IN THE MATTER OF AN ARBITRATION

BETWEEN

NAVISTAR INTERNATIONAL CORPORATION CANADA
- the Employer

and

NATIONAL AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS UNION OF CANADA (CAW - CANADA)
AND ITS LOCAL 127
- the Union

AND IN THE MATTER of a policy grievance regarding staffing in department 8

Arbitrator: Howard Snow

Appearances:

On behalf of the Employer:

Charles E. Humphrey	- Counsel
John Krete	- Human Resources Manager
Kathy Sherring	- Labour Relations Manager

On behalf of the Union:

Bob Hamilton	- Plant Chairperson / Presenter
Dan Dejaegher	- Assistant
Rick O'Rourke	- Witness

Hearing held in Chatham, Ontario on November 23, 1995.

AWARD

I. INTRODUCTION

In this policy grievance, the National Automobile, Aerospace and Agricultural Implement Workers Union of Canada (CAW - Canada) and its Local 127 (the Union) grieve that Navistar International Corporation Canada (the Employer) has improperly staffed one its departments. The Employer operates a truck assembly plant in Chatham. Some of the trucks which come off the assembly line need additional work prior to being shipped to customers. This work is done in department 8 - the Tune and Test department. The issue raised by this grievance is the number of staff in department 8 during the summer and fall of 1995.

In the seventeen weeks between July 24, 1995 and November 19, 1995, there were 57,986.46 hours of overtime worked in department 8. During this period department 8 was staffed with 146 employees, and the department operated two shifts per day. As the normal work week under the collective agreement was 39 hours, the overtime amounted to nearly 1500 weeks of work. If the overtime work had been done by hiring additional staff, it would have required the employment of an additional 87 employees throughout this 17 week period.

The Union submitted that the Employer was required to hire additional employees. As the Employer had not hired additional employees for department 8, the Union sought a declaration that the Employer had breached the collective agreement.

II. THE EVIDENCE

The Chatham plant builds trucks and operates on an assembly line basis similar to an automobile assembly plant. However, this plant does considerable custom work as many trucks are built for specific customers.

Some of the trucks have deficiencies when they roll off the assembly line. For example, a part may not have been available, or an employee may have made a mistake. In addition, when a particular task would take longer than could reasonably be done on the assembly line, the Employer sometimes planned for the task to be performed after the truck finished on the line. In any event, a large number of trucks require further work in department 8 after coming off the assembly line and before being shipped to customers.

This grievance was filed after a series of changes had been made in department 8 during 1994 and early 1995. While there is no dispute about these changes, it is necessary to outline them in order to understand the issues raised in the grievance.

In terms of the efficiency of operations in department 8, the optimal number of trucks awaiting work by the department 8 staff is 175 to 200. In September 1994, largely because of difficulties which had arisen in a new model being produced on the assembly line, the number of trucks awaiting work by department 8 had grown to some 1500. Thus, in order to reduce the backlog, the Employer increased the staff in department 8 and began to operate three shifts per day, instead of the usual two.

The Employer had originally intended the September, 1994 increase in staff as a temporary measure and by January, 1995 the number of deficient trucks awaiting work in department 8 had been reduced substantially. Beginning in January, 1995 the Employer gradually reduced the staff levels in department 8. By the beginning of July, 1995 the department had been reduced to approximately 176 staff, and during July the staffing level in the department was reduced by a further 31 employees.

The July decision flowed from a review of the operation of the department conducted by management in the spring of 1995. The review led to the adoption of a new strategic plan.

The new strategic plan prompted a number of related changes which were made at about the same time as the staff reductions. Some of the work which had previously been done on a planned basis in the department was returned to the assembly line. Some inspection work which had previously been done in the department was moved elsewhere. In addition, a greater focus was placed on the assembly line personnel doing the job correctly the first time, thus meaning less work for department 8. The organization of the work in the department was also rearranged by removing bottlenecks, reducing cycle time, etc., in an attempt to make the operation more efficient.

As a result of these changes the Employer decided it could revert to two shifts per day and did so in July at the time of the staff reductions. When it changed from three shifts to two shifts, the Employer increased by about 15 the number of workers on the two remaining shifts in comparison with the number of employees who had worked on these shifts during the period of the three shifts. However, the total staff in the department was reduced by 31. The decision to reduce the total staff by 31 was based on an assessment of the amount of work that was moved out of the department and by calculating the efficiency gains from eliminating the overlaps in staffing and the paid lunch breaks that are required when operating three shifts.

Dave Boland, Superintendent of Internal Quality, testified that the changes were initially very successful. However, after about six weeks, the operation of department 8 was affected by several events. In August the assembly line, which had been operating two shifts, added 11 hours of overtime production per week. In addition to the increase in the total number of trucks being produced, there was an unexpected increase in the percentage of trucks with deficiencies. A number of the deficiencies were caused by a problem with a rail supplier and another large number were due to a mistake in the coding of floor mats. In any event, department 8 was confronted with an unexpected increase in the number of trucks requiring

work.

By the middle of September, 1995, the need for additional work in department 8 was clear. The Employer decided to meet the need through overtime rather than hiring more staff. Mr. Boland testified as to the reasons for that decision. He emphasised the difficulty in predicting the amount of work that would be needed in this department. In addition, he noted that the current staffing was the "maximum" for each of the two shifts. If additional staff were added to the existing shifts, more work might be accomplished but the average productivity of each employee would drop as the department became more crowded and the employees competed for space and tools. If the Employer were to add a third shift, it would also make the overall operation less efficient as four days per week the regular shifts are 8.5 hours per day which creates staffing overlaps. In addition, because of the requirement to pay for lunch time in a continuous operation, operating three shifts per day produces fewer hours of actual work time per shift.

The physical layout of the department limits the number of trucks that can be worked on at one time. When there are three shifts per day there is some overlap in staff schedules and consequently there is more unproductive time than when the department operates with two shifts. Nevertheless, even during the period when department 8 operated with three shifts, considerable overtime was necessary.

Mr. Boland also testified as to the practical difficulty in adding staff. He indicated that it might take one week from the time the decision was made to add staff until the job postings appeared. It might then take another three weeks before the selected employee was free to move, and then the collective agreement provided that the employee had another 80 hours in which to demonstrate the ability to do the job. He testified that, while the agreement provided for 80 hours, it was frequently a month before employees were comfortable with

the work in department 8. He indicated that it might be 7 or 8 weeks from the time a decision was made to hire more staff until the department had the benefit of those people. Mr Boland also testified as to the cyclical nature of the work in department 8. Apart from workload variations due to changes in the number and extent of truck deficiencies, he said that there was pressure at the end of each month to ship as many trucks as possible and that the pressure was even greater at the year end. The Employer's most recent fiscal year end was October 31, 1995. During October, 1995 there was the usual year end pressure which increased the overtime.

Mr. Boland testified that the planning of overtime was ordinarily done on a weekly basis, but it was frequently done with less notice. The hearing in this grievance was on a Thursday and he testified that the overtime had been planned for the following week. However, the month end occurred during the next week and there were the usual pressures to ship as many trucks as possible, so the overtime had been arranged earlier than normal.

Finally, Mr. Boland testified that there were a number of people in the plant who have worked in department 8 and who were available to assist in the departmental work on an overtime basis. He testified that overtime has been a feature of the department for as long as he was aware - a period that goes back some five (5) years.

Mr. Boland agreed that the Employer had the capability to add a third shift or to add more staff to the existing shifts. He indicated however that, in his view, doing so would decrease the efficiency of the department's operations.

While the pattern of overtime over the period was not regular, it peaked in mid-October with 6571 hours in the week beginning on October 9. The hours had increased gradually from early August and then declined gradually in the weeks following October 9, with some

fluctuations. The weekly totals, rounded to the nearest hour, for the seventeen weeks beginning on July 24 were as follows:

Week of	Total Overtime Hours
July 24	4325
July 31	4099
August 7	446
August 14	1376
August 21	2305
August 28	2895
September 4	2522
September 11	3236
September 18	4653
September 25	4699
October 2	5129
October 9	6572
October 16	4893
October 23	4883
October 30	1730
November 6	2783
November 13	1442

Much of the above overtime was done by staff who regularly worked in department 8. In addition, some overtime was performed by employees from other departments. For example, if there were a number of floor mats which had to be replaced, the department which installed floor mats on the assembly line might be asked to provide staff on overtime to replace the floor mats. This "supplemental overtime," that is overtime worked by employees from other departments, was charged to department 8 and is included in the total overtime hours above.

This supplemental overtime was fairly constant throughout the period, but on occasion the supplemental overtime was reduced to zero. The Union had raised with management its concerns about the large amount of supplemental overtime being worked by employees from other departments and, as a result, there were temporary reductions in the reliance on this type of overtime. Evidence was given about the nature of these discussions, and about the

disagreement which arose as to what had been said, or agreed upon, but the matter was not addressed in argument and nothing turns on the precise nature of those discussions.

III. POSITION OF THE UNION

The Union submitted that additional jobs had existed in the department prior to July, 1995 and, while the Employer intent may have been reasonable in reorganizing the work, it was now clear that it had not been successful. The need for the work had reappeared. There were many hours of overtime work. The Employer's failure to fill additional positions was a breach of the employees' seniority rights as employees were deprived of the opportunity to bid on these jobs and exercise their seniority. The Employer had the time, equipment, and space needed to add a third shift. While the Employer had the right to determine if work was needed, its decision must be reasonable. Thus the Union sought a declaration that the Employer was obligated to post these jobs and, in failing to do so, had violated the agreement.

The principal provision relied on by the Union reads as follows:

> 7.10 (a) A new job or replacement opening is the initial increase in a current classification within a department, or, the initial populating of a new classification within a department, or, the initial introduction of a classification that is new to the plant, or, the initial opening to permanently replace an employee who has. [*sic*]
> left active employment with the Company for reasons other than layoff (such as retirement, LTD, quit, etc.)

The Union also noted the overtime provisions in the agreement.

The Union referred to extracts from Palmer's *Collective Agreement Arbitration in Canada* and from Brown and Beatty's *Canadian Labour Arbitration* as well as the following cases: *Re Canadian Union of Public Employees, Local 1, and Toronto Hydro Electric System*

(1971), 23 L.A.C. 27 (Brown); *Re Polymer Corp. Ltd. and Oil, Chemical and Atomic Workers, Local 9-14* (1974), 5 L.A.C. (2d) 344 (Rayner); *Re Horton Steel Work Ltd. and United Steelworkers, Local 3598* (1973), 3 L.A.C. (2d) 54 (Rayner); *Re R. J. Simpson Manufacturing Co. (Canada) Ltd. and United Automobile Workers, Local 1738* (1976), 11 L.A.C. (2d) 145 (Hinnegan); and *Navistar International Corporation Canada and C.A.W. - Canada, Local 127* (December 2, 1992) unreported (R. J. Roberts).

IV. POSITION OF THE EMPLOYER

The Employer submitted that the issue was what limits, if any, the collective agreement imposed on the Employer in determining whether to have the increased work performed by additional employees or by existing employees working overtime hours. The Employer noted the difficulty, especially in department 8, of predicting the amount of work and the advantage one has when looking at the situation in retrospect. However, the Employer did not have the option of operating with hindsight, and had to make its decisions based on predictions. The issue was this: did the agreement require the employer to post new or additional jobs instead of having current employees work overtime?

The Employer submitted that there was nothing in the collective agreement which restricted the Employer's rights in this situation. The Employer referred to a number of provisions in the agreement including the Functions of Management article, a Supplemental Letter [No. 72(A)] which indicated the factors the Employer must consider in a decision on whether to use overtime as opposed to recalling employees who are on layoff, and the overtime provisions in the agreement. The Functions of Management article reads, in part, as follows:

> 6.01 It is agreed that the Company has the right to direct generally the work of the employees subject to the terms and conditions of this Agreement, including the right to hire employees, to promote and transfer employees for proper cause, to discharge, suspend and demote employees for just cause, to assign them to shifts with due regard to seniority, to determine the amount of work needed, and to lay them off because of lack of work in accordance with

the provisions herein.

As noted, the Employer did not suggest that the Supplemental Letter or overtime provisions governed the situation - instead the Employer suggested that, given the number of items that have been addressed in the agreement, the absence of any language on this issue suggested the matter had been left to the exercise of management discretion.

In addition, the Employer submitted that the evidence demonstrated the Employer had exercised its discretion reasonably in these circumstances.

The Employer submitted that the cases relied on by the Union all dealt with the filling of existing jobs, not the question of the existence of jobs. The Employer referred to the following authority: *Re Wire Rope Industries Ltd. and United Steelworkers, Local 3910* (1982), 4 L.A.C. (3d) 323 (Chertkow).

V. CONCLUSIONS

The factual background for this dispute is given above. In deciding to have the extra work done by existing employees working overtime rather than by hiring additional staff, the Employer did not intend or purport to be acting pursuant to any provisions of the collective agreement. The Employer was of the view that none were applicable. Nevertheless, as noted in the review of the evidence above, the Employer witness, Mr. Boland, explained in considerable detail the decision that had been made and the basis for that decision.

The resolution of this grievance thus requires two questions to be resolved:

1. Does any provision in the agreement require the Employer to staff in a particular manner, or to base its staffing decisions on particular factors?
2. Does the Employer's decision have to be reasonable, and if so, was it?

I address each question in turn. With respect to whether the agreement regulated the decision, I note again that the Employer made its decision without referring to any provision of the agreement.

The collective agreement is extensive - including the Supplemental Letters it is 368 pages in length. The parties have addressed many items in the agreement. For example, overtime is addressed at length. It is dealt with in some 10 pages of the agreement, 3 pages of an appendix and in 15 Supplemental Letters. The provisions of the agreement on seniority are also extensive taking some 25 pages. Many other issues are dealt with directly. For example, Supplemental Letter No. 72(A) addresses the factors to be considered when work is available, employees are on layoff, and the Employer is deciding whether to recall some of those laid off employees or use overtime.

The Union relied primarily on Article 7.10 (a) reproduced above. This provision is essentially a definition of a "new job or replacement opening." Where a new job or replacement opening exists, other provisions of the agreement detail the arrangements for posting and filling the position. The Union did not specify which part of Article 7.10 (a) it felt was applicable in this instance. The most likely is, in my view, the first part - that is the "initial increase in a current classification within a department." The Union sought a ruling that the Employer was obliged to increase the number of employees currently in a classification in department 8.

The question is: What or who determines when there is an "initial increase?" Given the extensive provisions on overtime in this agreement I find it difficult to believe the parties intended that the initial increase occurs automatically simply because of the existence of a large number of overtime hours of work. The Functions of Management article provides in part that the Employer has the right to "direct generally the work of the employees subject

to the terms and conditions of this Agreement, including the right to hire employees, ...to assign them to shifts... to determine the amount of work needed ... ". Thus the Functions of Management article clearly contemplates that, in a general sense, the organization of work is the job of management. Supplemental Letter No. 72(A) limits that power in one instance by specifying factors which management has to consider when making a decision as to whether to recall laid off staff or use overtime. In the context of that Letter it is clear that the parties contemplated that the decision was a management decision and the Letter simply requires the Employer to consider certain factors. Given the similarity between the decision to be made here and the one addressed in Supplemental Letter No. 72(A) where the decision is clearly a management one, I believe it is probable that the decision here was intended as a decision to be made by management. That view is consistent with the Functions of Management Article and Supplemental Letter No. 72(A). Thus, on the basis of the combination of three factors, that is

1.) there is no clear indication in Article 7.10 (a) as to how the decision is made,

2.) the general responsibilities for staffing and organising work are left to management in the Functions of Management Article, and

3.) the Supplemental Letter 72(a) makes it clear that, in a similar context, the decision is a management decision,

I have concluded that the decision as to whether there is an "initial increase" under Article 7.10 (a) in a situation such as this is a management decision.

Having concluded that the decision as to whether there is an "initial increase" is a management decision, the issue arises as to whether there is anything in the agreement which expressly constrains the decision making. In a similar context, Letter No. 72(A) places constraints on the decision by specifying four factors which must be considered. However, no such provision was cited in argument as being applicable in this situation and I conclude that there is nothing in this agreement which expressly addresses the bases upon which the

decision has to be made.

It follows that there was no violation of any express provision of the agreement. None were applicable in this instance.

The second question is whether the Employer decision was reasonable. The parties did not expressly address the issue of whether the Employer decision was subject to a reasonableness standard. However, they both appeared to accept that the Employer had an implied duty to act reasonably, as both parties made submissions on whether the decision which the Employer had made was a reasonable one. I have therefore reviewed the decision applying a standard of reasonableness.

Before proceeding, I note that I have not decided that the Employer had a duty to act reasonably. While both parties addressed the question of whether the decision was reasonable, neither party referred to any express duty to act in that manner, nor did either party address whether there was an implied duty to do so. While a duty to act reasonably in this situation may well be an implied term of this agreement, in the absence of submissions from the parties I have refrained from pursuing it. If I conclude that the Employer's decision was reasonable, then the issue of whether the Employer had a duty to act reasonably does not have to be resolved.

In dealing with this issue I have reviewed the cases relied upon by the Union. Most of them address the issue of reasonableness in a similar context dealing with some aspect of staffing. While none of them are directly on point, each addresses a similar issue and each is helpful as to the general approach adopted by other arbitrators. I comment briefly on those cases.

In *Re Toronto Hydro-Electric* the agreement provided that job vacancies were "determined

in the discretion of Management by the availability of work..." The board held that a failure to exercise that discretion was a violation of the agreement. The agreement before me contains no similar language. In addition, I concluded above that the Employer had a discretion, that the Employer had exercised its discretion, and I outlined the reasons which the Employer provided for exercising the discretion in the way it did.

In *Re Polymer Corp.* the Union sought an order that a vacant classification be filled. In this case, the Union relied on the following conclusion:

> ...if this grievance is to succeed the union must establish that there was, in fact, adequate work available in the classification in question. Indeed, the union must establish that the company would have come to that conclusion if it had acted reasonably and had taken an objective view of the facts. In other words, the board accepts the proposition that the company must initially determine whether work is available in an open classification. Of course, in making this determination, the company must act reasonably and their conclusion must be supportable by the facts of each particular case. [p. 346-7]

In the situation before me, the Employer already had many employees in the classification and had to decide whether to increase the number or, alternatively, use overtime. The *Polymer* case suggests the Employer has to review the available facts, act reasonably, and that its conclusion should be supportable by the facts.

A similar view of the proper approach is expressed in *Re Horton Steel* which again emphasised that the Employer must determine if there is adequate work to justify filling a vacant classification and, in so doing, must act reasonably. Of course, in the case before me there was no vacant classification.

In *Re R. J. Simpson* the issue was again one of filling a vacant classification and a similar standard of reasonableness was used.

In *Navistar,* an earlier award between these two parties which dealt with Article 7.10 (a),

two workers had been transferred into another classification for about four weeks. The issue to be decided was whether the four week transfers amounted to an "initial increase" such that the jobs should have been posted. Relying on the four week temporary transfers, the arbitrator concluded that there were new jobs under Article 7.10 (a), and that they should have been posted and filled in accordance with the agreement. In that case, however, it was clear that management had decided that two more workers were to be working in the classification for a period of four weeks and, given the increase in the number of workers, the issue was whether Article 7.10 (a) applied so as to trigger the posting requirements. The Employer had argued that in temporary transfers there was no initial increase that would trigger the posting requirements. The award did not address the issue of whether the Employer was required to add more workers, or the basis upon which a decision to add workers should be made.

Reviewing a decision such as the Employer's in this instance for reasonableness is not an easy task. The Union has a clear interest in protecting the seniority rights of its members under the agreement and the jobs in department 8 are desirable jobs. They are better paying jobs than many other jobs in the plant. On the other hand, the Employer has an interest in maintaining its right to organize the work and to staff the plant in the manner which best fulfils its business objectives.

The Union's main argument on this issue was essentially based on the prior existence of the third shift and the large amount of overtime that ultimately was needed. However, that amount of overtime was not apparent at the beginning of this period. The amount of overtime varied during the period, building gradually into October and then declining over the following weeks. I do not find the mere existence of a large amount of overtime hours to be an adequate basis for concluding that the decision to rely on overtime was unreasonable.

In my view, in assessing whether the decision was reasonable, the Employer's decision has to be examined on two levels:

1.) Was the decision based on legitimate business considerations and only on legitimate considerations? and,

2.) Was the decision one which a reasonable person standing in the place of the Employer might have made? There is often a range of reasonable decisions and the issue is whether this decision falls within that range.

Dealing first with the bases for the decision, the Employer based its decision principally on the following factors:

1. The projections for future work;
2. The concern for inefficiencies that flow from operating three shifts;
3. The physical limits in attempting to add staff to the existing shifts;
4. The length of time it would take from the time of the decision to add staff until the Employer had the benefit of the new staff; and
5. The Employer's recent review of the department and subsequent adoption of a strategic plan which called for operating with only two shifts, and the difficulty of assessing that plan if the Employer did not give it a reasonable opportunity to be tried.

These are legitimate business considerations. There was no suggestion that the Employer relied on any irrelevant or improper factors. Thus, I conclude that the decision was based solely on legitimate business considerations, and that it passes scrutiny on the first level described above.

The second level of review addresses whether the decision falls within a range of reasonable responses. In retrospect, it may be that the Employer would organize the work differently. It is clear that the Union would do so. The issue before me, however, is whether the Employer's decision, at the time it was made, was a reasonable one. I have already outlined

the bases for the decision. As a practical matter, decisions like this have to be made on the basis of incomplete information and are often based on projections and "best guesses." I noted earlier the way in which the amount of overtime changed throughout the period. In addition, it is clear that the Employer has used overtime in this department for many years. Overtime was common even when the department operated three shifts. I have concluded that the Employer decision was one which fell within the range of reasonable decisions. It was a decision which a reasonable person could have made in this situation. The fact that the overtime projections turned out to have been low, does not mean that the Employer's decision was unreasonable.

In summary, I have concluded that:

1.) There is no provision in the agreement which required the Employer to staff in a manner other than it did;

2.) There is no provision which required the Employer to base its decision on particular factors; and

3.) The Employer decision was reasonable, having regard to the information that was available to it at the time it made the decision.

For the reasons given above, the grievance is denied.

Dated in London, Ontario, this _____ day of December, 1995.

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Howard Snow, Arbitrator