IN THE MATTER OF AN ARBITRATION

BETWEEN:

Rio Tinto Alcan Inc.

(The "Company")

AND:

UNIFOR, Local 2301

(The "Union")

(Mandatory Overtime Policy Grievance)

ARBITRATOR:	RICHARD COLEMAN
FOR THE EMPLOYER:	KEVIN O'NEILL, Q.C.
FOR THE UNION:	THEODORE C. ARSENAULT
DATES OF HEARING:	August 10, 11, 2016
DATE OF AWARD:	September 3d, 2016

This arbitration decides a policy grievance filed by the Union with respect to the Company's right to assign mandatory overtime to wharf workers under the provisions of the current collective agreement. The circumstances leading to the dispute arose in the fall of 2015 when the Company began to assign mandatory overtime related to the loading and unloading of ships at its new aluminum smelter in Kitimat. The Union takes the position that the chief and determining contractual obligation is contained in article 18, Overtime, which contains a statement of general policy that overtime "is to be kept to a minimum" plus a contractual commitment that overtime "shall be voluntary" with two exceptions which are not relevant to the current dispute. The Company has a different view, and maintains that the operative clause is article 17.05 (c)(iv) which, it says, explicitly permits the mandatory assignment of work outside a worker's regular shift hours, to "allow for continuous loading and unloading ships". Aside but connected to the contract interpretation dispute, the Union is concerned that mandatory overtime, which is served in extra twelve hour shifts on employees' regular days off, is having significant negative effects on the personal lives of its members; whereas the Company is concerned with the very high cost of delays in loading ships, including the current demurrage fee running at $200,000 per day, and is of the view that article 17.05(c)(iv) represents a contractually legitimate tool to avoid over-staffing wharf crews since expanded numbers—and hence the overtime—are usually only necessary in the second half of each month when transport ships require loading.

The Union seeks a declaratory opinion that the Company has violated the collective agreement, and an accompanying cease and desist order.

The two articles read as follows:

> 17.05
> (c) Shift workers will not normally be required to work on hours other than the scheduled hours for the shifts on which they are employed, unless it is for one of the following reasons:
>
> (i) Because of breakdown of plant or machinery affecting production
>
> (ii) Because of an emergency necessitating the carrying out of urgent repairs.
>
> (iii) Because they provide essential services for continuous operations
>
> (iv) To allow for continuous operations for the purpose of loading or unloading ships.
>
> 18.01
> The Company's policy is to keep overtime to a minimum. Where there is a recurring amount of overtime work in a department such overtime shall be

provided divided as equally as possible among the employees in the department who would normally perform such work. The sole purpose of this section is to provide for the distribution of overtime in an equitable and sensible manner.

18.02
Overtime shall be voluntary. However employees other than production workers may be required to work overtime for one or more of the following reasons:

(a) Because of an emergency necessitating the carrying out of urgent repairs, or providing emergency services in Kemano.

(b) Because they are required to provide essential services ancillary to production operations to ensure the non-interruption or resumption of continuous operations.

Facts and History:

There is a certain amount of relevant history to both the noted contract provisions and the shipping of material in and out of the Company's Kitimat operations.

The Company has operated an aluminum smelter at Kitimat B.C., for a number of decades. Until recently, ships came and went from a single wharf, known as Terminal A which has rail connections to the smelter and to the North American railway grid. Raw material in the form of green coke, pitch and alumina was brought in by ship; and finished aluminum ingots were shipped to a world market by the same method of transport. Generally, the shipping of aluminum product required no more than a single ship per month, which arrived in the second half of the month within an anticipated span of days. The smelter's yearly production was approximately 270,000 metric tons, 90% of which was transported to world markets by ship, with the remaining 10% sent out by rail or truck transport. There was no evidence as to the frequency of ships carrying raw materials needing offloading.

Aluminium product was transported from smelter to wharf by rail, which had specific rail crews separate from the wharf crews. There were eight employees per shift on the wharf, working eight hour shifts five days per week. It is not clear in the evidence whether this was a 24 hour operation, but there was at least a day and a graveyard shift, and when a ship required loading, the graveyard shift switched to days to accomplish the task or a second day shift crew would be called in, either arrangement leading to a double complement. When Union witness, Ed Abreu, current Chairperson of the Local's Grievance Committee, went to work on the wharf crew in 1994, it was his experience that all overtime was done on a volunteer basis, but when necessary, the Company supplemented the crew with on-call casual employees.

In 1996 the situation changed somewhat with the negotiation of a twelve hour, seven day a week shift pattern termed a "compressed work week", to replace the old eight hour five day a week pattern. The

new shift pattern was codified in Letter of Understanding 17-LU-#8 titled "Twelve Hour Shift - Wharf". Wharf workers were divided into four shifts, A B C and D, and began to work the four days on/four days off pattern known as shift schedule #61. At the same time all existing casuals were hired as regular employees, necessary to bring the employee complement up to sufficient levels to staff the new shift pattern. That arrangement carried on for a number of years, until 2012, with overtime covered by volunteers, and additional staffing provided with temporary employees—a different category than casual. During that time, temporarily absent workers were replaced from the temp. pool. Mr. Abreu gave his own experience as an example, testifying that when he began a full time Union leave in 2004, his position on the wharf crew was filled by a temporary employee. According to Mr. Abreu, there was no mandatory overtime during this period, evidence which was not contested.

In 2012 the Company began construction of a new smelter incorporating new technology and new processes. In the same time frame they purchased and put into operation a second wharf, known as Terminal B, the intent being to use the old Terminal A to receive and off-load incoming raw material arriving by ship and load finished aluminum product going out by rail and truck; and Terminal B to load product going out by ship. Metal going from the smelter to Terminal A is unloaded onto the wharf and then loaded into box cars in a fairly continuous operation throughout each month. Rail crews bring the product to Terminal A and take away the box cars, but they do not currently unload the box cars.

Terminal B is removed from Terminal A and is not served by rail, making it necessary to transport material to and from the port via road transport where it is offloaded onto the dock and then loaded onto ships, referred to as "metal vessels". This in turn has required new transport equipment, which came in the form of a tractor trailer with a flatbed, called the "Ottawa", and two transports called "Superpacks" or SPTVs. Both types of transports are designed to move on roads. The SPTVs are designed to be able to pick up loads of product assembled on special pallets at the smelter at the end of the production line (casting), and efficiently transport the pallets to either wharf. The Ottawa is used to transport sheets of aluminum and what are called "sows" between casting and Terminals A and B.

Also in 2012, coincident with the start of construction of the new smelter and the phasing out of the old operation, the work schedule for wharf employees was changed from shift #61 to shift #34, which retained twelve hour days but replaced the four and four schedule with a pattern which, as I understand it, provided only two consecutive days off, the objective being to have everyone in the smelter on the same shift. At the same time, and as happened with the casuals in 1996, all temporary workers in the then existing temp pool, smelter-wide, were made permanent employees. For reasons that were not put in evidence, they were not replaced with a new temp. pool.

Also coincident with the start of construction of the new smelter, the parties agreed that the Company could hire "transition employees" to supplement smelter staffing during the transition to the new smelter

operation, but none of the new transition employees were assigned to the wharf. There is also agreement for the use of contractors during the transition period which would otherwise contravene sections of the collective agreement. By agreement, the transition period is to end in June, 2017 at a point defined as "steady state".

Post 2012, wharf employees have continued to be divided, at least nominally, into four crews of twelve, but it is common ground that with no temporary employees available to fill temporary absences, the actual number of bodies on each shift is usually less than twelve, sometimes down to nine. It is also common ground that some of the remaining workers are medically limited from working overtime.

The new smelter went into production in June 2015, with the expectation that all parts would not be completed and fully commissioned until June 2017. By the fall of 2015, production was up to 275,000 tons per year. By August 2016 it was at 425,000 tons and is expected to rise to 470,000 tons. As already noted, in the past, 90% of production left the smelter by ship. By the summer of 2016 and the time of this hearing, that percentage had shifted significantly with a growth in the North American market, to 40% now being shipped by rail. There is some expectation that by 2020, the North American market will account for 90% of shipments, most or all of which will out by rail or truck.

Mr. Abreu testified that problems with mandatory overtime on the wharf began in September 2015, when the new smelter began to produce increased amounts of product. In his observation the number of workers required to load a metal vessel amounted to almost double the number of workers on their regular shifts at the time; and there were insufficient volunteers. He blamed the shortage of volunteers as mainly due to the advent of shift pattern #34. He explained that the previous four and four pattern allowed a worker to give up a single day of their days off, knowing that they still had three more days for personal and family affairs. But with a two on and two off pattern, the loss of a full day disrupted days off and personal lives to too great an extent. No overtime records for October and November were provided, but the inference is that by that time, mandatory overtime had become quite significant. Mr. Abreu testified that the Union was being told by its members that the situation had left their personal lives "in shambles", and that some were very upset. He added that at the time, and for a number of reasons including a preponderance of new and untrained workers, it was taking five days to load a vessel rather than three days which was the goal.

Unfortunately, at the time, one of the wharf crew supervisors reacted to the shortage of volunteers by mistakenly leaving "overtime exemption" forms in the lunch room, allowing wharf employees to decide whether they wished to continue to be offered overtime or not, the form containing the options of "no longer wish to work overtime" and "wish to resume working overtime". The Company concedes that this was not an appropriate form for the occasion and was an error, but the number of employees indicating

they no longer wished to work overtime at all, nonetheless demonstrated a significant problem, leading the Company to post the following notice:

- We are having trouble filling overtime opportunities
  - Employees removing names from call in list
  - phones not being answered when calling for overtime
- We need to ensure continuous operations, loading and unloading ships
- Supervisors will identify overtime needs on the overtime planning sheets
- Please sign up by the cut off date listed on the sheet
- The employee with the lowest overtime hours on the cut off date will be the "winner" of the opportunity
- If there are no employees signed up on the cut off date, we will be assigning the employees with the lowest overtime hours
- Once an employee has signed up for, or been assigned to, an overtime shift, it will be treated as a regular shift-any absences must be substantiated
- We're trying to give as much notice as possible to those who may be assigned to an overtime shift. If you have any suggestions to further improve the process, please let us know!
- Note that we have not removed names from the overtime list, as the collective nature of the requests is an illegal job action—we'll address this through the union.

In the course of the hearing I was provided with the "overtime planning sheets" referred to in the fifth bullet, for each month from December 2015 to the date of the hearing. In is my understanding that the sheets go up at the beginning of each month, one for each crew for working days on which overtime is expected to be required. Among other details, each sheet records the total workforce required for the day, the workforce on shift, a space for volunteers "interested in overtime", a separate space for "employees assigned to overtime (hopefully not necessary!!!)" and a breakdown of where the workforce will be required, listing Ottawa tractor, Superpack Transport, rail loading/unloading, metal vessel, alumina vessel, pitch vessel, and "other".

In his evidence, Mr. Abreu was taken to the sheet for "D" shift for December 24, 2015, which shows a workforce requirement of 16, workforce on shift of 9, and five volunteers, one of whom was then assigned elsewhere, leaving three to be assigned on a mandatory basis. Among the specific assignments, the form lists one Ottawa Tractor operator, and two Superpack Transport operators.

Mr. Abreu testified that by the fall of 2015 the Company was shipping the equivalent of 275,000 tons per year, and that they were dealing with two ships per month. He said the the Union took their concerns about overtime to management, suggesting that the Company hire more transition workers or use more

contractors. The Company declined to use transition workers, but proposed hiring two additional contractors to work on the wharf "on the hooks". At the time there were already contract employees loading boxcars and unloading carbon blocks at Terminal A. The Company did in fact retain additional contractors at Terminal B, "on the hooks", and sometime later, another two to operate the Ottawa and the Superpacks while a metal vessel is being loaded, and two more on the vessel to assist the hatch tender. All of which, by July, amounted to ten contractors, and a dramatically reduced need for employees to work overtime with most of those slots filled with volunteers. Documents reveal that in July, 2016, there was only one occasion for mandatory overtime. The sheet for July 19 records 10 employees required, 6 on shift. Of the short fall, two slots were filled with volunteers.

By way of a longer term solution, it was Mr. Abreu's opinion that stock can be stored on the wharfs, which was once the practice. But his main contention is that the Company is chronically under staffed. In any case, witnesses for both sides acknowledged that in the current arrangement of using Terminal B for outgoing metal ships, the loading of the vessel sometimes has to stop while the wharf crew waits for sufficient stock to come via SPTV.

The sole Company witness was Ms. Galbavy, who has been the Plant Services Coordinator in charge of several departments including shipping and the wharf, since July 2014.

Ms. Galbavy testified that before October 2015, overtime had been voluntary, but in September of 2015 a metal and an alumina vessel came in at the same time and they had trouble dealing with both. In October it was expected that one vessel would arrive sometime between the 10th and 15th, and a second between the 26th and the 31st. All of which led her to seek advice from the Company's Labour Relations department which referred her to article 17.05 (iv) which she understood to be contractual recognition of mandatory overtime for the loading and unloading of ships. In October she said they continued to rely on volunteers, but it became apparent at the end of the month that they were still short of the numbers required, and faced a $200,000 per day demurrage when the vessel had to remain in port for more than three days. In October it had taken 5 days to load the metal vessel.

As I understand Ms. Galbavy's testimony, when operating smoothly, the Company expects that it will take three days to load a vessel, with a target of 42,000 tons every 24 hours. With respect to getting the product to the wharf, she said that an SPTV is capable of delivering a load comprised of a pallet containing 24 bundles of aluminum double stacked, which is pre assembled in castings. Once a pallet is prepared it must come out of the pots building, otherwise production must be shut down.

Asked if there is storage space to place finished product at castings, Ms. Galbavy conceded there is a small area where theoretically a small amount of aluminum product could be stored, but that is not a viable option since metal to fill an order is still being produced while the ship is in port, making the

transport cycle a continuous exercise, and indeed, loading has on occasion been halted to await an SPTV delivery. She did not address the possibility of storage on the wharf itself. But she did say that the end of 2015 the Company made a decision to reduce inventory. To do so they retained contractors who have been assigned to load box cars at Terminal A, and for the time being have increased the use of road transport, currently using both contractors and Company employees to load the trucks.

Also since the dispute arose, she said that the Company has increased the competence of wharf crew through training, which, in cross examination, she agreed was initially delayed; and they have modified how they load ships, including the use of shipwright contractors to oversee how the ship is loaded thereby lowering the number of employees in the ship.

Ms. Galbavy testified that when they started to use mandatory overtime, individuals with the lowest accumulation of overtime hours were assigned, which would be in accordance with the equitable distribution requirement codified in art. 18.01. But in February 2016 when it became apparent that the same people were being assigned, they looked at overtime accumulation over a longer period before making assignments. Shortly before the arbitration hearing, she said she met with Union officials and as a result changed the monthly process such that when the form is put on the notice board, it already contains a list of who will be assigned mandatory overtime if no one volunteers, as opposed to letting volunteers come forward first.

She summarized the conundrum faced by the Company in that they do not want to continue to use mandatory overtime, but at the same time they do not wish to staff to the maximum number necessary to unload a ship because there will be no work for those people for the rest of the month. With respect to the option of using a temp. pool, she said that to her knowledge, no area of the plant uses temps, and in any case, the Company does not want to use temps on the wharf because there is no guarantee that after training, they would get the same people back.

Looking to the future, she said the Company is engaged in trying to determine what the market for aluminum will look like in 2017. The growth of the North American market has been significant, and now accounts for 40% of the Company's output, and is expected to grow considerably higher, with a potential to reach 90% in coming years. It is has been at 115,000 tons and they are "now looking at 170,000 tons", although the time frame is not clear in the evidence before me. All of which has significance to staffing requirements in that less international shipping will mean less ships to load and less work in that area. They also expect that there will be efficiencies, in that the objective is to have all of the wharf crew cross trained and able to move between jobs, thereby making the loading faster.

In cross examination she conceded that temps could obviate the need for mandatory overtime, but need to be trained. She repeated her concern that once trained, temps who are not needed for the less busy

part of the month will either leave Rio Tinto's employment or go to another area of the plant and there is no guarantee that they will come back to the wharf. She is also of the understanding that even temps have to be full time. She also agreed that it was a management decision not to replace sick leave or union leave. She concurred with the Union's figures, that eleven workers are directly required in the loading of a vessel, and that at the current time four places are being filled with contractors; and overall, there are ten contractors at work on transport.

History of collective agreement articles.

It is confusing at the best of times to trace changes in contract language through multiple collective agreements, a confusion compounded is this case by the expanse of time extending over sixty years and many rounds of bargaining, continuing renumbering of articles and reorganizing of contract provisions, with no extrinsic evidence other than a single unilateral management submission to a conciliation board in 1966. What follows is what I have been able to discern from the pages of past collective agreements put into evidence.

The parties agreement that overtime will be kept to a minimum, and that whatever overtime is worked will be on a volunteer basis with limited exceptions, has been in place for over sixty years. Since at least 1954, and with only minor changes in wording, there have been clauses which state that "the Company's policy is to keep overtime to a minimum" and that overtime will be "on a voluntary basis" except in defined situations. In 1954 there were no exceptions. In the 1957 the defined exception was "in the case of scheduled overtime".

In the same time frame, the contact also contained an article similar to the current 17.05. Article 22.07 first appeared in the 1957 collective agreement:

> 22.07 Continuous shift workers and noncontinuous shift workers will not normally be required to work on their scheduled rest days, or during other than the scheduled hours for the shifts on which they are normally employed, unless it is for one of the following reasons:
>
> (a) Because of a breakdown of plant or machinery affecting production.
> (b) Because of an emergency necessitating the carrying out of urgent repairs, continuance of essential services, or the maintenance of minimum operations on production, or.
> (c) Because they are temporarily employed on day work.

The likely explanation for art. 22.07 appears in the Company's submission to a conciliation board the same year, which contained the following statements:

> The company's position is simply that at the present stage of plant development it is impossible to permanently place the dockworkers on a rotating shift basis, as is done in the case of our continuous operations. Until the volume of shipping is sufficiently large to warrant this being done there is no alternative but for our dockworkers to alternate between day work and shift work, and those who are not prepared to accept this might better transfer to steady day jobs or the steady continuous operations jobs. The Company believes that the Union and the employees concerned fully appreciate the force of this.
>
> Another point on which some disagreement still exists, are the statements… that day workers, continuous shift workers, and noncontinuous shift workers will not normally be required to work on their days off or during other than the scheduled hours for the shifts on which they are normally employed, except in the case of a breakdown of plant or machinery affecting production, and emergency necessitating the carrying out of urgent repairs, the continuance of essential services or the maintenance of minimum operations on production
>
> Disagreement arises from the fact that the Union wishes all overtime to be on a strictly voluntary basis, whereas the Company maintains that the Company should be able to require an employee to work overtime in the case of an emergency. The Union is prepared to admit that under certain circumstances the Company has a right to expect men to report for work in their leisure time, hence, there is virtually no basic difference between us. The problem as the Company sees it, is a fear that the Company might abuse the right to requirement to work overtime in the case of emergency by classifying every instance as such. There are varying degrees of "emergency", and the Company has no intention of asking people to work against their will, except in a situation where the work is necessary to keep the plant running, and only then if no available volunteer who can adequately perform the work is (sic) available.

This likely explanation for the origin of the language in art. 22.07 would also explain how the parties came to address the matter of what is essentially mandatory overtime, in an hours of work clause rather than in the overtime clause. It also indicates that the overtime article and what I will call for convenience the abnormal hours article, both came to apply to the same situation.

Moving on with collective agreement history, the wording closest to the current language respecting the voluntary component of overtime appears to have first appeared in 1960 in the then voluntary overtime article 18.03, and in large part replicates the 1957 hours-of-work clause, 22.07, other than the exception related to temporary employment in day work, which solidified the connection between the abnormal hours clause and overtime:

18.03 Overtime will be voluntary. However, employees other than production workers may be required to work overtime on a scheduled rest day for purposes of one or more of the following reasons:

(a) Because of a breakdown of plant or machinery affecting production.
(b) Because of an emergency necessitating the carrying out of urgent repairs.
(c) Because they are required to provide essential services ancillary to production operations to ensure the non-interruption of continuous operations.

Even after some wording changes to 22.07 (which became 23.07 in 1960), the abnormal hours article and the voluntary overtime article continued to carry the same exceptions. The 1960 art. 23.07 contained the following list of exemptions:

(a) Because of a breakdown of plant or machinery affecting production.
(b) Because of an emergency necessitating the carrying out of urgent repairs,
(c) Because they provide essential services for continuous operations.
(d) Because they are temporarily employed on day work.

By 1966, the voluntary overtime article (renumbered as article 19.02) had been revised to eliminate (a) as above ("(a) because of a breakdown of plant or machinery affecting production"), but two additional exceptions were added, including the first explicit reference to loading and unloading vessels in the new (d):

(c) To maintain normal services to the Kemano community.
(d) To allow for continuous operations for the purpose of loading and unloading vessels at the wharf.

As with previous years, the voluntary overtime clause (now 19.02) and abnormal hours clauses (now 18.03(c), continued to refer to virtually the same exceptions. In the 1966 collective agreement the newly numbered 18.06(c) abnormal hours clause (in the immediately previous contract covered in art. 23.07) dropped the old 23.07(d) (reference to "temporarily employed on day work") and added virtually the same ship loading/unloading exception that appeared the same year in the 19.02(d) overtime clause, in only slightly different language. (d) became: "To allow for continuous operations for the purpose of loading and unloading *ships*" as compared to "*vessels at the wharf*". There is no obvious difference between "ships" and "vessels at the wharf". There is no extrinsic evidence to explain either the reasoning for the addition of "loading and unloading vessels at the wharf" as an exception to voluntary overtime,

nor with respect to why the same exemption appears in both the abnormal hours of work article (18.06(c)(iv) and the voluntary overtime clause, 19.02(d).

Which takes me to the current, 2012-2017 collective agreement, where the wording from the 1966 abnormal hours article, 18.06(c), appears unchanged in the current 17.05(c). The exemptions in the voluntary overtime article (now 18.02), however, have been revised. The previous (a) and (c) have been reworked into a single (a), covering emergencies related to urgent repairs and Kemano, (b) remains the same, but the old (d) and reference to loading and unloading of vessels at the wharf, no longer appears. I have no evidence, documentary or otherwise, as to when or why this change was made, other than that the revisions and the removal of the "loading and unloading vessels at the wharf" exception from the voluntary overtime clause, occurred sometime in the forty-six years between 1966 and 2012.

Submissions:

Union Submission:

The Union contends that mandatory overtime should not be a "normal" or routine occurrence, as both a general principle and under the provisions of the collective agreement, which, it is argued, treats mandatory overtime as an exceptional occurrence by inference arising from the contractual commitment that overtime will be minimal and largely voluntary. Leading from those propositions, the Union argues that the chief cause of the imposition of significant amounts of mandatory overtime on the wharfs has arisen because the Company has failed in its duty to properly staff the operation, which counsel terms is the real core issue in dispute. Mr. Arsenault went through the overtime sheets for each month since December, 2015, noting a stated need at the end of each month for almost double the number of bodies normally scheduled for a particular shift, leading to the contention that the Company is in fact understaffed by almost a dozen workers.

The Union further argued that the current use of contractors is a bandaid solution which will not address the problem after June 2017 when the new smelter will be deemed in "steady state", after which the use of contractors will breach the collective agreement.

The Union refers to *Zellstoff Celgar Ltd v. PPWC, Local 1* [2016] B.C.C.A.A.A. No. 27 as illustrative of the application of the applicable principles of contract interpretation. More specifically addressing the issue of excessive compulsory overtime, reliance is made on the analyses and conclusions in *Unisource Canada Inc. v. Communications Energy and Paperworkers Union, Local 539* [2005] A.G.A.A. No. 123, 84 C.L.A.S. 287 (Ponak), *Simplot Canada Ltd. v. United Steelworkers of America, Local 7184* [2000] M.G.A.D. No. 25, 60 C.C.A.S. 212, and *Quebec & Ontario Paper Co. v. Commonwealth Press Union, Local 101* [1992] O.L.A.A. No. 11, 24 L.A.C. (4th) 163, for the proposition that, with appropriate contract provisions, an employer has a responsibility to take steps to retain normal or regular work schedules and to minimize overtime.

As a secondary point, the Union argues that the Ottawa and SPTV transports are not properly included in the art. 17.05(c)(iv) ship loading and unloading exception, because they represent transport work similar to rail crews, and are not directly involved with loading and unloading.

With respect to remedy, the Union seeks a declaration that the Company is in violation of articles 17.05(c), 18.01 and 18.02, together with a cease and desist order.

Company Submission:
The Company's position is that the list of exceptions in article 17.05(c) represents a specific refinement to the contractual obligations set out in article 18 and therefore supersedes article 18. In particular, they argue that article 18 requirements codifying a policy that overtime will be kept to a minimum and voluntary, must be examined in context including the clear and unambiguous wording of article 17.05(c)(iv) which, it says, establishes that what will amount to overtime on the wharf for the purpose listed, has been formally recognized as a normal occurrence. That in turn, it is argued, distinguishes the current matter from the cases cited by the Union, all of which dealt with emergency and specifically non-normal situations and address disputes over whether the employer in each case had perpetrated non-normal hours of work. Whereas in the instant case, the fact of hours outside of the employee's regular ship is formally recognized as "normal".

Mr. O'Neil maintains that the Company does not want to have mandatory overtime but it has been necessary to impose its right to assign the work in that manner given a number of factors, including the fact that loading metal vessels only occurs in the latter part of each month, requiring a spike in workforce not needed for the rest of the month. Counsel also argues that for the period the Union is objecting to, when mandatory overtime was indeed high, the Company was dealing with new processes, new equipment and new requirements which were evolving, plus a necessity to train new wharf workers on the new equipment and with new processes. It is further argued that the use of temporary workers is not now, nor will it be, a viable option because temporary employees will automatically become seniority rated employees after 1500 hours or work. All of which, it is argued, points to the reasonableness of the decision to use mandatory overtime.

As an alternative to all of the above, the Company maintains that they have in fact kept overtime to a minimum and have continued to reduce overtime requirements up to the date of this hearing, as evidenced by declining overtime figures for recent months.

With respect to the the Ottawa and Superpacks (SPTV), the Company argues that operators of both transports are part of the wharf crew because they are a necessary part of the loading and unloading process given their critical part in keeping the loading continuous; and even if not covered by clause

17.05(c)(iv), the operation of both transports would fall into exception (c): "because they provide essential services for continuous operations" in that it is necessary to constantly remove product out of casting to avoid a shut down.

The Company relies on *Rio Tinto Alcan v. CAW, Local 2301[*2011) (Steeves) (Pavao Grievances), *Alcan Smelters & Chemicals Ltd. and C.A.W. , Local 2301*, [2001] 65 C.L.A.S. 61, 97 L.A.C. (4th) 340 (Hope), *Alcan Smelters & Chemicals Ltd. and C.A.W., Local 2301* [2003] B.C.C.A.A.A. No. 303 (Kemano Shift) (Hope), as representing similar management decisions which have been found to be reasonable; and *Wire Rope Industries Ltd. and United Steelworkers, Local 3910, Vernon (City) and Vernon Firefighters Assn. Local 1517* (1988), 14 C.L.A.S. 30, *Vancouver (City) and Vancouver Firefighter's Union, Local 18* (1995), 52 L.A.C. (4th) 89 as confirming "traditional rights of management to schedule and reschedule the workforce" (see *Vancouver City* p. 96). Counsel referred to the following paragraph from *Alcan Smelters & Chemicals and Canadian Association of Smelter and Allied Workers, Local 1*, [1979] B.C.C.A.A.A. No. 6 as representative of its position:

> 46. The right to manage and direct the work-force is fundamental to management and is jealously guarded. It is a clear principle of arbitral jurisprudence that any limitation on that right must exist in clear language under the collective agreement.

And from *British Columbia Transit v. Independent Canadian Transit Union, Local 3*, [1993] B.C.C.A.A.A. No. 405, para 17:

> 71… Where a vital management right is concerned, in the absence of bad faith it takes clear language or other clear evidence to support an assertion that management has bargained a right away; see *Re Wire rope industries Limited and United Steelworkers*…

Dunkley Lumber Ltd. v. Industrial Wood and Allied Workers of Canada, Local 1-424 [2004], B.C.C.A.A.A. No. 28, *Northstar Lumber and United Steelworkers of America, Local 1-424*, (2008) 93 C.L.A.S. 391 are cited as examples where the above principles have been applied to management decisions regarding assignments of work.

Analysis and Decision.

The main interpretive issues in contention are the interpretation of clause 17.05(c)(iv) and the relevance and impact of article 18, in particular the stated contractual commitment that overtime will be kept to a minimum and should be voluntary other than when required in the listed exceptional circumstances.

It is useful to set out the applicable principles of contract interpretation (established in *Pacific Press v. Graphic Communication International Union, Local 25-C* (1995) B.C.C.A.A.A. No. 637 (Bird) at para. 27, cited in *Zellstoff Celgar Ltd., supra:*

1. The object of interpretation is to discover the mutual intention of the parties.
2. The primary resource for an interpretation is the collective agreement.
3. Extrinsic evidence (evidence outside the official record of agreement, being the written collective agreement itself) is only helpful when it reveals the mutual intention.
4. Extrinsic evidence may clarify but not contradict a collective agreement.
5. A very important promise is likely to be clearly and unequivocally expressed.
6. In construing two provisions a harmonious interpretation is preferred rather than one which places them in conflict.
7. All clauses and words in a collective agreement should be given meaning, if possible.
8. Where an agreement uses different words one presumes that the parties intended different meanings.
9. Ordinarily words in a collective agreement should be given their plain meaning.
10. Parties are presumed to know about relevant jurisprudence.

Having regard to principles 2., 5. and 9. I find that the wording in clause 17.05(c)(iv) is clear in its wording and therefore its intent, that it will be considered normal for shift workers "required" for "continuous operations for the purpose of loading or unloading ships" to be asked to work hours other than their own. In the context of the history of this collective agreement, that necessarily means mandatory overtime. There is really no other reasonable interpretation to be had from the clear and unambiguous, plain meaning of the words "not normally" combined with "other than". "Normally" generally and in common usage means in the normal course of events and not abnormal; "not" normally means the opposite. "Not normally unless for the following reasons", although a double negative, is still clear in expressing the drafters' intent that the "following reasons" are the reverse of "not normal", which is by definition, "normal". By inserting those words into their collective agreement forty-six years ago, the parties must be seen as expressing an intention that, while it would not be normal for most shift workers to have to work hours other than their regular hours, they anticipated circumstances at the smelter, including the loading and unloading of ships, where that situation would indeed be normal. The source of that interpretation comes directly from the collective agreement, it is expressed in clear and unequivocally language which must be given its plain meaning. In the result, I reject the Union's

proposition that mandatory overtime should not be a "normal" occurrence for any of the Company's employees. Such a conclusion is contrary to the clear wording of article 17.05(c). More will be said below, about an applicable definition of "normal".

The determination of whether the Ottawa and SPTV are properly included in the 17.05(c)(iv) restriction also flows directly from the wording. (iv) reads "to allow for continuous operations for the purpose of loading or unloading ships." On its face, the clause is not restricted to the actual physical loading and unloading of ships. It instead reads to "*allow* for the continuous operations" (emphasis added) in the loading and loading of ships. What is provided for on the face of exception (iv) is what is necessary for continuous loading/unloading.

Given the system in place when the exception in 17.05(c)(iv) was included in the collective agreement it is unlikely that the parties considered that the transport of metal to the wharf would affect continuous loading. As I understand the history of the old Terminal A, rail operations were staffed with rail crews distinct from wharf crews, were involved in a relatively constant delivery/pick up operation. Aluminum product was placed on the wharf where inventory was allowed to build up. There is no evidence that ship loading ever came to a halt, leaving the ship idle, to await more product to come by rail. Hence it could not be said that rail service and the rail crew were necessary for continuous operations. That cannot be said for the two new road transports. The evidence is that in the current shipping process there is little to no inventory on the wharf, and there have been occasions when castings is still preparing orders for the ship in port and the loading process has had to be halted to await the arrival of an SPTV. On that basis, I find that when a ship is in port, and where continued deliveries of metal to the port are necessary to keep the loading operation "continuous", the new transports are within the scope of clause 17.05(c)(iv).

The interpretation and relevance of article 18, Overtime, is somewhat more complicated. Standing on its own, the contractual requirement for a policy that minimizes overtime is stated in clear language, signifying that management has bargained away its right to determine overtime in an unfettered fashion (re *Alcan Smelters & Chemicals and Canadian Association of Smelter and Allied Workers, Local 1,* [1979] B.C.C.A.A.A. No. 6 and *British Columbia Transit, supra.)* Instead, it is required to take positive steps to keep overtime to a minimum. Otherwise the substantive commitment in art. 18.01 standing on its face, is rendered meaningless. I do not see anything in the evidence or the collective agreement that the parties ever intended that the requirements of article 18, in particular the contractual obligation to keep overtime to a minimum, would be stripped from wharf workers when continuous loading or unloading of a ship is necessary. Had the parties intended that to be so, I would have expected to see "loading or unloading ships/vessels" as a listed exception to art. 18.01, as it was once listed as an exemption to art. 18.02. Based on the history, that is how the parties have traditionally addressed exceptions.

Which leaves the issue of whether the two clauses can be construed to give a harmonious interpretation as opposed to one which places them in conflict. Were the two clauses at odds with one another such that one contradicted the other, the Company would be correct that the specific nature of the exception in art. 17.05(c)(iv) would override art. 18.01's general statement with the implication that it did not apply to any of the exceptions in art. 17.05(c). But that is not the case. I do not find the two clauses to be in conflict. The Oxford Dictionary (http://www.oxforddictionaries.com/definition/english/normal) defines "normal", in part, as something typical or expected. Article 18.01 does not forbid overtime, nor render it unexpected or atypical, it only requires that management take steps to keep overtime to a minimum. Even after steps taken to keep overtime to a minimum, the contractually acknowledged imperative of maintaining continuous operations for the purpose of loading or unloading ships may well normally or typically lead to a need for a certain amount of mandatory overtime. "Normal" is a continuum.

In the result, I find that point 6 in the list of contract interpretation principles applies: that "a harmonious interpretation is preferred rather than one which places them in conflict". The requirement that overtime be minimized does not conflict with a requirement for overtime in the stated instances. I reject the Company's argument that art. 17.05(c)(iv) overrides article 18.01.

The same logic applies to art. 18.02. A harmonious interpretation of art. 17.05(c) in context of art. 18.02 requires that an interpretation must be sought which does not bring the two clauses into conflict. Requiring workers to work overtime "to allow for continuous operations for the purposes of loading or unloading ships", does not conflict with an obligation to offer the work on a voluntary basis in the first instance, provided the volunteer is qualified. If sufficient qualified workers volunteer, mandatory assignments will not be necessary to "allow" for continuous operations. This conclusion is strengthened by the removal of the ship loading and unloading exception from the requirement that overtime be voluntary. The only tool available to discern the parties' intentions when that contract revision was made, is the effect the exception would have on wharf workers if it had remained in 18.02. Had it remained as one of the exceptions in art. 18.02, there would have been a good argument that the concept of voluntary overtime would not apply to wharf workers to allow for the continuous loading and unloading of ships; and the Company would have been entitled to move straight to mandatory overtime assignments. The opposite conclusion must prevail given that that exception is no longer listed in art. 18.02. The combination of the current 18.02 with the current 17.05(c)(vi) provide contractual direction that volunteers must be used before conscription. That is, in fact, what was described as the current practice on the wharf, in the sense that although conscripted workers are named when the form is posted, the list of subsequent volunteers is exhausted before the Company resorts to mandatory assignments.

The remaining question is whether the Company has met its obligation to keep overtime to a minimum, on the facts of this case. Three cases put before me address the extent of an employer's obligations where there is a contractual obligation to limit overtime.

The employer in *Unisource Canada Inc. supra*, was in the business of delivering products to customers on a "just in time" basis, which, it argued, was by its nature an inherently unpredictable operation, with fluctuations in demand which the company said necessitated unpredictable overtime on a regular basis. Similar to the evidence in the current matter, the company rejected the use of casuals or temporary employees on the basis that training was required; and argued that keeping excess staff to cover the "ebb and flow of the workload" was too expensive. The arbitrator's conclusions are set out in the following paragraphs:

> 37 I accept the Employer's evidence that the nature of the company's business dictates that a certain amount of overtime is unavoidable. The ebbs and flows in the marketplace, the need to provide high levels of service to customers in a competitive environment, and the contemporary business expectation of just-in-time delivery all contribute to the necessity of overtime. *Quite apart from the nature of business demands, however, I find that the company's approach to staffing significantly contributes to the amount of overtime that must be worked.*
>
> 38 The company does not replace absent employees, whether for vacations, temporary absences, or longer term absences for injury or illness. While overtime may be needed even when all employees are present, overtime is a virtual certainty when several people are away, as regularly occurs during peak summer vacation months. *There was no evidence presented that the company makes allowances in its overall staffing levels for predictable employee absences throughout the year.* Indeed, management was very candid that they expect employees to "suck it up" when the operations are short staffed.
>
> 39 *Nor does the company make use of mechanisms it might have at its disposal to reduce overtime.* While it is true the collective agreement does not permit part time or casual workers, it does allow for summer students. The company does not make use of this provision even though it would help reduce overtime that arises from summer vacations. I find the rationale provided by management, that training requirements prevent the use of student replacements, unconvincing. This reasoning pre-supposes that summer students could not undergo training in advance, that partial training is insufficient for fill-in work, or that the same students could not work for several consecutive summers. *The decision to not make use of summer students is an indicator that overtime is management's preferred option for dealing with shortfalls in hours among regular employees.*
>
> 40 In short, I conclude that the Employer has chosen to run its operations so that overtime work of at least several hours per week per employee is routinely expected over the course of a year. That the Employer has the right to make business decisions of this kind is not at issue. It is widely recognized that operational and manpower strategy is a basic management right as long as the exercise of such rights is not

> inconsistent with the collective agreement. As stated by Arbitrator Chertkow in *Northwest Territories,* "it is trite law to say that unless the collective agreement provides otherwise, the scheduling of overtime falls within the exclusive prerogative of management" (page 357). The real issue in this case is whether the Employer's decision to rely on overtime to cover business fluctuations and absences violates the contract, in particular Articles 6.1 and 22.3.
>
> (emphasis added)

The Unisource award goes on to summarize *Simplot Canada Ltd. supra,* and *Quebec & Ontario Paper Co. supra,* in the following paragraphs:

> 45…..In *Simplot Canada*, the contract specified voluntary overtime except for emergency or certain operational requirements, in which case mandatory overtime was permitted. The company organized its staffing so that employee vacations necessitated overtime and then used mandatory overtime to ensure necessary staff. The arbitrator upheld the grievance because "the pattern that emerges here is one of consistently relying on compulsory overtime and consistently failing to provide sufficient trained employees to carry out the job at times of normal happenings like vacations, leaves and similar events" (page 6, Quicklaw version). Compared to the current case, the persistent reliance on compulsory overtime for routine operational purposes is very similar. The case does not shed light on the interpretation of "basic work week" in Article 6.1, *but does stand for the proposition that if there are restrictions on the use of overtime except in specified circumstances, operations cannot be structured so that those specified circumstances are always present.*
>
> 46 The *Quebec & Ontario Paper* case explores more directly the meaning of provisions that prescribe hours of work. In *Quebec & Ontario Paper*, the contract specified the start and end times of the company's three shifts and indicated overtime rates for work beyond the shift times. For valid business reasons, the company scheduled compulsory one hour safety meetings one day per week which had the effect of extending work time on that day by one hour. The extra work time was compensated at overtime rates. The union grieved that the company had changed the regular hours of work set out in the contract, a position upheld by the arbitrator. In coming to this decision, Arbitrator MacDowell reviewed case law on the implications of language specifying the normal work week. He cited Brown & Beatty, paragraph 5:3122, as follows:
>
> > Where the agreement merely describes the normal or regular hours of work for a particular group or classification of employees, however, some arbitrators have concluded that such a provision does not, of itself, negate management's ability to change the work

> schedule of employees. Nevertheless, in such circumstances, the employees affected may be entitled to such premium or overtime hours as stipulated in the agreement for hours worked outside their normal or regular hours.
>
> However, other arbitrators have expressed the view that where the phrase "normal" or "regular" hours of work appears from its context to refer not simply to the number of hours on which overtime hours are to be calculated, but rather to the employer's ability to schedule working hours for its employees, it would be improper, except for temporary and occasional assignments, for management to require its employees to regularly work some schedule other than that which is described as their normal or regular one.

Noting that the collective agreement before him set out starting and stopping times, Arbitrator MacDowell concluded (pages 173 & 174):

> *... the right to schedule overtime cannot be exercised so regularly, routinely, and predictably, as to effectively alter a negotiated work schedule; for to read it that broadly would negate a negotiated term of the agreement and render it meaningless. Overtime may be scheduled as necessary, but an employer cannot make "overtime hours" a required and routine part of the employees' regular work schedule without thereby changing the schedule.*
>
> It is clear that art. 8 contemplates compulsory overtime in some situations ... These provisions all contemplate the possibility of compulsory overtime when specific individuals fail to attend. ... However, the agreement does not expressly contemplate planned, routine, regularly scheduled compulsory overtime ... The recognition of compulsory overtime in limited circumstances does not imply a blanket authorization of the kind necessary to support the employer's practice here.

The current case is similar to *Quebec & Ontario Paper* in the sense that Unisource also has arranged its staffing so that compulsory overtime is a regular feature of the job. While the contract language and factual context are different, *Quebec & Ontario Paper* stands for the principle that persistent overtime requirements can have the affect of altering contractually agreed upon hours of work provisions. The analysis in *Quebec & Ontario Paper* is applicable to the current case and supports the Union position.

(emphasis added)

The contractual obligation affecting overtime in *Simplot* was contained in a clause which said that mandatory overtime would only apply in emergency situations; whereas in *Unisource* and *Quebec & Ontario Hydro* came at an overtime fetter from a different direction, where the obligation arose from contract language related to whether there was a contractual commitment to maintain "basic or standard" hours of work or "regular" hours of work, and whether there was a contractual obligation that the respective employers take positive steps to meet those hours. But the analysis is essentially the same for all three, which together stand for the proposition that regardless of how the parties structure the commitment to restrict or address extra working hours, where there is such a restriction or fetter, an employer is not permitted to arrange their workforce and structure the work in a manner which effectively nullifies the restriction. From *Simplot:* where "there are restrictions on the use of overtime except in specified circumstances, operations cannot be structured so that those specified circumstances are always present."

In my view, this case law represents a persuasive level of consistency in mainstream arbitral thinking and applies to the current dispute. When an employer enters a contractural commitment to minimize or restrict overtime, it cannot afterwards establish its operations in a manner which structures the work and the workforce in a manner which will have the opposite effect. Otherwise the clause becomes meaningless. Applying that analysis to the facts of the case before me, I find that the Company has violated art, 18 by failing to take steps to keep overtime to a minimum, which in turn has led to mandatory overtime.

That there was, and is, a need for a spike in the vessel loading workforce when a metal vessel is in port, is undeniable. That circumstance is formally recognized in art. 17.05(c)(iv). Where crew compliment was often at 9 or 10 employees, the overtime sheets before the use of contractors show a requirement for a workforce of up to 16 for ship loading, made up of one for the Ottawa Tractor, two for the Superpack, two for rail loading/unloading, 8 for metal vessel, and two for alumina vessel, and one "other". In October, 2015 when the need for several extra bodies became immediately necessary, the Company looked to article 17.05(c)(iv) and mandatory overtime rather than examine any of its options which could have avoided or at least minimized overtime, including measures specifically available during the transition period.

Some steps were taken shortly thereafter, such as the use of contractors to load rail cars as early as November, and in December to run loaders to assist in offloading green coke. Over time and into the spring of 2016 the Company has retained additional contractors which have significantly relieved overtime requirements on the regular crews to the point that by this hearing overtime has effectively been minimized. But I have no evidence as to why contractors could not have been in place in greater numbers and more quickly, much closer and coincident with the point in October when the Coordinator

sought advice; nor why the contractors used to supplement the Company's workforce could not have been anticipated.

The failure to keep overtime to a minimum is also evident from several of the Company's decisions prior to the crisis that arose in October 2015, which I find made excessive overtime unavoidable and amounted to the opposite of minimizing overtime. In particular, decisions were made to not make use of temporary workers or transition workers, and to cease the practice of replacing employees on leave despite the inevitable result that that would lead to shortages. I am not persuaded that the use of temporary or transition workers were not viable alternatives, for similar reasons to those given by Arbitrator Ponak in *Unisource, supra,* in paragraph 39 of that decision. Even appreciating that the process of loading a ship has changed and there is new equipment, casuals or temporary workers were used for a number of years with no evidence proffered at this arbitration that there were any significant problems with either skills or the workers returning. As with *Unisource*, I find that the Company's decision not to consider or make use of these alternatives is "an indicator that overtime is management's preferred option". To paraphrase Arbitrator Ponak in *Unisource* (para. 56), how the Company "choses to organize its affairs" to minimize overtime and comply with the collective agreement, '"is up to management as long as its approach is consistent with the collective agreement". The considerations listed above are among the options which were available to the Company but not properly considered or applied.

Award:

By way of summary, I find that article 17.05(c)(iv) contemplates that overtime will be a normal occurrence to facilitate the continuous loading of ships, including the operation of the Ottawa or SPTV where either is directly involved in ensuring the continuous loading of a ship in port. However, I also find that the Company has violated the collective agreement by failing to keep overtime to a minimum pursuant to art. 18.01. Art. 17.05 (c) must be read in context of the collective agreement, which I find contemplates a certain amount of mandatory ("required") overtime, but in an amount which reflects positive steps to minimize overtime.

The Union has asked for a declaratory opinion as to whether the Company has been in violation of the collective agreement. As above, I have come to that conclusion and make that declaration. The Company failed to arrange its staffing and operation to keep overtime to a minimum which has led to excessive mandatory overtime.

They have also asked for a cease and desist order, which I think is unnecessary given that the Company has taken steps to minimize overtime and appears to now be in compliance with art. 18.01. Clearly, those measures are temporary, as befits the nature of a transition period. What the Company may decide to do in terms of staffing and measures to meet the requirements of art. 18.01 in June 2017 when they are in a better position to determine what the new situation and business needs require, is speculative. More

importantly, my jurisdiction is for the period of this grievance, which is entirely contained in the span of time the parties have set aside as a transition period to allow the new operation with all its changes including staffing needs, to get established and up to speed. I accept that it is not yet known what the market in June 2017 will look like including the eventual split between rail/truck traffic versus ocean going ships. Nor does the Company know at this point, what the eventual numbers, make up, or organization of necessary staff will be. The transition period has provided breathing space to make those calculations. All that can be said at this point is that the requirements of art. 18 in the current collective agreement must be met, which I find means more than relying on article 17.05(c)(iv) to fill vessel loading workforce requirements.

My jurisdiction is restricted to a period within the the transition period from shortly after start up in June 2015 to the date of hearing, and whether the Company has met its contractual obligations given the tools available. I find they have not.

The grievance is sustained.

Dated this 3d day of September 2016.

Rick Coleman, Arbitrator