meetings in each department have not been taking place. But that situation appears to have been remedied in that prior to this hearing, the Company's Business Partner Human Resources, Drew Robertson, wrote to the Union indicating that the Company would like to organize meetings between the Union and "certain departments" to discuss the Company's allocation of overtime. Mr. Robertson's email includes the sentence "the upcoming closure of FY18 Q1 provides us with a great opportunity to develop a revised framework of the overtime allocation discussions."

Nonetheless, there remain issues between the parties as to whose responsibility it is, and has been, to schedule the meetings and what information should be provided.

The Employer argues that no meetings have been taking place because the Union has not asked for meetings. The Union takes the opposite course, arguing that it is the Employer's responsibility to schedule meetings and it has breached the collective agreement by failing to do so. Both have different ideas as to what I should take as the plain and ordinary meaning of the word "agree". The Employer relies on the *Oxford Dictionary* which, in part, defines "agree" as "say that one will do something which has been suggested by another person." The logic would seem to be a presumption that it is up to the Union to bring up overtime distribution concerns; and if the Union representative doesn't ask, there is presumed acceptance of the distribution of overtime, and therefore no need to waste time with a meeting. By contrast, the Union relies on a slightly different definition, taken from *Merriam-Webster's Dictionary*, which in part of its definition of "agree" states: "to consent to as a course of action", which, I take it, they say applies to the concept of quarterly meetings across the mine, and not each departmental meeting in isolation, on the logic that the clause in context represents a requirement for a quarterly audit of overtime for all departments.

The words "the Employer agrees to discuss" read in isolation, are ambiguous in that they could mean that the Employer has agreed to meet if the Union asks, or that the Employer has agreed to arrange for these meetings. The clause does not say "agrees to meet when requested", but nor does it say "will meet" or "agrees to arrange to meet", or words to either effect. Nonetheless, I think that consideration of the rest of the sentence and the words "at least quarterly with the Union" swings the balance toward the latter, and that the obligation to have the meeting is founded on a positive obligation on the Employer.

My reading of the language is that quarterly meetings are mandatory, and that the Union side to those meetings is to be "Union representatives in each department". But "discuss…at least quarterly" describes a positive obligation for the Employer. If no discussions take place, the obligation explicitly expressed in the wording has been violated.

That is not to say, however, that the Union is off the hook. My conclusion is that neither side is entirely correct, and that in context, the responsibility for a lack of meetings in the past rests on both sides. There is no evidence that the Employer has made any attempts to arrange for meetings; but nor is there evidence that either the Union or "Union representatives in each department" have asked for meetings, at least until the current grievance. It appears that until the grievance, the requirement for quarterly meetings was largely ignored by both sides. It is understandable that in the absence of complaint or comment from the Union at the Local or departmental representative level, the Employer did not

understand their distribution of overtime to be a problem, or that there was any objection to to not having quarterly meetings.

Subsequently, however, on September 4, 2016, the Local President, Mr. Ian Kelly, wrote to the Head of Human Resources, Ms. MacPherson stating that "this would be a good time for each department head to have a meeting with one of our Shop Stewards of each department to discuss how overtime will be dispersed fairly for this quarter." It appears that Ms. MacPherson took exception to the part of Mr. Kelly's proposal that implied that the discussion would be prospective, which is to say, how overtime would be dispersed "in advance", and replied that "Article 17 doesn't state that Management must meet with the Union Reps to plan the allocation of OT in advance — that remains well within Management's right, so departments will continue doing this as they have been".

Two issues are raised in this response. The first is whether Ms. MacPherson meant that the quarterly meetings are discretionary and the Employer can choose not to meet. As above, I disagree with this view if indeed that was her intended message, and find that the meetings are mandatory. Second, and perhaps more important looking to the future, the email reveals an issue as to the purpose of the meetings, and whether discussion of overtime allocation would necessarily impose on a management right. In my view, Ms. MacPherson was wrong, to the extent that art. 17.01 does impose on what would otherwise be an unfettered management right, by creating the requirement that there be department based allocation systems which do not conflict with the sentence, "distributed as equitably as possible amongst employees who normally perform the work." It is evident on the face of the clause, that the purpose of quarterly meetings is not exclussively a prospective or retrospective assessment. It is instead, a negotiated mechanism to allow a meaningful audit and assessment of what has taken place against the operative "distributed equitably" requirement. That assessment may or may not lead to a conclusion that overtime allocation in the following quarter could correct an imbalance in the proceeding quarter. In my view, it is reasonably clear on the face of art. 17.01, that the quarterly meetings represent an agreement to create transparency, and not to create a decision making mechanism. There is nothing in the wording of 17.01 that would indicate that the quarterly meetings will necessarily determine who will get future overtime. If the Union is not happy with eventual overtime assignments on the basis that the Employer is not proceeding to correct a perceived past imbalance within the parameters of "as equitably as possible", they can grieve. But that does not erase or minimize the discussion and consulting element of 17.01.

The next issue regarding the quarterly meetings, concerns the information the Employer is obligated to bring to the table to fulfil the purpose of the meetings. In this respect, art. 17.01 appears to have two operative lines. First, that each department will have its own system. For there to be meaningful

discussions and evaluation of distribution, those systems must be known and transparent and cover all overtime. In my view that is implicit in the clause. The form and content of each overtime system is up to the Employer, subject to the requirement that the result will not conflict with the ultimate purpose of the clause to ensure that overtime is distributed as equitably as possible amongst employees who normally perform the work.

The second operative line is "the Employer agrees to discuss overtime allocations…" In my April 11, 2017 pre hearing order that the Employer produce figures with respect to how overtime was distributed amongst individual employees, I stated that the language of 17.01 concerning the purpose of the quarterly meetings—which is to "discuss overtime allocations"—in turn suggests that overtime allocation information will be available to be assessed. In my view, that means information as to how overtime was actually distributed amongst individual employees. There can be no discussion of overtime allocations to assess equitable allocation unless those doing the discussing are aware of the allocations. Mr. Robertson's email of April 13, 2017 is consistent with this conclusion, where he writes "it takes some time for all the necessary reports to be generated…"

In the result, I find that this information is to be made available for the quarterly meetings.

(3) Use of Contractors

In my view, the law is well settled that overtime provisions, unless very explicit in reference to contracting out, cannot serve as a contracting out restriction where no such restriction exists in the collective agreement, as is the case here.

The right of an employer to choose whether or not to have work done via overtime is set out in *University of Guelph v. USW, Local 4120, supra,* at para. 13:

> 13 Similarly, in *Re Falconbridge Nickel Mines Ltd. And Sudbury Mine, Mill and Smelter Workers' Union, Local 598* (1981), 1 L.A.C. (3d) 309 (H.D. Brown), the arbitrator confirmed that there is nothing inappropriate in an employer scheduling its employees in a manner that avoids the additional labour costs associated with the scheduling of overtime. At pages 313-314, the arbitrator stated the following:
>
> > ... there is nothing to prevent the company through its supervision to cancel that work assignment and to rearrange by rescheduling other employees to perform the work during their regular shift so as to avoid the payment of overtime. ***There is nothing inherently wrong for an employer to try to avoid extra labour costs for the economic and efficient operation of the business, which is recognized in art. 4.01*** of this

> collective agreement, which includes the direction of the working forces in that manner. Where, however, the company has determined that overtime is necessary, it must abide by the distribution of such overtime as provided by art. 11.03. ***The pre-condition for the operation of that article, however, is that overtime is required by the company. It is for the company to determine whether work is to be performed and whether overtime is required and an employee cannot simply claim certain work assignments as overtime for the purposes of his group, even though he would normally perform that work during the regular schedule.***
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> [emphasis added]

(For a more recent confirmation and adoption of these principles see Re *Valspar Inc. and U.S.W.A., Local 14049* (2000), 62 C.L.A.S. 305 (Kirkwood).) Moreover, these principles are summarized as follows in *Canadian Labour Arbitration*, third edition, 2005, Donald Brown and David Beatty (Canada Law Book, Inc.) at paragraph 5:3220:

> ... It is generally agreed that unless there are specific provisions in the agreement to the contrary ... ***employees do not have any right to have overtime work assigned to them ... Rather, overtime is perceived as simply one manner in which management may have its work performed.*** Thus, unless the agreement provides otherwise, it is assumed that management is free to have such work performed by reallocating it, or by rescheduling operations, recalling employees, or by instituting temporary transfers or promotions of personnel. Indeed, there appears to be a general consensus that ***management's ability to assign the work in such ways, rather than have it performed on an overtime basis, is not restricted by a provision in the agreement requiring it to distribute overtime equitably amongst the employees who normally perform the work.*** Arbitrators have insisted, however, that the reorganization of work not be carried out arbitrarily or in bad faith. ...
>
> [emphasis added]

Compwood Products Ltd. v. I.W.A. Local 4-417, supra, applies the same approach to facts very similar to the circumstances in the current case:

> 14. In short, the Grievor's understanding was that a contractor was called in to avoid an overtime assignment, a decision he saw as in breach of Article IV(2)(e) of the collective agreement. It reads as follows:
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> > IV(2)(e) [Overtime] will be distributed equitably amongst those who usually perform the work.

The Arbitrator's conclusions are set out in paras. 32 and 33:

> 32. The submission of the union was that the issues raised in the grievance do not involve contracting out, they involve the interpretation and application of the provisions that govern the employer in the making of overtime assignments was work normally performed by members of the maintenance crew, thus requiring that its performance must be assigned to the Grievor equitably.
>
> 33 However, I am not able to find in that language a restriction on the right of the employer to assign work to a contractor. In my view *the provision at issue bespeaks a mutual intention to require the employer to distribute overtime assignments in a particular way. That provision presupposes that the employer has made a decision to have work performed as an overtime assignment. It does not restrict the retained right of the employer to elect to have the work performed in some other fashion, including a contracting out that does not cause the layoff of affected employees…*
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> *(emphasis added)*

In the result, I think it is well settled in law, that the use of non bargaining unit individuals instead of bargaining unit employees "who normally perform the work", to do work which would otherwise be overtime for the bargaining unit employees, is within management's rights. Therefore, the use of non bargaining unit individuals does not violate art. 17.01.

(4) Has there been an inequitable distribution of overtime?

The final issue is whether overtime has in fact been inequitably distributed. I agree with the Employer that there is insufficient evidence upon which to make a finding that overtime has been inequitably distributed. I concur with the working definition of "equitably" set out in *Worthington Pump Division, supra,* at para. 10, and in particular, the sentences:

> 10 According to the first sentence, the company must attempt to distribute overtime "equitably" and do this "among employees who normally perform the work". "Equitably" means "fairly", it does not necessarily mean "equally". The company must do what is fair. And this fairness must prevail among like employees…

The inequality in distribution shown by the gross numbers is suspicious, but suspicion is not fact, and it does not consitute proof of an inequitable distribution. There are too many other variables which could explain the differences per employee, including whether or not employees have declined overtime opportunities or simply been unavailable as would be the case if they were on days off, or were unqualified.

Similarly, while the fact that several departmental policies have contained inappropriate considerations, there is insufficient evidence that any have been applied to deny overtime to this point. I agree with Employer's Counsel that the example provided by Mr. Landry regarding an employee allegedly being denied an overtime opportunity because of an attendance problem, is heresay and insufficient to found a claim. No reason was given as to why the affected employee was not brought to the hearing to give evidence on his own behalf.

Summary:

I will say that while it is apparent that the issue of overtime allocation appears to have been a long simmering issue, particularly with respect to the assignment of what would otherwise be bargaining unit overtime, to contractors, I detected no bad faith on anyone's part, nor any attempt to short change or artificially reduce overtime opportunities. For example, Mr. Landry frankly testified that in his department, that "they ask us first, and then the contractor". My conclusion at the end of the hearing, and having heard the evidence and submissions, is that honest disagreement combined with misunderstanding as to both facts and legal rights, has led to the current dispute.

By way of summary, I find:

(1) Quarterly department meetings pursuant to art. 17.01 are mandatory.
(2) The Employer is obligated to provide clear and transparent overtime systems for each department, and is to do so for the set of meetings arising from Mr. Robertson's April 20, 2017 email.
(3) The Employer is to immediately cease and desist from using additional and not listed criteria such as seniority, discipline, disciplinary record, safety record, employee's attendance, in the allocation of overtime.
(4) The Employer is entitled to use contractors and non bargaining unit staff in place of bargaining unit staff "who normally perform the work", for valid business reasons.
(5) The Union has failed to prove that actual overtime allocation to this point has violated article 17.01.

It is so ordered.

Dated in Vancouver, B.C., this 4th day of May, 2017.

Richard Coleman, Arbitrator