HOURS OF WORK / OVERTIME

SEP - 5 1995 D

(NORTHWOOD)

IN THE MATTER OF AN ARBITRATION

Between:

Northwood Pulp and Timber Limited

(The Company)

And:

IWA - Canada, Local 1-424

(The Union)

R. MOLL ET AL - OVERTIME GRIEVANCES

Arbitrator	Alex Brokenshire
Counsel for the Company	Norman K. Trerise
Counsel for the Union	Camran S. Chaichian
Dates of Hearing	July 17 and 18, 1995
Date of Award	August 29, 1995

This arbitration was heard in Smithers, B.C. on July 17 and 18, 1995. The parties concerned agreed that I had jurisdiction to hear and rule on the matters in dispute.

The Union has processed grievances on behalf of **Rick Moll, Shirley Williams, Harjinder Parmar** and a multi-person grievance involving **Jack Smith, Sahib Toor, Jacques Brulotte** and **Derrick Fuller**.

While each of the grievances is individual unto itself, there is a common factor that has given rise to these disputes. The common factor is the method or methods used by the Company when allocating overtime work.

The Company contends that in instances where it has made a mistake in the allotment of overtime work, the remedy to the employee for that mistake should be either a payment in cash or a "remedy in kind". The parties agree that a "remedy in kind" means other work at the appropriate overtime rate of pay.

The Union does not agree that the Company should have the option of a remedy in kind. It argues that the remedy for an employee who was bypassed for overtime work should be a cash payment.

These differences of opinion by the Union and the Company have produced an ongoing series of grievances in the Company's Houston Mill.

Two of these grievances progressed through the grievance procedure including arbitration.

Professor J.M. MacIntyre Q.C. acted as sole arbitrator in each arbitration hearing.

The first case was the overtime grievance of **Ken Karsten**. The case was heard on December 14, 1994 and **Arbitrator MacIntyre** made his award on January 19, 1995.

The second case was the overtime grievance of **Hiebert et al**. This was heard on March 13, 1995 and **Arbitrator MacIntyre's** award is dated April 6, 1995.

It would be reasonable to think that the two awards made by **Arbitrator MacIntyre** would have provided the parties concerned with an understanding as to whether a remedy in kind is an appropriate resolution in instances where there has been an incorrect allocation of overtime work by the Company.

This is not the case; the presence of the grievances in front of me shows that there remains a difference of opinion between the Company and its employees.

The Company takes the preliminary position that the issue of whether a remedy in kind is appropriate is *res judicata* (a case already settled) by reason of the two earlier grievances: *Northwood Pulp & Timber Limited (Houston Mill) and IWA Canada, Local 1-424* [Karsten Overtime Grievance] (January 19, 1995) MacIntyre, and *Northwood Pulp & Timber Limited*

(Houston Mill) and IWA Canada, Local 1-424 [Hiebert et al Overtime Grievance] (April 6, 1995) MacIntyre.

The Union submits that there is a degree of inconsistency between **Arbitrator MacIntyre's** two arbitration awards which has created uncertainty in the thinking of the Union and mill employees. This gives rise to continuing processing of grievances regarding whether or not a remedy in kind is an appropriate resolution of problems stemming from incorrect allocation of overtime work. The Union maintains the position that a remedy in kind is not an appropriate answer to rectify these overtime mistakes, but in any event it asks that the decision on this matter be conclusive and in a form that is clearly understood by the parties concerned.

In a lighter vein, Union Counsel suggested that the Union's opinion that **Arbitrator MacIntyre's** awards contain contradictory elements puts my decision in the position of being the "tie breaker."

In addition to copies of **Professor MacIntyre's** previously cited awards, Counsel for the Union and Company have provided me with Briefs of Authorities containing cases related to the remedy in kind vs. cash payment methods of resolving problems which arose from incorrect allocation of overtime work. I have reviewed these cases and carefully considered **Arbitrator MacIntyre's** opinions on the matter of whether or not the Company has the right to utilize a remedy in kind method of atoning for incidents of incorrect allotment of overtime work.

The question of the suitability of a remedy in kind is not a new or obscure subject in the working life of labour arbitrators. It has been dealt with many times over a fairly lengthy time period. The question then arises as to why the issue repeatedly emerges at the arbitration stage of grievance procedures. It is my opinion that there are two main reasons for this. They are:

1. Arbitrators have been somewhat divided in their decisions on the suitability of using the remedy in kind method of restoring appropriate payment for incorrect overtime work allotments.

2. Each case that comes to arbitration regarding this matter is confined to the circumstances which are pertinent to that specific case. These are such things as the terms of the collective agreement and any established practice that has developed therefrom; letters of understanding, other agreements between the parties and practices that have arisen therefrom; and practices that have been instituted and followed by a company on a unilateral basis. There are, without doubt, other reasons that have helped to perpetuate the disputes on this matter but I will not attempt to enumerate more at this time.

To progress consideration of the arguments made by counsel regarding the application of the doctrine of *res judicata* I first will examine a fundamental aspect of arbitration procedure. That is its legislated purpose as set out in Section 82 of the Labour Relations Code (the Code). It says:

> Purpose of Part
>
> 82. (1) It is the purpose of this Part to constitute methods and procedures for determining grievances and resolving disputes under the provisions of a collective agreement without resort to stoppages of work.
>
> (2) An arbitration board, to further the purpose expressed in subsection (1), shall have regard to the real substance of the matters in dispute and the respective merit of the positions of the parties to it under the terms of the collective agreement and shall apply principles consistent with the industrial relations policy of this Code, and is not bound by a strict legal interpretation of the issue in dispute.

This part of the Code gives arbitrators clear instructions as to the purpose of arbitration while leaving them with sufficient leeway, in the regards of strict legal interpretation, to meet the purpose of the Code.

Paul Weiler chaired a five person panel of the British Columbia Labour Relations Board (No. 79/76) which considered a case that had been previously addressed in arbitration. That case is: *Board of School Trustees, School District No. 57, Prince George and International Union of Operating Engineers, Local 858.*

The Labour Relations Board in its decision said in part:

> ... Initially, we would make it clear that an arbitrator is not bound to follow earlier arbitration decisions as a matter of law, by reason, for instance, of such common law doctrine as *res judicata* (See Re I.B.E.W. and Canadian General Electric (1959), 9 L.A.C. (Laskin). Indeed such common law doctrines could not strictly bind British Columbia arbitrators in view of the language of S.92(3) of the Labour Code [same wording now in S.82(2) of the Code] (see A.I.M. Steel Limited and United Steelworkers of America, Local 3495 (1976), unreported (B.C.C.A.). But the fact that there is no external law which compels arbitrators to follow earlier precedents is not the end of the matter. There still remains the question about what should be the view taken by the arbitrator to this question as a matter of principle. In other words, what should be the policy worked out by arbitrators themselves, as part of their arbitration jurisprudence, concerning the weight given to earlier arbitration awards?
>
> That analysis must be founded on a sense of the realities of the arbitration process. As this Board has pointed out a number of times, grievance arbitration is intended by the Labour Code to be an alternative to work stoppages as a means of resolving grievances. For that purpose arbitration must be an effective antidote to strikes during the term of a collective agreement. It is common practice under such an agreement for a dispute to arise, the language of the collective agreement to be somewhat unclear on the point, and for the union to take the case to an arbitrator who hears evidence and argument and issues reasons for decision disposing of the grievance. That is what happened in this case. But it is not contemplated by the parties that the significance of such an arbitration award is to be confined to the facts of the immediate dispute which gave rise to that grievance. In the normal run of

> events, arbitration awards will contain a general analysis and ruling about the interpretation of the relevant language of the collective agreement. The typical and sensible expectation of the parties is that general interpretation will be followed in the future in their own collective bargaining relationship.
>
> What would happen if that were not the practice? The next time the same issue arose the union would have to file a new grievance and take the matter up through to arbitration to secure the same result. That practice would not only generate extensive delays and additional costs, but the burden it would place on the arbitration process would so clog up the system that genuine new issues could not effectively be dealt with either. Further, suppose the employer were to win its favoured interpretation from a second arbitrator in the second case. Does that end the matter? There does not seem to be any reason that it would. At this stage, each party will have won one arbitration decision and the Union would be perfectly entitled to try a third time to break the tie. Obviously, that kind of practice is totally inconsistent with the needs of grievance arbitration under the Labour Code. Arbitration is supposed to provide a final and conclusive settlement of disputes between parties about the interpretation and application of their agreement. If it cannot provide that kind of finality, the result will be industrial unrest as employees become more and more dissatisfied with the inadequacies of this peaceful mechanism for resolving grievances ... .

An examination of the parties' positions regarding the utilization of the doctrine of *res judicata* reveals that following **Arbitrator MacIntyre's** award in the **Ken Karsten** overtime grievance, where a remedy in kind was found to be not suitable, the Union argued *res judicata* was applicable in the subsequent **Hiebert et al** Overtime Grievance.

In the **Hiebert et al** case **Arbitrator MacIntyre** decided that because of certain circumstances peculiar to that case a remedy in kind was appropriate. The Company now argues that because of that arbitral ruling the matter of the correctness of application of a remedy in kind regarding the cases which are before me is subject to the application of the doctrine of *res judicata*.

After considering the decisions made by **Arbitrator MacIntyre** and placing strong reliance on sections of **Professor Weiler's** decision in the case of *Board of School Trustees, School*

District No. 57, Prince George and International Union of Operating Engineers, Local 858, which I have set out above, I conclude that neither of the cases between the Company and the Union (**Ken Karsten** and **Hiebert et al**) produce a result that determines whether or not the application of a remedy in kind is appropriate in the grievances that are now at arbitration before me. Each of **Professor MacIntyre's** decisions were the result of his reasoning of the evidence that was produced for each case on an individual basis.

Therefore neither of these cases has decided the correctness of the application of a remedy in kind as it applies to the grievances that are now before this Board of Arbitration. I reject the argument that the doctrine of *res judicata* is applicable in these cases.

I now address the question of whether a remedy in kind rather than a cash payment is appropriate where employees were not provided with overtime work in a correct way in: (a) all cases; (b) in some cases; (c) not in any cases.

A number of cases dealing with this subject were presented to me in the parties' briefs of authorities. Some were cited in **Arbitrator MacIntyre's** decisions re the cases he arbitrated for the Union and the Company.

The Company's brief of authorities contains a copy of the arbitration award by **Arbitrator M.A. Hickling** in the case of *ICTU, Local 1 - and - PLH Aviation Services Inc. (Gustafson Grievance)*.

Arbitrator Hickling at page 8 of his award said:

> There is a difference of opinion amongst arbitrators as to what is, prima facie, the appropriate remedy. [for the incorrect allotment of overtime work]. One line of opinion, relied upon by the union, suggests that prima facie an employee is entitled to monetary compensation for loss of overtime opportunities. Indeed, Professor Palmer went so far as to suggest that not only is there a rebuttable presumption that monetary relief is the appropriate remedy but that the "clearest of cases" must be made out before an arbitration board is warranted in moving away from that position.

Arbitrator Hickling then cites a section of **Professor Palmer's** award in the case of: Re *Gulf Canada Products Co., Clarkson Refinery and Chemical Workers Union, Local 595* (1982) 6 L.A.C. (3d) 189, 191. The cited paragraph reads as follows:

> This so, in my opinion, because to a great extent, the position taken by the company in this case leads to the fact that they can breach the agreement and put the grievor and the union to the trouble of vindicating their claim and, at the end of the day, only receive the opportunity to work under circumstances which are necessarily different than on the initial occasion. This, to me at least, seems unfair. Consequently, while one can envisage situations where an in-kind remedy might be appropriate, there must be a strong bias against it" [*id.*].

Arbitrator Hickling sets out the opposing view by saying in part:

> The opposing view, taken by the employer, holds that *prima facie* a remedy in kind is the better way of restoring an employee to his proper situation. Today this appears to have become the dominant view ... .

Arbitrator Hickling goes on to cite and review arbitration awards which subscribe to the view that a remedy in kind is an appropriate way of restoring employees to their proper situation.

At page 3 of his award, **Arbitrator Hickling** refers to Re *International Chemical Workers, Local 346 and Canadian Johns Manville Co. Ltd.* (1971) 22 L.A.C. 396 (P.C. Weiler), wherein **Professor Weiler** said:

> In the case of a missed overtime opportunity, it is certainly true that an award of lost wages, and all other benefits that might be earned, would give the grievor everything he would have obtained from a proper performance of the contract. However, it goes much further than this. If he had been given the overtime assignment, he would have been able to earn this money, but he would have had to work for it. Simply giving him the monetary damages results in him having the money as well as the day of leisure, which is

> significantly better than a situation where the overtime was properly distributed. If we look at the company, their position is worsened by the damage award because they have had to pay for the employee who performed the work, as well as the employee who should have done it, but did not. Hence, from the point of view of both the grievor and the company, a damage award is somewhat defective in fulfilling the objectives of contract remedies.

The positions taken by **Professors Palmer and Weiler** clearly show there are differences of opinion regarding the application of a remedy in kind when overtime work is incorrectly allocated.

I will not review here in writing the numerous cases that deal with the application of a remedy in kind. However, it is my opinion that it is an appropriate method of restoring employees to their rightful situation in some cases where there has been an incorrect allocation of overtime work.

What circumstances determine which cases are properly susceptible to a remedy in kind resolution? **Arbitrator Stephen Kelleher** made comment on this aspect in Re *Doman Forest Products Ltd. Ladysmith Division and Pulp, Paper and Woodworkers of Canada, Local 8*, when he said at page 6 of his award:

> What emerges from these many cases is this: in general terms, it is more appropriate to order a remedy in kind for the breach. However, a monetary award is appropriate in any of the circumstances: first, if the employer's breach of the agreement was deliberate; second, if there is a pattern of persistence, albeit good faith, mistakes by the employer; and third, if, for whatever reason, it is not possible to fashion an appropriate in-kind remedy.

I am in accord with **Arbitrator Kelleher's** assessment of this question if his third point is taken to mean that each case must be carefully examined to ascertain if such things as the collective agreement, letters of understanding or local agreements or practices render inappropriate a remedy in kind resolution.

In the Northwood Pulp & Timber Ltd. Houston Mill there is a collective agreement. The term of that agreement is from July 1, 1994 to June 30, 1997. It is, in general, the industry agreement that is signed by employers in the forest industry in British Columbia and IWA Canada.

Arbitrator MacIntyre in his decision regarding the *Northwood Pulp & Timber Ltd. (Houston Mill) and IWA Canada, Local 1-424* (Hiebert et al Overtime Grievance) made findings pertaining to the collective agreement by saying the agreement only contained the standard provisions setting out the work week and requirement to pay overtime in certain circumstances. **Professor MacIntyre** was specific in his **Ken Karsten** award when he said while there was a basic contractual provision that stated overtime on a Saturday is to be paid at time and one half there is nothing more in the agreement which governs a lost time situation. I agree with the part of his decision where he said the agreement is silent regarding lost overtime situations.

In both of the previous arbitration awards regarding overtime allotment in the Houston Mill (**Ken Karsten and Hiebert et al**), **Arbitrator MacIntyre** dealt with the relevancy of a set of "Overtime Guidelines" which are in effect in the mill. These were written in 1992 and since that time have formed the basis of overtime allocation to employees in the mill. There are two sections in the guidelines, one for production employees and one for maintenance employees. The grievances before me have to do with the Production Section.

The union asked **Professor MacIntyre** to find that the Overtime Guidelines which were allegedly breached constituted a binding agreement between the Union and the employer, and were in effect a part of the Collective Agreement; or in the alternative to find the employer was estopped from denying their binding force.

The Company argued the Overtime Guidelines were merely employer policy which it tries to follow and were not a binding agreement. The Company argued, among other things, that the application of the terms of the Overtime Guidelines was not subject to grievance procedure.

Professor MacIntyre reviewed the history of the guidelines in detail. I will not repeat his deliberation process on the matter but will record his conclusions. He asked the following question:
"Are the Overtime Guidelines, posted about February 1992, a binding agreement as between the union and the employer, under which breaches are grievable under the collective agreement?"

His answer to that question was:

> I find that they are not a binding agreement, but I also find the employer is estopped from denying their "grievable" status during the currency of the present agreement.

After an explanation of how he arrived at the decision set out above, **Arbitrator MacIntyre** proceeded to hear the **Hiebert et al** grievance.

I agree with **Professor MacIntyre's** decision that the Overtime Guidelines have grievable status during the currency of the present agreement.

I will now make comment on the concern exhibited by the Union and the Company that because of the different conclusions reached in the **Ken Karsten** grievance and the **Hiebert et al** grievance there may be an unexplained contradiction that requires clarification.

In reviewing **Arbitrator MacIntyre's** decisions in the two cited grievances it appears to me that he considered the circumstances of each case and from these concluded the **Karsten** case should be settled by way of cash payment and the **Hiebert** case by the in-kind remedy.

In the **Karsten** case **Professor MacIntyre** examined the facts of the case and found that the training offer made by the company as a remedy in kind seemed to be somewhat artificial and that it raised practical questions where the grievor is not seeking any training for any job and was already qualified in a number of jobs, and where there is a detailed training agreement designed for specific situations.

It seems to me that because of these points of consideration it was not possible to fashion an appropriate in-kind remedy. Hence the decision that a cash settlement was the correct method.

In the **Hiebert et al** grievance **Arbitrator MacIntyre** again examined the circumstances of those particular grievances and determined that the Company "now offers a smorgasbord of alternate overtime opportunities". He ruled that the employer could satisfy the overtime claims by a reasonable offer of overtime work which did not impinge on their own or others' ongoing claims as a remedy in kind. He adjured the Company to keep in mind the convenience of the grievors, who had lost the opportunity to take overtime at a time of their own choosing.

I do not find inconsistency or contradiction between these two cases. In the **Karsten** case the arbitrator found the proposed training hours to be not acceptable because of some artificiality and the possibility that it would breach the terms of an in-place training agreement, thereby adversely affecting other employees. In the **Hiebert et al** case he found the Company had offered alternate overtime opportunities that did not offend or impinge on the grievor's own or others' ongoing claims. He awarded the Company the right to satisfy the claim for overtime reimbursement with the remedy in kind method.

At this point a summary of the decisions I have reached on preliminary matters is set out.

1. The doctrine of *res judicata* is not applicable to the grievances which are before this Board.
2. Where there has been an incorrect allocation of overtime the Company may utilize the remedy in kind method to correct the employee's situation. Provided, however, that such remedy in kind does not impinge or infringe on other employees' contractual rights or rights set out in the Northwood Pulp & Timber Limited Wood Products Overtime Guidelines, or any other recognized agreements between the Union and the Company.
3. The collective agreement is silent regarding the allocation of overtime work; however, the Overtime Guidelines possess grievable status for the life of the current collective agreement. An alleged breach of those Guidelines is a grievable matter.

Before progressing to the consideration of the grievances before this Board I now copy the "Overtime Guidelines". They read:

NORTHWOOD PULP AND TIMBER LIMITED
WOOD PRODUCTS

OVERTIME GUIDELINE

It is the Company's desire to allocate overtime work equitably among qualified and eligible employees. To this end the Company will endeavour to allocate overtime on the following basis:

Production

1. Overtime will be offered first to the shift incumbent(s).
2. If the incumbent(s) is not available, the overtime will be offered to the qualified trainees or qualified relief on shift.
3. If there are no qualified employees on shift, the overtime will be offered to the opposite shift incumbent(s).

4. If no opposite shift incumbent is available, the overtime will be offered first to qualified employees in the department, then to qualified employees in the Plant.

Maintenance

1. The Company will endeavour to distribute maintenance overtime among employees qualified to perform the work. Qualifications will include possessing skills to perform specific tasks or functions, not just trade qualifications.

It must be recognized and understood that there will be occasions when time and other emergent circumstances do not permit the adherence to this procedure. However, every reasonable effort will be made to equitably distribute overtime in accordance with this procedure.

Overtime at one and one half times rate will take precedence over overtime at two times rate.

This board of arbitration will now deal with the grievances that have been brought before it by the Union.

The first case has to do with the grievance of:

Harjinder Parmar

The basic facts, in the case of **Mr. Parmar**, are not in dispute between the Union and the Company.

The grievor has been employed by the Company for twenty one years. On February 25, 1995, a Saturday, his job classification was grader. The Company was running two production lines that day (#1 and #2). To staff those lines it was necessary to call in some people on overtime. The parties agree that the call-ins were exercised in keeping with the terms of the Overtime Guidelines. Three people were called. The person who, under the

overtime guideline terms, was entitled to the first call was a **Mr. G. Minhas**. Some three and a half hours into the shift the #1 line broke down. Only one of the three graders who had been called in was required to work. **Mr. Parmar** and one other grader were sent home. **Mr. Minhas** was moved to #2 line and thereby continued to work. **Mr. Parmar** has more seniority than **Mr. Minhas** and it is the grievor's contention he should have been retained at work and **Mr. Minhas** should have been sent home. He bases his contention on the belief that the overtime guidelines set out the way people are called in for overtime work but once they have come to work seniority governs other aspects of employment. **Mr. Parmar** is claiming four hours pay at the applicable overtime rate.

DECISION

The purpose of the Overtime Guidelines, as I see it, is to distribute overtime work amongst defined groups of employees on an equitable basis. This objective is buttressed by a practice of rotational calls for graders. Evidence shows that this practice which was in effect before the overtime guidelines were written, was devised to prevent the most senior person or persons from having the opportunities to work all or most of required overtime. This practice remains in effect at this time.

The practice or process used to call graders for available overtime work is the medium used to allow the graders, in their turn, to work on the equalization program. In the case before me, **Mr. Minhas** was entitled to and got the initial call for overtime work. If he had been the only extra grader called he would have continued to work on February 25, 1995 as long as he was required. In other words he had first entitlement to overtime that day. The later call-in of **Mr. Parmar** and one other grader was extraneous to the call to **Mr. Minhas** albeit there is no argument of those calls being in conflict with the call-in practice for graders.

However, to do what **Mr. Parmar** asks would not be in keeping with the purpose of the grader call-in practice or the overtime guidelines. If **Mr. Parmar** had been kept at work and

Mr. Minhas had been sent home, **Mr. Minhas** would have been deprived of work to which he was entitled at the time he was the recipient of the properly timed initial call.

The Company correctly utilized the grader call-in practice and the terms of the overtime guidelines when on February 25, 1995 it sent **Mr. Parmar** home while retaining **Mr. Minhas** at work.

The grievance fails.

The second case before this Board of Arbitration concerns a grievance of:

Shirley Williams

Witnesses gave sworn evidence. **Ms. Williams** contends she was not called for overtime work on November 24, 1994 when it was her turn to be called. She defined her turn as being that which has been determined by the long term practice (maybe ten years) of calling incumbents within the grader job classification on a rotational basis which was designed to provide equalization of overtime work within that group of employees. In her stead another grader named "Bahatti" was called and worked. **Ms. Williams** contends she should be compensated for this by way of a cash payment. She expressed the concern that if she was not paid in that manner she would be instructed to accept work of a nature that was not in keeping with her liking. She illustrated this concern by saying she might be asked to "paint or something." This, in the opinion of **Ms. Williams** would be a remedy in kind and she did not think that option was open to the Company. **Kerry Austman**, Human Resources Manager for the Company's Houston Mill testified that the Company agreed that it had incorrectly allocated overtime work to an employee other than **Shirley Williams** on November 24, 1994. This work should have gone to **Shirley Williams** and the Company agreed a mistake had been made. The remedy which the Company considered to be correct

regarding **Shirley William's** entitlement is to have her work **Mr. Bahatti's** hours in the rotation for equalization process used with the graders until such time she has been "made whole" in the matter of her earnings.

Another point of concern by **Ms. Williams** was cited. She was of the opinion that if the Company was allowed to make restitution to employees in any other way than cash payment the Company would be encouraged to not be too concerned about making mistakes and these mistakes would become more frequent. This would be disadvantageous to employees. **Ms. Austman** testified that there was quite a large amount of overtime worked in the mill. In 1994 about 66,000 hours of overtime were worked. This was 11.9% of the total hours worked. In 1995 to date about 30,250 hours had been worked. This is 10.3% of total hours worked. During those time periods about 100 hours of overtime allocation had been grieved. While being cross examined **Ms. Austman** agreed that in the pursuit of settlement for those hours which had been grieved; cash payment had been made in some, some cases had been dropped and some employees had been offered the opportunity of other work at overtime rates as a remedy in kind. It is noted that **Ms. Williams** did not know how many hours had been grieved but the Union questioned the Company's numbers. It thought there had been quite a number, probably in excess of fifty individuals, who had been incorrectly treated in the allocation of overtime work in 1994 and 1995.

I will not set out a detailed account of the evidence provided by **Shirley Williams** and **Kerry Austman.** I have considered it in depth and the points enumerated above form the basis of my decision.

DECISION

Shirley Williams was not called for overtime work on November 24, 1994. She should have been called, the Company agrees and says there was a mistake made in not doing so. The evidence shows that mistakes are made by the Company from time to time when calling

employees for overtime work. Is a deterrent to making mistakes in the form of reimbursement of payments by cash required? The Union contends there would be value in using that method.

In the mill there is quite a large amount of overtime worked, 11-12% of total hours worked. The mistakes made while calling employees are not significant when they are compared with total hours. However, incorrect calls are an imposition on employees' rights and a cost to the Union when these matters travel through the grievance procedure. I do not find that the mistakes made by the Company are excessive to the degree they constitute a need for financial censure at this time. In so saying I do not impart any comfort to the Company by any implication that it is acceptable to make mistakes. It is my hope that the Company and the Union will meet to examine ways of reducing the probability of overtime call-in mistakes.

Another facet of this case which required attention was whether there was any pattern established within the call-in mistakes that have been recognized by the Company, and if so, did the pattern indicate discrimination against certain employees. **Ms. Williams** said she may have been discriminated against in the matter of call-ins because she was a woman. No evidence has been brought before me that there has been a pattern of discrimination.

This Board of Arbitration concludes that **Shirley Williams** shall be reimbursed for the Company's mistaken call-in on November 24, 1994 in the following way.

She shall be given the earliest possible opportunity to equalize her overtime hours worked within the grader's rotational practice. She shall be given the opportunity to work hours that would normally be allotted to **Mr. Bahatti** until such time that those hours and payment of those hours are equal to the amount she would have earned if she had been correctly called to work on November 24, 1994.

This will maintain the practice of using rotational equalization of overtime work for graders in the Houston Mill. If, when the Company makes the cited work available, **Ms. Williams** declines to avail herself of that opportunity, the company will have no further obligation to make payment for those hours unless there is a valid reason for non-acceptance at that time. Such things as state of health, previously planned personal activities or other pressing personal matters would be valid reasons.

Ms. Williams' grievance wherein she asked for payment in cash for overtime hours incorrectly allocated on November 24, 1994 fails as such; however, she shall be reimbursed in the manner set out above.

The next case before this Board of Arbitration concerns the grievances of:

Jack Smith et al

This case involves grievances which have been processed by: (1) **Jack Smith** (2 grievances); (2) **Sahib Toor**; (3) **Jacques Brulotte**; (4) **Derrick Fuller**. The claim in each is the product of a mistake or mistakes made by the Company when overtime call-ins were made in a manner which was not in conformity with the terms of the mill's Overtime Guideline.

The Company agrees that the alleged mistakes which gave rise to the grievances did occur. The difference between the parties is the way in which the grievors should be reimbursed for those mistakes. That is the question to be answered by this Board.

The Union, on behalf of the grievors, contends payment should be made in cash pay-outs. The Company wishes to use the remedy in kind method by allocating hours of work paid at the applicable overtime rate and for the number of hours each grievor lost by not being correctly called for overtime work.

DECISION

Earlier in this award I made the decision that the Company is within its rights to use a remedy in kind method of reimbursement provided the allocated work is of an appropriate nature. I have also, earlier in this award, defined the types of work that are appropriate.

Arbitrator MacIntyre in *Northwood Pulp & Timber Ltd. (Houston Mill) and IWA Canada, Local 1-424* said at p. 10 of his April 6, 1995 decision:

> The employer now offers a smorgasbord of alternate "overtime opportunities" ... Although the union may have some legitimate objections to some particular items in Ms. Austman's list, ... I still surmise that she could find assignments for Mr. Rodrigues and Mr. Herbert which they would have to accept ... .

Evidence given by **Kerry Austman** at the present hearing leads me to believe that the Company can, at this time, offer a "smorgasbord" of "overtime opportunities". Ms. Austman indicated that these overtime opportunities would be changed or modified from time to time to properly reflect changing work requirements.

When it is necessary to designate work that is appropriate for utilization in a remedy in kind method of employee reimbursement, great care must be exercised. I earnestly adjure the Company to make sure that any work utilized as a remedy in kind meets the test of appropriateness before any allocations are made. If this is not done grievances will continue to flow. This would not be in the best interest of either the Union or the Company.

DECISION

To resolve the **Jack Smith et al** overtime grievance the Company, as soon as possible, will offer each of the grievors an opportunity to work the equivalent number of hours at the same rate of overtime pay as they would have received if they had been previously correctly called in by the Company.

If a grievor does not accept the proffered overtime opportunity the Company will not be obliged to make reimbursement in any way unless there is a valid reason for the non-acceptance of that time. Such things as state of health, previously planned personal activities or other pressing personal matters would be valid reasons.

The Jack Smith et al grievances cited in this case which request payment in cash for overtime hours incorrectly allocated fails as such. The grievors shall be reimbursed with a remedy in kind as set out above.

This case concerns a grievance of:

Rick Moll

Rick Moll is employed at the Company's Houston Mill. He has been there for about eight years. During that time he has operated a number of machines in the Production Department.

Mr. Moll's grievance arises from his contention that he was not called for work on Sunday, May 29, 1994. When he returned to his regular scheduled shift on Monday, May 30, 1994 he found that an employee who was junior to him had worked on the previous day. He asks for 8 hours pay at the Sunday overtime rate.

Witnesses were called and provided sworn testimony.

Evidence shows that weekend work was scheduled to test a new Chip-N-Saw line. To technically and economically carry out this test it was desirable to run certain parts of the mill in conjunction with the test of the new line. In this way there would be some product

manufactured. The extent of mill equipment that could be operated depended on how many employees could or would work on the weekend.

Mr. Moll testified that on Friday, May 27, 1994 a foreman, **George Ewald**, asked him to work on Saturday and Sunday. He came to work on day shift Saturday. Part way through the shift the foreman, **Joe Gonsalves**, asked him if he would work an extra four hours that day. He said "no" and laughed. He testified that he and his girlfriend had plans for the evening and "she would kill me" if those plans were cancelled. He testified that no question regarding Sunday work was asked. **Mr. Moll** said that at the end of the shift, about 3:30 p.m., he was in the office and asked the Plant Superintendent, **Wayne Tofsrud**, if there was work for him on Sunday. The answer was no. He went home.

When **Mr. Tofsrud** gave testimony he said that he could not remember **Rick Moll** asking him about Sunday work but it was quite probable that he had done so.

Joe Gonsalves testified he was working as a relief foreman on Saturday, May 28, 1994 and Sunday, May 29, 1994.

In the afternoon of Saturday **Wayne Tofsrud** asked him to check and see how many employees were available to work twelve hours that day and how many could work on Sunday.

The first employee he asked about working was **Rick Moll**. They met on a catwalk in the operating section of the mill. The mill was running at a reduced rate and noise levels were less than normal. Both men were wearing earmuffs, which is a mandatory requirement. When they spoke they were quite close to each other.

Mr. Gonsalves said he asked **Mr. Moll** if he would work twelve hours that day (Saturday). **Mr. Moll** said "no" and smiled. **Mr. Gonsalves** then asked "how about tomorrow". No spoken

answer was given; **Rick Moll** turned and grinned. The witness demonstrated the facial expression given when he grinned. This was interpreted by **Joe Gonsalves** as being a "smirk". From past experience he took the smile or smirk to mean **Rick Moll** was not available for work on Sunday.

Joe Gonsalves proceeded to ask other employees regarding working twelve hours Saturday and on Sunday. The result of this was that there were enough people available to work the additional four hours on Saturday at that day's level of testing and production. For Sunday enough people were available to continue with the testing of the Chip-N-Saw line and it appeared production would be limited to running one edger. This information was taken to **Wayne Tofsrud** and the decision to operate at those levels was made.

Shortly after the start of shift on Sunday, about 8:00 - 8:15 a.m. the trimmer was filling up and an operator was needed to run it. **Joe Gonsalves** started phoning people to see if one would come in. A millwright was running the trimmer in the interim. After a number of phone calls an employee named **Diane Ophus** said she could come in at 1:00 p.m. She expected to be paid for four hours. The witness believed this to be what was done (a time sheet shows four hours at double time). In cross examination **Mr. Gonsalves** said that while he was trying on Sunday to get someone to come in and run the trimmer, he had called several people and two of these had declined Sunday work when they had been asked on Saturday. However, because of **Rick Moll's** "grin" when asked on Saturday re Sunday work, no attempt was made on Sunday to contact him. The Company witnesses agree that if **Rick Moll's** grin had not been interpreted as a refusal to work on Sunday he would have been the employee who should have been called first on Sunday when it was found another operator was needed.

DECISION

The basis from which I make my decision is narrow; it has everything to do with the conversation between **Joe Gonsalves** and **Rick Moll** which took place on a mill catwalk sometime after the second coffee break on Saturday, May 28, 1994. The Company's interpretation of that conversation is the point I must consider in arriving at the decision.

There is different evidence given by the two men who were present, **Joe Gonsalves** and **Rick Moll. Joe Gonsalves** testified he asked **Rick Moll** if he could work twelve hours on Saturday and that the answer was "no", accompanied by a smile. **Rick Moll's** testimony is quite similar; he differs slightly when he says he answered "no" and laughed. **Joe Gonsalves** testified that he then asked if **Rick Moll** could work on Sunday. The response was a facial expression that has been referred to as a smile, a grin and a smirk. **Joe Gonsalves** interpreted that facial expression as being a "no" answer. No spoken reply was made by **Rick Moll. Rick Moll** testified that he was not asked about his availability for Sunday work. The purpose of **Joe Gonsalves'** trip through the mill was to ascertain how many employees were available for work for an extra four hours on Saturday and how many would be able to work on Sunday. I consider that the probability of **Joe Gonsalves** asking **Rick Moll** about his availability for Sunday work is very high. There then is the possibility that **Rick Moll** did not hear the question. The noise level of the mill was reduced because of partial operation, the two men were close to each other and the first question about Saturday work was heard and answered. These facts make it difficult for me to believe the second question would not be heard. However, I cannot say with certainty that it was. There is agreement that the question, if heard, was not answered by any spoken words. Of course if it wasn't heard no spoken answer would have been forthcoming.

In the absence of a spoken reply **Mr. Gonsalves** interpreted a facial expression – a smile, a grin or a smirk – as a negative answer. **Joe Gonsalves** could be correct in that interpretation. However, he could be wrong.

After hearing all the evidence I must say that **Mr. Gonsalves** should have taken the step of asking for a definitive spoken answer from **Rick Moll**. I am mildly critical of **Mr. Gonsalves** for not doing so when all the circumstances of the case are considered. This incident illustrates the necessity of supervisors leaving as little to chance (in this case interpretation of a facial expression) as possible when in the process of making decisions that affect employees of the Company.

Because of the absence of a definitive refusal by **Rick Moll** to work on Sunday, and because he then was the person who should have first been called for work that came available on Sunday, the company shall reimburse him in the following manner.

He shall be reimbursed for the number of hours at the rate he would have received if he had correctly been called for work on May 29, 1994.

The Company may make this reimbursement through the remedy in kind method. This should be done as soon as possible while taking into consideration **Mr. Moll's** personal life in such things as his health, previously planned personal activities or other pressing personal matters.

If **Mr. Moll** does not accept the overtime opportunity the Company will have no further obligation to make reimbursement in any way unless **Mr. Moll** has a valid reason for the non-acceptance of that time.

Rick Moll's grievance succeeds to the extent set out above.

I retain jurisdiction until November 30, 1995 in the cases dealt with above.

Signed this 29 day of August 1995.

A. Brokenshire

A. Brokenshire

OBITER DICTUM

The Briefs of Authority and the arguments presented by both Union and Company Counsel were interesting and useful in the decision-making process of these cases. I thank Counsel for their conduct of these cases as they ably represented the interests of the Union and the Company.

Both Mr. Trerise and Mr. Chaichian expressed the hope that my decisions regarding these cases would assist the parties in the understanding of how the allocation of and payment for overtime work should be handled in the Company's Houston Mill. I too hope that my decisions in these cases will, through understanding by the parties, reach the objective of stemming the flow of grievances.