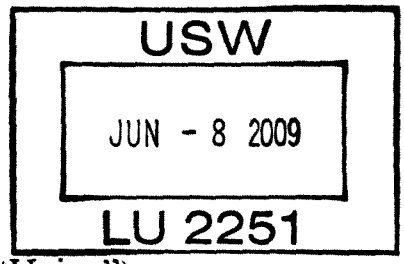
IN THE MATTER OF AN ARBITRATION



Between:

United Steelworkers, Local 2251
("Union")

- and -

Essar Steel Algoma Inc.
("Employer")

And in the matter of a general nature grievance #08-175
re: overtime policy

Arbitrator: Nimal Dissanayake

Appearances: Merle Evans (Counsel)
and John Shiels
for the union

David Bannon (Counsel)
Steve Orr and Sharon Nadeau
for the employer

Hearing: October 20, 2008 and May 6 and 7, 2009
at Sault Ste. Marie, Ontario

AWARD

This award pertains to a policy grievance filed on April 14, 2008. It reads:

This grievance, of a General Nature, is filed to protest the fact that the company implemented an overtime policy without agreement from the union as per Article 5.05.10 of the Collective Agreement. Further, the company is violating the contracting out provisions of the collective agreement.

The company is failing to apply for the appropriate job permits for all overtime and has unilaterally instituted an overtime policy contrary to the CBA.

It is the union's position that the company is estopped from implementing this policy. Arbitrator Devlin, in the arbitration award between USW Local 2251 and Algoma Steel Inc. (Award dated February 21, 1986) quoted Lord Denning in Combe v. Combe (1951) 2 K.B. 215, for a definition of estoppel as.

"The principle, as I understand it, is that where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted upon it, the one who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relations subject to the qualification which he himself has not introduced, even though it is not supported in point of law by any consideration, but only by his word."

The company's position is a violation of Articles 1.01.10, 1.02.10, 1.02.11, 1.02.30, 1.02.40 the Letters of Agreement Re: Contracting Out, Article 7 of the General Article, Article 4.01 Management Rights, Article 5.05.10, 5.05.11, 5.07.10, 5.07.21, 5.07.30, 5.07.31, 5.07.32, 5.07.33, 6.01 and any other pertinent articles or Letters of Agreement of the CBA. The company, by implementing this overtime policy, has acted in an unreasonable discriminatory and bad faith manner.

We request a meeting to resolve this matter. We request that the company revoke their unilateral overtime policy and follow the overtime provisions of the CBA. We also request that the company make application to the Director of the Ontario Labour Relations Board for extension of hours in excess of 60 hours to adhere to their responsibilities under the collective agreement. We further request full redress for all employees who missed overtime opportunities due to the policy implementation.

The overtime policy challenged by this grievance was dated March 26, 2008 and revised on April 24, 2008. In its revised form, it reads:

OVERTIME POLICY

Purpose

Algoma Steel is committed to creating a work environment that balances the needs of the operations with the need to provide our employees with sufficient rest and time away from work. Likewise as a corporation we must respect all overtime parameters that exist both within our collective agreements and in all employment-related legislation.

This policy is designed to guide managers, front-line supervisors and employees when work of an urgent nature arises and the only viable alternative is to staff it through the use of overtime.

General Policy

As a corporation we must continually strive to eliminate overtime and only allow for its authorization in those circumstances where it is absolutely necessary. Every Level 3 employee is required to account for and justify the need for any and all overtime worked on a weekly basis.

No employee is permitted to work a combination of straight time and overtime hours that would exceed 60 total hours in any given work week. Any employee found to be in violation of this restriction will be subject to the corrective action procedure detailed within this Policy. Any supervisor allowing an employee to knowingly exceed this limit, will likewise be subject to the corrective action procedure.

The only exception to this Policy is if the cause of the overtime is a result of one of the defined conditions below, and when such occurs all such overtime must be approved by the accountable Level 4 Manager, or his approved designate.

Exceptions

Safety of Employees

Defined as work required to address a situation where employee safety is at risk or being compromised. Included is overtime required to address those situations where an insufficient number of employees are available to provide mandated spell relief.

Environmental Hazard

Those situations where failure to address an issue immediately, will result in a discharge violation or represent a hazard to the environment.

Emergency Work

Defined as work required to address a breakdown or work of an immediate nature that would result in risk to the integrity of operating assets if not executed.

Note: this definition of emergency work must not be confused with the definition contained in Article 1.02.11 of the Local 2251 agreement regarding Contracting Out.

Accountability

- Each Operating Superintendent is accountable for ensuring that their department does not exceed a 5% overtime threshold.

- Each Operating Superintendent is accountable for ensuring that no employee within their span of control exceeds the established overtime guidelines.

- Front-line Supervisor/Scheduling Personnel must not schedule, or knowingly allow any employee to work in a manner that causes a violation of this policy.

- Each employee is accountable for ensuring that they do not individually exceed the overtime limits set without the expressed permission of their supervisor once removed.

GENERAL

Overtime Limits

- No employee shall work more than a total of 60 hours in any work week (Section 17(4)(i)(iii) of the Employment Standards Act).

- No individual shall work more than 16 hours in a 24 hour period.

- No individual shall work a night to day double.

- Every employee will get 24 consecutive hours off in a work week or in the alternative 48 consecutive hours off in a period of two consecutive work weeks. (Section 18(4) of the Employment Standards Act).

- Working overtime while on vacation would be considered a last resort.

Work Schedule

Departments must not post a weekly schedule that will result in a violation of the Overtime Limits section of this Policy. Production and work schedules may need to be adjusted at the discretion of the accountable L4 manager after considering the impact on operations.

Planned Down Day Overtime

Pre-identified work to be performed during a down-day will be assigned to an employee after the scheduler has confirmed through Kronos, that such overtime will not violate the Overtime Limits.

Where any employee has volunteered to work overtime in their department or in another department, it will be their accountability to ensure they are not in violation of the overtime policy. Supervision is required to check the Kronos record of each volunteer to establish whether there was compliance.

Reporting of Overtime

Any employee who exceeds 12 hours overtime in a given work week, must be included on the **Overtime Analysis Report** detailing the cause of the overtime and the particular skill knowledge the employee possessed or the circumstances requiring his/her selection.

Overtime Analysis Report

Through the SAP system, each Level 3 manager will access the overtime Reports and produce and forward to their immediate supervisor, a detailed listing of those employees who worked overtime in the previous week and the reason for such overtime.

Pre-Approval

All overtime, unless occurring under the Exceptions category must be pre-approved by the accountable Level 3 Manager.

Any employee who works overtime without first obtaining the permission of their immediate supervisor, will not be paid for such hours worked.

Corrective Action

Any employee found to be in violation of this Policy will be subject to the following corrective actions:

First Occurrence

An employee found to be in violation of this Policy will meet with his immediate supervisor and his supervisor once removed to review the issue(s) which contributed to the violation; attempt to identify alternate solutions that could have been implemented, a review of the Policy and finally be issued a warning that a repeat violation will be dealt with on a progressive basis.

Second Occurrence

An employee found to be in violation of this Policy a second time will repeat the steps detailed in the First Occurrence. In addition, the employee will be issued corrective action (letter to file, demerits, time off without pay, etc).

Third or Subsequent Occurrences

An employee found to be in violation of this Policy a third time will repeat the steps detailed in the First Occurrence and in addition be issued more progressive

corrective action than that taken under the Second Occurrence, up to and including discharge.

At the outset, I note that while the grievance statement relies on "estoppel", at the hearing the union did not pursue an estoppel argument. Similarly, no evidence was led with regard to the allegation in the grievance statement "the company is violating the contracting out provisions of the collective agreement".

The collective agreement between these parties includes the following provision in its management rights clause:

> **4.01** Except to the extent otherwise stated in the Collective Agreement, the Union recognizes that all functions, rights, powers, and authority which the Employer has not specifically abridged, delegated or modified by this Agreement are retained by the Employer.

It has been long accepted that the right to decide whether or not to use overtime, as a general matter, is part and parcel of the right to manage and operate. Thus in Brown & Beatty, Canadian Labour Arbitration (4th ed.) At para. 5:3220 write:

> Legislative enactments aside, it is generally agreed that unless there are specific provisions in the agreement to the contrary, or where the assignment to a particular employee would be unsafe, or where an estoppel operates, employees do not have any right to have work assigned to them as overtime, or to determine the amount of such overtime hours. 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, 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.

In Re R.P. Scherer Hardcapsule (unreported, September 17, 2002) I had occasion to apply this fundamental principle. In dismissing the grievance, I wrote as follows at pp.6-7:

> When the scheduled employee called in sick, it did not "create a need for overtime", contrary to the union's submission. What it did was to leave some work to be performed. It was the management's right to decide whether to have that work performed, and if so how to perform it. The collective agreement permitted several options, including resort to overtime. It chose to have the work performed by reassigning an employee from the gel room. . . . The union did

not point to any provision in the collective agreement that prevented the employer from doing this.

In the present case the union's primary position is that the collective agreement restricts the employer's ability to unilaterally implement an overtime policy. The employer disagrees. The union submits that the employer is prohibited by the collective agreement from implementing any overtime policy without the agreement of the union. In the alternative, the union submits that particular provisions included in the policy are inconsistent with the employer's obligations under the collective agreement, and ought to be struck down.

The evidence is that the employer had resorted to significant amounts of overtime over a considerable period. The company, then known as Algoma Steel, was acquired by owners in Mumbai, India, in June 2007. One of the main concerns of the new owners was what they perceived as excessive use of overtime. Management received directions that the use of overtime be reduced to zero. Management started tracking and submitting regular reports on use of overtime to the new owners in India. It was pointed out to the owners that eliminating overtime altogether may not be possible, since the employer was obligated under the collective agreement to resort to overtime before contracting out available work. However, management, undertook to reduce overtime as much as possible. With this goal, the overtime policy was developed and implemented.

The employer did not assert that the policy was agreed to by the union. The evidence is that a draft was prepared, and submitted to the union. The union provided certain comments and objections. The final version included some changes. The evidence, however, is clear that the policy ultimately implemented was not an agreed upon document, but one unilaterally done by the employer.

In support of its position that the employer was prohibited from unilaterally implementing an overtime policy, the union relied on the following provisions of the collective agreement:

> **5.05.10** The parties agree that overtime must be kept to a minimum, but will cooperate in meeting situations where it is necessary. The Company shall provide the Union with monthly reports of overtime worked by department, and the parties shall meet either quarterly or as required to discuss and agree on methods of reducing overtime.

General article

4. Union Management Committees

...

c. Duties and Responsibilities

...

monitors contracting out and overtime hours (excluding replacement hours) in excess of 10% of all hours worked in a 12 month period in any specific functions or jobs in the departments of each area and initiates any action required in accordance with the policies and administrative processes established by the Joint Steering Committee.

7. **OVERTIME, CONTRACTING OUT, AND EMPLOYMENT LEVELS**

The parties agree to monitor and review the levels of overtime and the levels and type of contracting out on an ongoing basis.

Each Union Management Committee will provide the Joint Steering Committee with a quarterly report for each department in their area.

The Joint Steering Committee will take appropriate action to eliminate or reduce any overtime or contracting out deemed to be excessive.

It is the union's position that by agreeing in article 5.05.10 to meet with the union "to discuss and agree on methods of reducing overtime", the employer has relinquished the right it otherwise would have had, of unilaterally implementing methods of reducing overtime.

Similarly, the union submits that paragraphs 4c and, 7 of the general article envisage that any action to reduce overtime is to be initiated through the Union Management Committee. Mr. Mike DaPrat testified that the methods of reducing overtime set out in the policy were not agreed upon, or even discussed, at the committee level. The union submits that by agreeing to those provisions, the employer had deprived itself the power to initiate action to reduce overtime other than through the committees.

Having reviewed all of the relevant provisions of the collective agreement, I agree with the employer's position that it has not relinquished its management right to control and reduce overtime. It is clear that in article 5.05.10 the union has agreed with the objective that "overtime must be kept to a minimum". The balance of that article and the provisions of the general article relied upon by the union constitute an attempt to enlist the union's cooperation in achieving that objective. However, while those provisions provide a mechanism to obtain the cooperation and agreement on initiatives to reduce overtime, there is nothing in any of the provisions stating explicitly or implicitly that the employer had agreed that any initiative for reducing overtime would only be taken through that process. The provisions represent an attempt to facilitate a cooperative and joint process. Such a process is commendable since it serves to minimize disputes. However, those provisions cannot be reasonably interpreted as an abandonment by the employer of its management rights. Much clearer language is required to produce such a result. Therefore, I find that there is no prohibition in the collective agreement against the employer unilaterally taking initiatives to reduce overtime, provided those initiatives are not inconsistent with its obligations under the collective agreement.

This brings me to the union's position that particular terms of the overtime policy are inconsistent with the collective agreement. The union made a number of challenges.

1. The union contended that the provision in the policy to the effect, "As a corporation we must continually strive to eliminate overtime and only allow for its authorization in those circumstances where it is absolutely necessary", is in conflict with that part of article 1.02 of the collective agreement, which provides "where a sufficient number of qualified and eligible employees are available, they will be offered to work overtime prior to contracting out such work".

I disagree. If the employer contracts out particular work without first offering the work on overtime to available qualified and eligible employees, the union is entitled to grieve alleging a violation of article 1.02. There is no evidence before me that work that should have been offered to available qualified employees was contracted out. Obviously, article 1.02 constitutes a restriction of the employer's management right to make decisions on use of overtime. However, a general objective of using overtime

only where absolutely necessary does not offend article 1.02 because where article 1.02 applies, use of overtime will be absolutely necessary.

2. The union relies on the excerpt from para. 4c of the General Article (supra p.8) listing as a duty and responsibility of the Union Management Committee to "monitor overtime hours in excess of 10% of all hours worked in a 12 month period ...". It is submitted that the provision in the overtime policy to the effect that "Each Operating Superintendent is accountable for ensuring that their department does not exceed a 5% overtime threshold", is in conflict with the collective agreement provision.

I disagree. I conclude that the fact that the employer had agreed to certain methods and thresholds for reducing overtime through the joint cooperative process set out in the collective agreement, does not mean that the employer is restricted to those methods and thresholds. The provision cannot be read as an undertaking by the employer that it will not reduce use of overtime below the 10% threshold.

3. The next area of dispute is the provision in the overtime policy that "No employee shall work more than a total of 60 hours in any work week (Section 17(4)(i)(iii) of the Employment Standards Act)". The union contends that this is in conflict with article 5.05.11 of the collective agreement. It reads in part:

> Employees will not work overtime or a combination of regular hours plus overtime hours in a manner that results in the employee working:
> a) in excess of 16 total hours in any 24 hour period
> b) in excess of 24 total hours in any 48 hour period
> c) no nights to days doubles

The union points out that article 5.05.11 allows employees to work 84 hours every other week. Therefore it is argued that the expectation in the policy that overtime will not exceed 60 hours in any week is inconsistent with it. It is common ground that the employer had applied for and obtained an excess hours permit from the Ontario Director of Employment Standards authorizing employees to work up to 60 hours only. The union submits that the employer was obligated to apply for a 84 hour permit to be in compliance with the collective agreement.

With the greatest of respect, I disagree again. What article 5.05.11 does, is to cap the amount of hours an employee may work. It does not create an entitlement to any overtime hours for employees. Even the existence of a 60 hour extra hours permit does not change that, in that the employer is not obligated to authorize employees to work 60 hours a week because it had a 60 hour permit. The permit only prohibits working more than 60 hours, even in circumstances where the employer decides to use overtime.

The union led evidence to establish that despite the provisions of the policy many employees continued to work in excess of 60 hours a week. If that was the case, if no exceptions applied, it may mean that the employer's policy was not effective. It may also be the case that the employer was in breach of the extra hours permit. This arbitration, however, is about the validity of the overtime policy, and not about alleged violations of the work permit.

4. The union submitted that the policy was in conflict with the collective agreement, when it subjects bargaining unit employees to corrective action for exceeding 60 hours. It was submitted that employees are placed in a very difficult situation because if a manager directs an employee to work beyond 60 hours, the employee runs the risk of being disciplined by complying. On the other hand, if he does not comply with the manager's direction, the employee would run the risk of being disciplined for insubordination.

I do not read the policy as mandating discipline on an employee who exceeds the 60 hour maximum on the direction of management. In fact, under "Accountability", it is specified that the employees' accountability is to not exceed the overtime limits set "without the expressed permission of their supervisor once removed". There was evidence that the employer had "spoken to" two employees, as well as their supervisors, in instances where the 60 hour maximum was exceeded. However, in neither case was any discipline imposed on the employee in question. Indeed, it is not imaginable that any arbitrator would uphold discipline imposed on an employee for complying with a supervisor's direction to work beyond 60 hours. The purpose of the policy as stated is to put employees on notice that they ought not exceed the limits on hours without expressed authorization from management. This intention is reinforced by the

provision in the policy that "Any employee who works overtime without first obtaining the permission of their immediate supervisor will not be paid for such hours worked".

5. Article 14.06 of the collective agreement provides: "The company and the union agree on the principle that eligible employees must take vacation". The union submits that the statement in the overtime policy that "Working overtime while on vacation would be considered a last resort" is in conflict with article 14.06.

My understanding of the union's argument in this regard is as follows. The policy envisages that as a last resort, an employee may work overtime while on vacation. If the employee does that, he would be denied of his vacation, and that would be contrary to article 14.06. In my view, whether that result follows depends on all of the circumstances of the arrangement in a given case. As the employer pointed out, article 14.06 does not require the taking of vacation at any particular time. If an employee performs overtime work during his scheduled vacation, article 14.06 may not be breached if his vacation is rescheduled for another time. If the union is of the view that in a particular case an employee had not taken his vacation and that it violates article 14.06, it may be grieved. The contemplation in the policy that an employee on vacation may perform overtime as a last resort, by itself is not in conflict with article 14.06.

6. The overtime policy provides:

> "Production and work schedules may need to be adjusted at the discretion of the accountable L4 manager after considering the impact on operations."

The union contends that this provision is in conflict with article 5.04.20, which states:

> When an employee works on one of his scheduled days off or works overtime on a scheduled day, he shall not be required by the Company to take another scheduled day off during the work week if work is available.

The union's submission pre-supposes that the L4 manager will use his discretion to adjust work schedules to require an employee to work back to back shifts in contravention of article 5.04.20. However, the policy does not require or even authorize the manager to do so. The discretion granted must obviously be exercised so as not to contravene the collective agreement. If a particular adjustment of the work

schedule results in the violation of article 15.04.20, or for that matter any other provision of the collective agreement, it may be grieved. The granting of a general discretion to adjust the work schedule as per operational requirements, by itself does not conflict with the collective agreement.

The union made a number of other similar challenges to provisions of the overtime policy, which it submitted were in conflict with provisions of the collective agreement. I will not review each of these. However, I find that, as with the union's challenges number 5 and 6 above, those terms of the policy per se do not conflict with the collective agreement. The union's submission assumes that the provisions of the policy will be applied in such manner as would result in a contravention of the collective agreement. As with issues 5 and 6 above, if that occurs the union would be in a position to grieve. It is trite to state, that the employer is not entitled to apply its policy in a manner that is contrary to its obligations under the collective agreement or any legislation. The policy itself, under "purpose" recognizes that "as a corporation we must respect all overtime parameters that exist both within our collective agreements and in all employment related legislation. The policy on its face does not purport to authorize violations of the collective agreement. Therefore, the policy itself does not become invalid, in anticipation that it will be interpreted and applied in so as to contravene the collective agreement.

Finally, the union made general submissions to the effect that the employer was continuing to contract out work in contravention of article 1.02.10 in an effort to meet its goal of eliminating use of overtime. The union's position was that the only legal way of reducing overtime is to hire more employees. As I have pointed out above, the employer has the right to determine whether available work is to be performed through the use of overtime or by resorting to other means such as contracting out. However, whatever means it resorts to must not be contrary to its obligations under the collective agreement. The overtime policy does not on its face mandate any initiatives that contravene the collective agreement. If particular application of the policy result in violations the union and affected employees are entitled to seek redress by grieving.

In summary, I conclude that there is nothing in the collective agreement that prevents the employer from unilaterally implementing an overtime policy. The overtime policy as promulgated, does not on its

face contain any provisions that are in conflict with the collective agreement. The possibility, and anticipation by the union, that the policy will be applied in a manner resulting in violations of the collective agreement does not render the policy itself invalid. In that eventuality, it is open to the union to grieve the particular application of the policy.

For all of the foregoing reasons, the grievance is hereby dismissed.

Dated this 4th day of June, 2009 at Hamilton, Ontario

Nimal Dissanayake
Arbitrator