OPINION AND AWARD

In the Matter of Arbitration Between:

November 20, 2023

GENESIS ALKALI, LLC
Green River, Wyoming

and

UNITED STEELWORKERS
Local 13214

FMCS Case No. 220830-08816

Grievances:
SO – 22 – 024 – Production Department (JX 2)
BP – 22 – 022 – Production Department (JX 3)
SO – 22 – 046 – All Affected (JX 4)
SO – 22 – 057 – Sesqui Department (JX 5)
SO – 22 – 096 – Production Department (JX 6)

Before

Elizabeth Neumeier, Arbitrator

Representing:

The Employer:	Kenneth J. Yerkes, Barnes & Thornburg, LLP
The Union:	William Wilkinson, USW Staff Representative, District 11

Statement of the Award: The grievances are returned to the parties to discuss and arrive at remedies consistent with this Opinion. The undersigned Arbitrator will retain jurisdiction for the sole purpose of providing more specificity regarding remedy. In the event that neither party makes such a request, my jurisdiction will terminate 90 days from the date of this Award.

BACKGROUND

Genesis Alkali ("Genesis" or "Company") and United Steelworkers Local 13214 ("Union") are parties to a collective bargaining agreement ("CBA") effective July 1, 2019. The Company operates a trona mine and multiple plants in Green River Wyoming. The Union represents employees in the underground mine approximately 1600 feet beneath the surface, and facilities on the surface including the Sesqui, Bicarb, ELDM, Mono, Caustic, Westvaco and Granger plants. The Union has represented employees in the underground mine, maintenance, distribution, and Surface Production units for more than 50 years, under various owners and a succession of collective bargaining agreements.

The parties agreed to combine five (5) surface operations grievances[1], representative of numerous grievances, for this arbitration proceeding to resolve their dispute over application of overtime equalization language contained in the CBA. Four of the grievances state the complaint as:

> The Company denied payment to employees outside the 20% spread. [JX 2, JX 3, JX 4, JX 6.]

The Remedy Requested for those four grievances is what is printed on the Grievance Report as follows:

> plus the Union demands that the Company cease and desist from violating the Collective Bargaining Agreement, that the incident(s) be rectified, that proper compensation, including benefits and overtime, at the applicable rate of pay, be paid for all losses and further that those affected be made whole in every respect, including interest on any monies owed. [JX 2, JX 3, JX 4, JX 6.]

The complaint is stated in Grievance No. SO-22-057 as:

> Sesqui Bid operators are being skipped on nonqualified (clean-up) overtime. Company is not keeping EE in the 80-20. All the clean-up over time is being offered to a few certain EE'S. Bid operators are not even asked. [JX 5.]

The Remedy Requested is what is printed on the Grievance Report as quoted above, and the following:

> The Company to follow the 80/20 that was agreed upon in the

[1] Four of the grievances were filed on behalf of all affected employees, SO-22-024 (Joint 2), BP-22-022 (Joint 3), SO-22-046 (Joint 4), and SO-22-096 (Joint 6). Grievance number SO-22-057 (Joint 5) was filed on behalf of a single employee in the Sesqui Department.

> contract and make individuals that are not being asked and out of the 80-20 whole in all ways. [UX 5.]

The only Company written response included in the record is for Grievance No. SO-22-024, dated following a meeting held on August 29, 2022. That response states, in pertinent part:

> Below outlines the Union's position in the Company's position in response to the 2nd Step Grievance.
>
> Union Position:
> The Company denied payment to employees outside the 20% spread.
>
> Company's Position:
> The Company is not denying payment for monies owed to employees allegedly outside the 20% spread. To the contrary, the Company has stated in many communications to the Union that the Company is going to pay what is justly owed. However, the Company and Union disagree on the method to be used to determine which employees are outside the spread and the amounts that are owed to these employees.
>
> After several meetings regarding the matter, the Company and the Union have not been able to come to a mutual resolution. Therefore SO-24-024, and other related grievances BP-22-022, SO-22-057, and SO-22-046, have been slated for potential arbitration. An arbitrator has already been selected to hear this matter at a later date. [JX 2, page 2.]

The undersigned arbitrator was selected through the auspices of the Federal Mediation and Conciliation Service. A hearing was held on June 7 and June 8, 2023, at the Hampton Inn and Suites in Green River, Wyoming at which time both parties had the opportunity to present witnesses and exhibits, and to cross-examine opposing witnesses. A transcript was taken. Following a mutually-agreed-to extension of time, posthearing briefs were filed.

The Union offered four witnesses. Andy Martinez has worked at the Company and its predecessors for 33.5 years as a mechanical maintenance employee and has been the Local Union President for 5 ½ years. He previously was a Steward and Chief Steward. ("President Martinez") Bobby Jo Winn has worked at the Company for 13 years and is the Chief Union Steward. ("Chief Steward Winn") William "Bill" Madura has worked at the Company and its predecessors for more than 25 years and is the Union Vice President. ("Vice President Madura") Marshall Cummings, a Utility Relief Operator in Surface Production, is the Chief Steward for Safety and is the Miners Representative. ("Steward Cummings")

The Company introduced four witnesses. Kristen Casey is a Human Resources Business

Partner who began working for the Company in April 2022. ("HR Partner Casey") James David Sturgis is a Process Engineer and Service Operations who began working for the Company in July 2008 and became manager of the Mono plant in late 2020. ("Manager Sturgis") Ryan Scott Alkema has been employed by the Company since June 2006, having worked as a process engineer, supervisor, plant analyst and unit manager at various locations, including serving as operational manager of the EH&S at the end of 2020 and as Sesqui plant unit manager in mid-2022. ("Manager Alkema") Bryan Lohstreter is a Labor Relations Manager and has worked for the Company for 6.5 years. ("LR Manager Lohstreter")

The crux of this dispute revolves around the proper application of the 80/20 overtime spread language contained in Section XIII Overtime of the CBA. The topic of assigning overtime and, particularly, the equalizing overtime opportunities, has been addressed numerous times in negotiations for collective bargaining agreements, in grievances, and in arbitration proceedings. In addition to Section XIII Overtime of the CBA, over the years various Memoranda of Understanding (MOU) or Memoranda of Agreement (MOA), terms used interchangeably, were entered into dealing with specific aspects of assigning and equalizing overtime.

Section XIII is very detailed and runs for nearly 10 pages, commencing with:

> **1. General**
>
> Employees shall perform overtime, call-in, and call-back work when requested to do so by the Company unless the employees give the Company written notice by mid shift of the first regularly scheduled shift that they don't want to work overtime in the work week or have an acceptable excuse.

Section XIII.4.A lists the Overtime Groups for 1) Surface, differentiating between Westvaco Surface Overtime groups and Granger Surface Overtime groups, and 2) Mine Overtime groups. Section XIII.4.A further states:

> It is understood that certain types of overtime such as "clean-up" may be offered to anyone in the production or service crews. In the event all available qualified employees in a specific mine production overtime group refuse overtime, supervision may offer the overtime to available qualified employees assigned to other overtime groups. It is also understood that Mine Maintenance and Mine Services employees are not restricted to any area of the mine for either straight time or overtime work assignments. It is also agreed that when the Company deems it necessary to assign additional employees to service crews or fill any vacancy on a service crew, the job will be posted for bid /.

Section XIII 4.B governs distribution of overtime as follows:

> 1. Spread[2]
>
> The Company will make a reasonable effort to have total overtime among individuals in each overtime group with the same qualifications as equal as possible at the completion of each calendar quarter. The overtime will be equalized as near as possible, not to exceed a 20% spread from high to low within any specific overtime group.
>
> 2. Exceptions
>
> a. Current maintenance procedures provide that some employees may bid for and receive additional training in the areas of instrumentation, mobile (heavy) equipment operation, certified welders, shop machine operator and machine shop work. Because of this training and related work assignments, overtime for those employees may become higher than other employees in their qualification groups. In these cases, the overtime will be equalized as near as possible among those employees with the same completed training.

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[2] *Footnote supplied*. The parties added this "Spread" provision following receipt of an arbitration decision in May 1969, holding that the appropriate unit for equalization of overtime was the group, not the crew. As to the remedy in that case, the Union conceded that holdover overtime hours need not be equalized. When an employee enters an overtime group, he is charged with the average overtime hours of the group. Interpreting the language that the Company is obligated to make a "reasonable effort to distribute overtime as evenly as possible among the qualified employees" Arbitrator Seligson found the keywords to be "reasonable" and "qualified." He held:

> I would consider this to be a reasonable guideline: excluding holdover and charged overtime at time of entry into the group, the obligation to equalize was then be confined to call-in and hours refused. If in these categories the Company maintains no more than a 20 percent spread between the high man and other employees in the overtime group, it will have satisfied the provisions of Section X, 8 A (2). [Union 4, pgs 5-6.]

b. It is understood that a disproportionate spread in total overtime hours may develop due to an employee working a higher number of "Preferred Overtime" hours as explained under definitions below or if an employee in a specific overtime group has qualifications or skills that are not the same or equal to other employees in the group.

c. It is understood that a disproportionate spread in total overtime hours may develop at the end of the quarter if higher overtime employees work due to overtime refusals or no phone answer when calling during the last ten (10) days of the quarter.

In addition to those exceptions, on May 24, 2010, the parties entered into a MOU for Overtime Equalization in the Surface Maintenance Department. MOU #45 provides:

> Sections ***XIII***.4.B.(1) and ***XIII***.4.B.(2) of the Labor Agreement will be disregarded for the Surface Maintenance Department and the following language will apply: * * *

That following language of MOU #45 requires the Company to make a reasonable effort to equalize overtime among individuals with the same qualifications at the completion of *each calendar year, not quarterly*. It further provided exceptions recognizing that some employees have additional skills and qualifications and unique skills and qualifications listed on the weekend overtime call out list, that a disproportionate spread may develop at the end of the year, and that a disproportionate spread all may develop due to absences at the end of the annual equalization.

Section XIII.4.C defines Preferred Overtime for Service Maintenance, Stores, Asset Cleaners, and bid yard crew positions; for Mine; for Shift Workers; and for Shipping, and basically amounts to the employee working on the job being given the first choice to holdover.[3] "Other Overtime" is defined as all overtime not defined as Preferred Overtime. Adjusted Overtime is the average overtime of an overtime group as of the date an employee enters the group. "Total Overtime" is the sum of Adjusted Overtime, Preferred Overtime worked and refused, and Other Overtime worked and refused.

Section XIII.4.D details how overtime is "charged" as follows:

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[3]MOU #2, signed June 24, 2016, amended the Preferred Overtime provisions for the Shipping Department.

D. Overtime Charging

1. Hours - Employees who accept overtime assignments will be charged for the overtime hours paid. This includes payment in lieu of an overtime lunch.

2. Hours Equalized - Employees permanently assigned to a new overtime group will be charged with the average overtime hours of that group as of the date they enter the group. Employees who are off from work for any reason or who are on light duty for a period of over thirty (30) calendar days will be equalized with the average overtime hours charged their overtime group from the time they are off thirty (30) calendar days until the date they are given a full release to return to work.

3. Hours Refused - Employees who decline overtime for any reason will be charged with the hours paid to their replacement.

4. Other Provisions - Overtime charging is also subject to the following provisions:

   a. When someone other than the employee answers the phone and says the employee is not available, the employee will be charged with the number of hours paid to their replacement.

   b. If employees have no phone and they are eligible for call-in overtime, they will be charged with the number of hours paid to their replacement.

   c. Employees who sign a no overtime request will be charged with any overtime for which they would have been eligible during that week.

   d. Employees will not be charged with

refused hours if there is no answer at their phone.

e. Employees who accept overtime assignments will be charged for the total overtime hours paid.

f. If employees do not sign a "No Overtime" slip prior to going on vacation, they may be called for any overtime for which they are eligible on their off days immediately preceding and following their vacation. If employees worked on these days, they will be charged the total number of hours paid. If the employees refuse to work on these days, they will not be charged with any refused time. Employees who are on vacation who have requested to be called for overtime opportunities during their vacation period will be charged for only those hours actually worked. Offers of overtime to those employees will only be made after the overtime list has been exhausted.

However, if the employees' vacation is for less than a full week, they will be charged for a maximum of eight (8) hours per day for refused overtime on scheduled days off immediately preceding and following the vacation period. Employees that have not signed a no overtime slip, may be offered overtime assignments during a single day vacation and will only be charged for overtime actually worked.

g. Each week for weekend overtime on surface maintenance, mine shop maintenance, and mine services, a

sign up list will be available for each overtime group. Administration of the weekend overtime sign-up procedure shall be in accordance with the Memorandums of Agreement MOU 53, 18, 16

Employees are made aware of available overtime through postings in accordance with the following:

E. Posting Requirements

An overtime list showing the overtime groups, employee names, and cumulative Preferred, Other, and Refused overtime shall be posted by the fifth working day of each month. The overtime hours posted shall be considered correct unless written objection is filed by the employee within ten (10) days of the posting date.

Finally, Section XIII.4 contains special provisions, as follows:

F. Special Provisions

1. General

a. It is not the Company's intent to attempt to equalize overtime on an hourly, daily or even weekly basis.

b. The procedure does not in any way limit the Company's right to assign any employee to any job for which the Company believes the employee is qualified.

2. Mine

Method of Offering Overtime: Normally overtime requirements will be filled by offering overtime to the low overtime qualified employee in the respective overtime group, who is going off shift. When the Supervisor has adequate advance notice of overtime requirements, employees in their overtime group may be called out in order to distribute overtime as equally as possible.

3. Shift Workers

> work until their relief has reported to take on the responsibilities of the position. If their relief does not report, the shift workers shall remain at their assigned position until a substitute is secured or the employees are released by their supervisor and if necessary, work one extra shift.

ISSUE – THE PARTIES USUALLY EACH STATE AN ISSUE

The Union's issue:

> Did the Company violate the Collective Bargaining Agreement by not maintaining overtime hours within the required 20 percent maximum spread within the surface production overtime groups? If so, what shall the remedy be?

The Company's issue:

> Has there been a mutually agreed and enforceable past practice with regard to the process and factors to be applied by the parties in determining whether the Company has equalized 80/20 overtime, as required by Section XIII(4)(B)(1) of the Collective Bargaining Agreement, for surface operations? And if so, did the Company properly apply the prescribed past practices in denying the incident grievances? If not, what is the remedy?

The Union's Contentions

The Union contends that the parties met over the course of 2021 to discuss overtime equalization. At the end of 2020 the Company had ended the practice of paying out the 80/20 equalization on a case-by-case basis and took the position they would only equalize on a quarterly basis, as the CBA states "It is not the Company's intent to attempt to equalize overtime on an hourly, daily or even weekly basis."

Regular audits were not being performed by either party. The Union stewards would audit when employees made complaints on a case-by-case basis. Overtime lists were maintained in a totality method, with all employees on one list. Chief Steward Winn testified that he first performed an audit for Q1 2021 at the request of President Martinez because people were complaining about being skipped and grievances were being filed. He reached out to the Company for help and presented the results on June 1, 2021, using a spreadsheet created with John Pitts, using the contract (qualifications) method. At the Company's request, another audit was performed using the totality method.

The Union points out that in multiple negotiation sessions throughout 2021, on what and how the process would be going into 2022, the Company made no mention to the Union of any type of past practice verbally or in writing. The Company terminated the case-by-case practice known to the Union by the grievance answers and the negotiations with the Union.

In 2021 some grievances were being settled, some were not, some were getting the now-standard grievance answer:

> It is not the Company's intention to equalize Overtime on a daily, weekly, or monthly basis. The Company believes that the 80/20 will resolve most issues. There has been no contract violation, therefore this grievance is respectfully denied. [Union 3, pg.2.]

Some supervisors were paying it out.

In a meeting on June 3, 2021, with President Martinez and Chief Steward Winn for the Union and Erin Toolson, LR Manager Lohstreter and Brandon Tornes for the Company, the Union agreed with the Company's stance saying, "If they wanted to go to the quarterly, that we would begin auditing the overtime and there would be no leniency on a quarterly basis." The Union was putting the Company on notice, that if the Company wanted the change to follow the language the Union would agree. The Union E-board also agreed with the Company, that they will only have to pay out quarterly instead of the case-by-case basis they were accustomed to. This would help the Company, as they wouldn't have to pay for individual bypasses anymore and would just make sure everyone was in the range at the end of the quarter.

The parties mutually changed how overtime would be canvassed and how it would be administered going forward, i.e., by qualification rather than using the totality method. The parties discussed how to implement a change to the database for the qualifications method.

The Union contends that any past practices were terminated by the agreed-to changes. This is further established with the November 15, 2021-email from LR Manager Lohstreter to Chief Steward Winn and the rest of the Union E-board. LR Manager Lohstreter stating "IT is working on reprogramming the overtime database so that it will track overtime per the contract…..Once the database is updated, I will make sure I hold training sessions for all supervisors on the new system." (Union 10.)

The new overtime system was to go live quarter 2-2022, but it actually went live January 1, 2022. This change created a complete breakdown of the overtime distribution system in Surface Production. Without the regular grievances to keep overtime as equal as possible the Company stopped canvassing the overtime lists from low to high on a consistent basis. They also would call employees at home instead of canvassing them at work. This created large spreads in all of the overtime groups in Surface Production.

The Union audited the results of the first quarter and Chief Steward Winn identified people out of the 20 percent spread. (Union 11.) The Company did not ask to use any of the

exceptions in the CBA around overtime charging. The Union does not have the documentation to see what is eligible and what is not, if they called in the last ten days, or if someone is out on medical leave, or bid to a new area. The Company has that documentation.

Grievance S–22–024 stems from that first quarter of 2022. The Company denied the grievance, stating they would pay the monies owed but disagreeing with the method being used. During that time and since, the Company has not equalized overtime in the Surface Production overtime groups for over six quarters.

The Union contends that Section XIII requires the Company to make a reasonable effort to have the total overtime among individuals as equal as possible, not to exceed 20% from high to low within any specific group. The 20 percent spread language has been in the agreement since 1981. Since that time the only change to the language was that starting in 1995 overtime would be equalized quarterly rather than on an annual basis, except for Surface Maintenance who have the exact same 20 percent language but are equalized on an annual basis.

The Union will show that it's been clear that if someone is out of the spread they will be paid out. This language helps to keep overtime equal for all of the employees in any particular group so that the same person doesn't get all of the overtime offered or the same person isn't being forced to work all the overtime.

In his 1969 award in favor of the Union, Arbitrator Seligson said "The question remains whether they are to be offered makeup overtime or to be paid for those hours. The weight of authority seems to be for money payment." (Union 4.)

While that was a Surface Maintenance not a Surface Production arbitration, both were part of the same language on page 21 in 1969. The Company quoted this arbitration award to the Union on a Surface Production grievance, further proving that the Company is aware that they are not separate in terms of the agreement or practice.

The Union contends that under the CBA employees will not be charged refusal hours if there is no answer at their phones when an employee is called for overtime outside of work. In Grievance BI-94-3 (Union 6) the issue for the Company was they could not charge hours for no answer at the phone or answering machine. The Resident Manager stated;

> The process of overtime equalization works only if several conditions occur. First, supervision has to use the system by calling the low person on the list and then working up the list in order until the overtime need is met. Second, the hourly people in the overtime group must generally want to work overtime. Third, the overtime group must all have the qualifications to work the jobs requiring overtime. [Union 6, pg. 5.]

It was clear 29 years ago and the Company knew then they need to run the overtime list from low to high for equalization to work. The final response from the Resident Manager was the

Company would charge overtime hours to employees whose answering machines are reached. That was not accepted and a settlement agreement was reached on January 23, 1995, eliminating all other practices and methods in relation to the 80/20 equalization process and adding that in cases other than callout, holdover, and other contractual provisions the low man shall be offered overtime first. (Union 7.)

The Company has made it clear they do not have to call from low to high and currently do not do that on a consistent basis. The Union is holding up its end of the 1995 settlement, by encouraging the members to get qualified on more jobs to maximize their overtime opportunity.

In the 1997 and 2016 negotiations the Company proposed language to charge hours for a no answer at the phones. This was the very reason the parties mediated the issue in 1995. (Union 8 and 9.) The Company claims that since 1994 they have a past practice of deducting hours for missed calls, at the end of the quarter. The bargaining history shows that to be untrue, as they have tried on two occasions to get that language.

Numerous things could affect the numbers in audits such as possible hours not being reflected accurately on the Company's new overtime lists. All hours of training overtime were always on the non-qualified list, because they are still overtime hours being worked. Mr. Tornes had created another list for training and safety and removed the hours from the list. When presented with the Sesqui overtime list from February 7, 2022 (Union 14), Robert Henderson had 156 hours of other work. When compared to the end of quarter audit it showed Mr. Henderson only had 32 hours of other work. (Union 11.) Over 100 hours had been taken off, and put onto "another list," a list the Union didn’t receive or have access to.

The CBA is clear that Other Overtime is all overtime not defined as preferred. Chief Steward Winn performed another audit for the second quarter in 2022, and people were outside of the spread, again. In emails between Chief Steward Winn and LR Manager Lohstreter between July 13 and July 14, 2022 (Union 15), LR Manager Lohstreter denies Chief Steward Winn's grievance, stating the Company will pay the money they owe, but disagreeing with the methodology the Union is using as it does not align with practice.

This was the first time the Union heard anything of a "practice." In over a year and a half of meeting together, the Company had discussed process, training, and implementation. If there was a past practice around the method that either party had, it would have been discussed. The Union requested information from the Company about the practice on July 23, 2022. The Company’s September 16, 2022-responses are the same for all: they don't audit unless the Union requests it. For the last five years the Company claims it has performed no audits of the overtime lists. Additionally, they do not put in writing to the Union any practice or method the Company is referring too.

The only practice Chief Steward Winn knows of is the one that LR Manager Lohstreter instructed him to perform. All direction on how to audit the lists has come from salaried personal. If this is a well known and established past practice, the Company would have instructed the Union on how that practice worked.

On June 15, 2022, the Union and Company met to discuss these grievances. The Company presented the Union with a spreadsheet (Union 19). The Company is now asking that if a call was placed, the hours would be deducted as a missed opportunity, a direct violation of the CBA, page 23, letter d. The Company wanted to deduct all preferred hours from all employees, a violation of the CBA on page 21, b, because you only adjust those hours if they cause a disproportionate spread, in an particular overtime group. Also, it would make the list get further and further out of the 80/20 spread. This had never been done in the past, to the Union's knowledge.

The next issue is the Company deducted all of the missed phone calls. The Union has been clear, that has never been accepted in any form or area. Even the Company's provided list shows that they only have two people within the 20 percent spread.

The Company's overtime sheet shows the audit was performed the same way Chief Steward Winn had done his, and actually has the 80 percent spread built into the form. The Company did not deduct refusal hours for missed phone calls, nor did they deduct all the preferred hours. The Union presented numerous pay stubs, from multiple employees. Chief Steward Winn was aware of the Company paying out employees on the first step in the past, without a grievance. Some of these pay stubs are examples of that happening from both production and maintenance.

Both President Martinez and Chief Steward Winn testified about Mr. Paoli performing audits on a case-by-case basis. President Martinez had no idea how Mr. Paoli conducted his audits or about some sort of other practice. He only knew that Mr. Paoli had performed audits of the yard crew and for Ms. Fennell (Human Resources) when she was a supervisor. This was not a regular process and was done on a case-by-case basis. Mr. Paoli was a yard person and hadn't worked in production for years. President Martinez was not aware of any union steward who would allow the Company to not count or deduct the hours missed if a call was placed and not answered. He was not aware that Mr. Paoli allowed this to happen with anyone at any time. Chief Steward Winn was unaware if Mr. Paoli even did audits, and had never received any evidence of such. He had never heard of Mr. Paoli allowing the Company to deduct hours from missed calls because they were given the opportunity.

The Union contends that employees on 12-hour shifts are available to the Company at work 15 days a month, yet the Company is insisting upon calling them on off hours instead. The Company has paid out when they didn't ask someone on their four-day shifts while at work, and paid out sums from ten to fourteen thousand dollars to individual employees. Members would work consecutive days, then go on a "long change." They wouldn't be asked while at work to work on their days off and it's their turn. Then the Company would have to pay them for being outside of the 20 percent spread. The Union reminded the Company when it was getting close to the end of the quarter to make sure to get the people in the spread, canvass them and use the exceptions at their disposal.

In maintenance where President Martinez works, they ask them when they are at work, and make clear efforts to make sure everyone's overtime is as equal as possible. In the mine they

are doing it per the contract and having almost no issues. The mine managers have a good grasp on the 80/20 because they have never done it the way the Company is trying to do it.

President Martinez elaborated on the fact that the cell phone reception in this area is not very good with no service at the mine, only 25 miles out of town. The Company has the ability to "game" the system with the employees when calling them and hanging up, to get to the person they want. The Company has gone from asking people at work, to the point of being within feet of the operator who is low and not asking him to work, and paying them out. (Union 1.) Trying to call them is obviously the more unbeneficial way for both parties because people won't have reception if they are not in town and they are not being charged for those hours.

The 12-hour shifts have been in Surface Production for roughly 23 years. The Company gave an example of only one overtime shift being worked in a quarter. That is unrealistic in that operation and has never happened. If it did happen the Union would work with the Company as they already do in the mine, where this has happened, and the Union did not force them to equalize those hours.

The Union notes that they have no issues in the mine because the Union and Company work together on the 80/20 equalization process and the Company puts in good efforts to make sure everyone's overtime is as equal as possible. If they have issues and someone is out they just pay what is owed. Vice President Madura stated that he would meet with the mine manager on a weekly basis. In the past he would attend weekly business meetings with all of management. LR Manager Lohstreter was in attendance along with multiple other managers, including Fred Von Ahrens the Vice President of Manufacturing. The mine has around 200 people in 12 overtime groups, and only two people were out of the spread in quarter 4 of 2022. The quarter 3 audit of the mine and emails (Union 25) between the Company and Union, show no one was out of the 80/20 spread. The Company has never tried to deduct the missed phone calls in the mine audits, or all of the preferred hours and Vice President Madura, attends all levels of grievance meetings, was not aware of any such practice.

Vice President Madura said several things need to happen for this to work. The Mine Manager communicates with his business leaders. Those business leaders canvass the list from low to high, ask people while at work if possible, and use the contractual exceptions in the agreement. This is exactly what the Union is asking the Company to do in this arbitration. They are already doing this in all other departments, except for Surface Production. In the mine similar to Surface Maintenance, they have a clerk that does the hours and posts the overtime lists, something that is not done in Surface Production.

Vice President Madura filed a Mine Maintenance grievance on April 10, 2021, over improper canvassing. Mr. Iorg was not directly asked if he wanted to work, just what he would be doing on his days off. He was charged for those hours, even though he didn't get the opportunity to work. This particular supervisor was having issues with overtime, and another Mine Maintenance grievance was filed on behalf of Freddy Brock, along with overtime sheets from quarter 4, 2020 (Union 27). Mr. Brock was not canvassed for the hours and was paid out 15.10 hours. The issues with this supervisor have stopped because the mine manager has worked

with him to follow the language and works to keep overtime as equal as possible.

In 1977 the Union and Company negotiated a settlement in the grievance procedure to pay people outside of the 80/20. This settlement, with all other evidence, shows the bargaining history and application of the 80/20 language in all areas on the lease. The arbitration award from 2009 stemming from a Mine Production grievance filed in 2006 (Union 29) shows both parties are aware that employees are to be in the 20 percent on a quarterly basis, or they will be paid out.

The Company's post hearing brief from that arbitration (Union 30), gives more insight to their stance on the 80/20 and overtime equalization. Company witnesses Steenberg and Ortega, who manages the mine utility department, confirmed that the Company looks very carefully at overtime hours throughout the quarter. The Union and Company play active roles to ensure that overtime equalization is followed and that people are paid out if not in the spread.

Both the Union and the Company agree that the equalization process is not for people to be paid out. The principle objective was so that certain individuals would not receive more than their fair share of overtime, that no favoritism being shown, that hours should be distributed as evenly and fairly as possible, and that everyone should be given at least the opportunity to say yes or no. This was the Company's stance on this issue in 2009, the same stance the Union is making today. Charging them refusal hours for missed phone calls is a violation of the agreement and takes away their opportunity and the ability to say yes or no. In that arbitration the Company says they offer overtime low to high, not what they are saying and doing now.

Vice President Madura explained how deducting all preferred hours is against the CBA and also would cause more people to be out of the 80/20 spread. On the NA column for no answer phones, Vice President Madura was clear that from his five years working on the surface, in the early 2000s, to all his years in the mine or any of my involvement through the grievance process as a Union representative for the past eight or nine years, he hasn't seen no answer phones being deducted or hours out like that in the past. He was unaware of anything Mr. Paoli, who worked in certain areas of Surface Production, did. Mr. Paoli had not been Chief Steward or working for years, having gone out on medical prior to his retirement, when this problem arose in late 2020. The Union has around 45 Union Stewards, about 30-40 stewards in Surface Productions and more than just Mr. Paoli would have known if there was a practice. Mr. Paoli attended the two Union meetings held each month and no past practice he supposedly created was ever discussed with the Union leadership.

Steward Cummings testified that in his time working in the mine they would offer overtime low to high and try to keep employees overtime as equal as possible, during the quarter. When he moved to the surface around 2011, they would canvass from low to high, mostly face to face. When someone was skipped prior to overtime being worked, they would let the lower-hour employee work. If the work was already performed, they would pay out, or make sure that the low person would get the next available overtime shift. Most of the time these issues were settled without having to reduce the issue to writing, in the grievance procedure.

Steward Cummings said that, since 2020, if you brought an issue up it would be a fight with the Company saying they have no obligation to give them this overtime and they'll make sure the employee will be even by end of quarter. Today, they do not run the list from low to high on a consistent basis.

Steward Cummings testified that, just the previous Sunday, the Company asked him to work. He currently has 42 hours of overtime, and the Company didn't ask the person with zero hours of overtime. Most of the overtime is offered via phone instead of traditionally asking them while at work. The Union has been requesting to know as soon as the overtime opportunity is known. In 2020 Steward Cummings said he was hearing things like "we ask who we want when we want." Favoritism is something the language is supposed to be preventing. Everything got moved to grievance now, because the Company stopped working with the stewards.

Steward Cummings and another Steward filed 429 grievances over the 80/20 at the end of February 2023. Members were frustrated as the Company has not equalized overtime in over a year and they are missing overtime opportunities. Steward Cummings tried to file grievances over the whole course of 2022 but the Company called time limits, as stated in the email dated March 31, 2023 (Union 31). The Union points out that the first grievance was filed for quarter 1 of 2022. The Company is still not equalizing overtime so the grievance is still continuing to this very day.

The call out sheets show who and when people were called, and if anyone was skipped. At the end of quarter 1 2023, Steward Cummings found 108 times where he believed the Company breached the contract, so he filed 108 grievances. The Company missed their timeline to respond. The CBA is clear on page 40, if they miss a deadline, the matter is settled in favor of the grievant. Those 108 grievances are pending the outcome of this arbitration.

The Company argument that they should be allowed to deduct hours from the employees for missed calls at the phone at the end of the quarter is contrary to the clear contract language the Company unsuccessfully tried to change on numerous occasions. They are attempting to have it changed through arbitration.

Even if Mr. Paoli himself was agreeing to violate the agreement, the Company cannot create a past practice with one employee or direct bargain with one employee.

In HR Partner Casey's notes from the June 15, 2022-meeting, the Union was discussing the practice of case-by-case basis for bypasses on Surface Production, even when Mr. Paoli was the Steward. Mr. Paoli wasn't doing quarterly but case-by-case as well. The Company's "cut and paste" answer for all 80/20 grievances shows both parties were aware of a change, a change initiated by the Company, to stop paying out on case-by-case and to equalize at the end of the quarter. HR Partner Casey also made it clear, that they gave them an "opportunity" when they called the employee, so those hours shouldn't count. The Company is stating they are not charging hours at the time of the missed call, but instead get credit at the end of the quarter. It's creative, but still a violation.

HR Partner Casey was instructed by LR Manager Lohstreter to deduct all Preferred Hours. The Union has shown this is not an accepted practice and has never happened. No specific past practice was stated by Chief Steward Winn. The Union's only known practices are a totality overtime list, that the Company changed, and paid out on a case-by-case basis, again a change made by the Company.

Manager Sturgess claimed he would observe audits in his various roles, and go through the information, and it was written down. They would mutually perform the audits, to check for exceptions in the contract, something that is not happening today, and use call out sheets to see if they were called in order. He claimed that Mr. Paoli would consider it a "reasonable effort" if they had made a call. If it was true that employees had their calls deducted on a case-by-case basis, that practice would of come out. People would know that they are actually being charged for no answer at the phones. Manager Sturgess also stated this was being done at the end of the quarter. In Employer 1, it shows clearly that wasn't true. The notes state "Paoli was getting individual missed payments at the time but not at the end of the quarter."

On the example offered explaining how they run the list, traditionally low to high, they did run the list correctly. The Union has shown that they do not do this consistently. Even Manager Sturgess, says "it's not a past practice, but a best practice." The Company stated in Union 5 grievance answer, where they have no obligation to canvass from low to high.

The Company presented some call sheets where they did in fact run the overtime list from low to high. The issue is the supervisors that refuse create havoc with the overtime sheets, especially the non-qualified list, as shown in Union 11.

The Union contends that LR Manager Lohstreter was the person who terminated the case-by-case overtime payments in 2020, because it didn't align with the contract. LR Manager Lohstreter says he learned of the Mr. Paoli practice in June of 2021, when talking to James Sturgess and Manager Alkema, but didn't talk to the Union about it, until June 15, 2022. In that meeting he still hadn't referred to it as a practice, but as a want, this being a settlement meeting.

The Company notes of the June 22, 2022-meeting show they were speaking about Preferred Overtime, not phone calls, when "the Paoli way" was brought up. (Company 1.) LR Manager Lohstreter believes, from his research, this "practice" went back as far as 1994. In 1995 the parties mediated answering machines (Union 7) and in 1997 the Company tried to change the language in contract negotiations, unsuccessfully. The grievance from 1997 was from Surface Production, the same area they are claiming has this practice.

The Company entered a grievance from April of 2012 (Employer 15), also containing handwritten notes. In the notes Mr. Paoli asks low people first, and reasonable effort attempt to call. If he did in fact say that, it does not say you get to remove the missed hours at the phone. Nothing in this grievance or notes, shows a practice of deducting hours for missing phone calls.

In a grievance from July 2008 over being out of the 80/20 (Employer 27) the Company and Union audited the overtime during th grievance process. In the notes Mr. Paoli is saying to

deduct "her" preferred. If they were deducting the grievant's Preferred Hours, she would have been further out of the spread, as she was the low-hour grievant. A likely conclusion, with no direct testimony, is that someone else's hours created a disproportionate spread and needed to be deducted. Nothing is said in the grievance that the Company is allowed to deduct all Preferred Hours or deduct missed calls. It also shows the Company and Union audited together, something that the Company refuses to do today.

In a grievance from 2009 (Employer 17) Mr. Paoli made a comment, if this goes to third step we will request the records. LR Manager Lohstreter, states "Why would you want phone records if it was .8 times high person pay?" The Union would need to see if the call was placed, also to see if they called in order. If no call was placed, and he was in fact the low man to get the hours to work, on the case-by-case practice he would have been paid.

No real audit has been performed. The Union views the raw data numbers of overtime in Surface Production in Employer 19 as nonsensical and absorbent. The Company is trying to violate our agreement and use bloated figures to try and gain language they currently do not have, and have been unsuccessful to gain in bargaining.

The Union contends that the total cost should not have any bearing on if they did, or did not violate the agreement. The Union has been unable to get real numbers because the Company will not participate in the audit process, as we see they do in other areas, on the lease. The Company has maintained a stance that they do not and have not performed audits. This is shown in Union 17, where the Company says they conduct no such audits and have not conducted such audits.

In Union 32, a multi-page document containing grievances, overtime sheets, and emails, the first page confirmed that an audit had been performed and not given to the Union. The second page, another grievance filed for a bypass, was paid out in March of 2022. The Company had yet again performed an audit and did not give that audit to the Union. The Company continued the payouts on a case-by-case basis, even into 2022. The overtime sheets show that not only he was out, but four other employees were as well. The Company still maintains they will pay what they owe, only they didn't pay what was owed to the four other employees when the Company agreed they were all out of the 80/20 spread.

It was established that the new overtime system went live in quarter 1 of 2022. How the Company wants to deduct hours for missed calls was clarified from their perspective. They don't want to not charge them, initially, they would like them counted as opportunities at the end of the quarter, and only in surface operations. The evidence shows they have been trying to achieve this for years. It has never been accepted, to the knowledge of anyone in the Union, and no evidence was ever produced to show it's ever even happened, and clearly was not accepted.

The Company states they have no contractual obligation to meet with the Union and audit the overtime, the way they do in the mine. They are purposefully keeping the numbers high, no audits, not running the list from low to high, and not asking while at work. People could bid out, be on leave, retired, or meet other exceptions in the contract, that would adjust those figures.

In Employer 1, the Company notes and LR Manager Lohstreter confirmed that the Company did terminate the individual bypass payments and started giving the 80/20 answers. He confirmed that no one in Union leadership knows about the past practice and "the Paoli method" to them is totality, not deducting missed phone calls, that the Union was opposed to change, and that LR Manager Lohstreter initiated the change with the overtime lists. LR Manager Lohstreter made claims the Union never told him they would now withdraw the individual bypass grievances to settle up at the end of the quarter. Union testimony and evidence, show they clearly told him that. The Company has made claims that the Union wouldn't need call out sheets, yet Steward Cummings stated he was always trying to get them for overtime equalization.

The Company brought examples of when they had done it right. The Union presented a grievance from March 21, 2023 (Union 33) where they did not. In that grievance the Company is alleged to have canvassed an individual for four overtime shifts throughout the month instead of running the list each time, to spread the hours out. The Company gave the same 80/20 end of quarter will take care of it answer, but now has not equalized now in more than six quarters.

The Company claims they have had this past practice since 1994, yet in a 1995 Surface Production settlement that practice is not referenced. That settlement started because the Company wanted to charge refusal hours for answering machines. The Union presented a call out sheet (Union 34), where the Company had bypassed lower people with no explanation as to why they were skipped. Another call out sheet was presented (Union 35) showing, again, people were skipped in the canvass. LR Manager Lohstreter confirmed that he told the Union he could ask one guy for 45 hours and then 45 to another guy if the Company wants.

The Company confirmed that they have not tried to use any exceptions on their spreadsheet and speculated on if people would qualify or not. LR Manager Lohstreter also confirmed that when the Company was making case-by-case payouts, the Union and Company were not auditing at the end of the quarter. This shows the Union testimony to be true and accurate, as they said about random and case-by-case, not at the end of a quarter, something both Manager Sturgess and Manager Alkema testified to.

On rebuttal, Steward Cummings identified typed notes from October 26, 2022, regarding SO-22-030 (Union 36). In that meeting with both Company and Union personal the Union states they will withdraw the surface bypass grievance, but expect she and everyone else out of the 20% spread will be paid. This was also said on SM 22-048, i.e., the same response from the Union in two different areas. Specifically, Vice President Madura is talking to LR Manager Lohstreter.

On rebuttal Vice President Madura identified a third quarter audit from the mine in 2015 (Union 37). It shows that there is a practice that if someone only works one shift in a quarter the Company would not be required to payout the rest of the employees. Vice President Madura testified that the Union's position has never been to just go .8 and draw a line and pay everyone, and this has been their position longer than just three weeks. Vice President Madura always wants the Union and Company to work together. He has no knowledge of what Mr. Paoli did or

didn't do and all the knowledge he has came from the Company.

UNION CONCLUSION

The Company has made claims of a past practice they formed with Union Steward Paoli. The Company provided no evidence, not one document or grievance answer, that employees were being deducted hours at the end of the quarter. All the testimony on what Mr. Paoli did came from the Company, mainly the advocate during the arbitration, not direct testimony and evidence.

A past practice must be well known and accepted, and this is not. No one from any level of the Union has ever heard of such a thing happening over 30 years of testimony. Not only is it not known by anyone from the Union, the bargaining history clearly shows it's not accepted. The Company attempted to achieve this in the 1994 grievance and answer (Union 6), then the final settlement in 1995 (Union 7). They proposed to charge for answering machines in the 1997 negotiations (Union 8), then again in the 2016 negotiations (Union 9), to be able to deduct hours for missed calls. The Company cannot achieve in this arbitration what they did not get in negotiations, all while alleging they had a practice in place.

The Company does not have the right to create a past practice with an individual employee as that would be direct bargaining.

The Union and Company met multiple times over these issues starting in 2020 and through all of 2021. Not one time did the Company tell the Union they believed they had a right to deduct calls at the end of the quarter. The first time the Union heard this from the Company was in their spreadsheet (Union 19) on June 15, 2022. At that time it was a settlement offer, as a want. It was not referred to as a past practice. It wasn't until the day of this arbitration that the Union became fully aware of what the Company is attempting to achieve. In the time frame of late 2020 to June of 2022, during those talks, the Company most certainly would have told the Union how they view the equalization process.

The only clear past practice was payouts on a case-by-case basis. The Company said Mr. Paoli would audit quarterly, but evidence and testimony from both parties, shows it was when there were issues raised by members. When the Company stopped the individual payouts, at the end of 2020, that was a change and effectively terminated that practice. Mr. Martinez was very clear that the Company wanted to change, that he and the Union didn't understand why and did not want to change. The Union ultimately agreed to the Company's proposed changes. The Company and Union met multiple times in 2021. Clearly they were bargaining over what the 80/20 equalization process would be going forward. A past practice must go unchanged. No past practice can exist since the Company changed it. The Union and Company both agreed that the Company stopped the individual payouts. The Company created the "new" overtime system.

The Company is attempting to separate the areas on the lease covered under this agreement. The contract governs all bargaining unit members. The Company referenced the 1969 maintenance area arbitration in a Surface Production grievance answer (Union 3). Clearly

both parties viewed that arbitration award as binding for all on the lease, not just Surface Maintenance. The Mine Maintenance and Surface Maintenance follow the language and understand the language. They canvass at work, run the overtime lists from low to high, and equalize at the correct times. Company representatives on all levels, meet with the Union representatives and they equalize mutually.

The Company is refusing to do what they are already doing in other areas. Chief Steward Winn and Steward Cummings work in Surface Production and stated they do not canvass low to high consistently, with some supervisors flat out refusing to canvass from low to high. LR Manager Lohstreter told the Union he can offer one guy 45 hours then another guy 45 hours, as long as they are in the spread at the end of the quarter.

The Company created a problem, initiated change, and now are throwing a ridiculously bloated price tag to steal our language away. The Union worked with the Company in good faith for over a year to get something that worked for both parties. The Company stopped making reasonable efforts to make the overtime as equal as possible and our members have suffered. Our people are missing out on pay and overtime opportunity, and they are being forced to work overtime out of turn. This has created favoritism, frustrations and pay loss, everything that this language was built to prevent. The Company has not equalized in more than six quarters. The Company should not get a free pass on this issue, the Union has done everything they asked, and agreed to everything they wanted. The Union has proven its case, the language is clear, and we are asking that you sustain these grievances.

The Company’s Contentions

The Union bears the burden of proof as the party alleging a violation of the parties' CBA. The Company presented a plethora of evidence of a binding past practice that had been in place for at least 30 years of how the Union audited 80/20 overtime compliance for Surface Production. This practice is the contract. The Union flat-out acknowledges that it is changing the practice. The Union cannot meet its burden here in showing that the Company violated the contract when it is the party that is violating the contract by unilaterally departing from binding past practice mid-contract with no justification for the change. Moreover, the Union presented no evidence indicating that the Company agrees with its departure from past practice or the Union's interpretation of the overtime equalization language.

A. The Issue in This Arbitration Focuses On The Union's Past Practice Of Auditing 80/20 Overtime Compliance For Surface Production.

As explained in its grievance responses and communications to the Union, the Company commits to paying money justly owed to employees outside the 20% spread. The issue is the parties' disagreement on the method used to determine which employees are outside the spread. The Company relies on an established past practice that was developed by the Union itself that the Company acquiesced to and built business practices around since that practice has been in place. The Union now seeks to unilaterally change the practice mid-contract to demand

potentially millions of dollars in overtime equalization payments from the Company.

1. The Union Attempts To Deflect From Its Admitted Departure From The Auditing Practice By Introducing Irrelevant Arguments.

The Union's attempt to introduce irrelevant and factually incorrect arguments at the arbitration hearing are red herrings to deflect from its breach of the established past practice.

I. That the Company Does Not Pay Employees Who Are Bypassed On An Individual Bases Is Of No Import.

The Union claims that it changed its auditing practice for Surface Production in response to the Company changing its practice of handling overtime bypass on an individual basis. Specifically, the Union argued that the Company started answering grievances by stating that it had no obligation to equalize missed overtime opportunities on an individual basis but only at the end of the quarter as required by the contract, and this is what led the Union to change its audit practice "without leniency".

First, there is no bypass language in the contract, despite the Union's attempt to introduce bypass language on at least six occasions in the past. Accordingly, the Company has never been contractually obligated to pay on an individual basis if an employee was skipped during the quarter – it is only accountable if an employee is out balance at the end of the quarter.

Second, the Company has never changed its approach with regard to bypass situations. The Company presented evidence that in 2009 the Company denied a grievance where the Union was seeking relief for an individual bypass. The Company's response to that 2009 grievance contained the same contract language the Company quotes today: "it is not the Company's intent to attempt to equalize overtime on an hourly, daily, or even weekly basis." LR Director Lohstreter testified that his research revealed that the Company has been utilizing that contract language in its grievance responses as far back as the 1990s. Therefore, the Company's recent responses quoting that same language are nothing new, and certainly not a change in practice. Moreover, the Company is simply reciting the contract language that explicitly recognizes that the Company does not owe for overtime bypass on an individual basis and is only obligated to pay if the individual remains out of balance at the end of the quarter. There is nothing disingenuous or new in LR Director Lohstreter providing this response in response to Chief Steward Winn’s attempt to change past practice.

Accordingly, the Union's argument about this alleged "change" is factually incorrect and irrelevant. The issue in this arbitration and raised in the grievances is the method of auditing 80/20 overtime equalization for Surface Production, not an alleged change from individual bypass to quarterly resolution.

ii. The Union’s Argument About Changing The Way The Overtime Call Out List Is Complied Is Likewise Irrelevant.

The Union's emphasis on the change in the way the overtime call out sheets are compiled from the "totality" to the "qualification" method is also misplaced. It is uncontroverted that the change to compile the list based on hours employees have been charged for specific qualifications instead of total overtime hours came after Chief Steward Winn brought this very issue to LR Director Lohstreter's attention. Union President Martinez acknowledged that the Union has never filed a grievance over this change or otherwise debated this change, making it undisputed that this was mutually agreed and not a unilateral change.

Thus, the Union's argument that the Company is the party attempting to change a practice by changing the way the overtime list is compiled is factually incorrect, since the change only happened because the Union, through Chief Steward Winn, raised the issue. The Union never objected to the change brought about by his inquiry. The Company made it clear through its testimony that it is agnostic to which method is used and is open to returning to the using the totality list. The Company made the change in an effort to cooperate, not escalate.

Finally, the Union's objection during the arbitration to the change from the totality to the qualification list is irrelevant to the issue in this arbitration, i.e., the auditing practice used to determine the 20% spread, not the manner in which the overtime call-out sheet is compiled. That has no bearing on how the spread is calculated. LR Director Lohstreter gave unrebutted testimony that the Company was clear in its communications with the Union that the issue was the audit practice, and never once did the Company tell the Union it was changing the audit practice.

iii. The Company Has Never Changed Calling From Low To High On The Overtime List.

The Company presented testimony and documentary evidence of call-out sheets confirming that its practice is still to call low to high for overtime. The Company acknowledged that mistakes and accidents happen and there could be instances where supervisors do not call low to high. There is no contractual requirement to call low to high but failing to do so would exacerbate the difference between high and low overtime on the 80/20 list and increase overtime liability. The auditing practice polices any such abuse. In its grievances the Union does not even argue that the Company stopped calling low to high or that it improperly changed the method of compiling the call-out lists.

iv. The Union’s Arguments About The Practices In The Mine Are Likewise Irrelevant To This Arbitration Since It Only Deals With The Practice For Surface Production.

There are practical differences between the mine and Surface Production that have contributed to different practices evolving, making the practice in the mine irrelevant to practice on the surface. The mine has a handful of rotating 12-hour shifts in the mine (13 people out of 210 employees). There are far more rotating 12-hour shifts in Surface Production, making overtime equalization more difficult on the surface. In the mine, if an employee calls off work the mine typically will continue to run, just producing less output. On the surface, if someone

calls off and there is not a relief operator, the Company has to call someone in to fill that job to keep the production process moving.

Another significant difference between the mine and Surface Production is that the mine has more opportunities to charge an employee with refused hours, making it easier to balance employees' overtime at the end of the quarter. In the mine, if the Company offers an employee overtime, the employee refuses, and no one ends up working the overtime, the Company can still charge the employee for those refused hours. On the surface the Company only charges if the overtime shift is ultimately worked.

There are practical, logistical, and business differences between the mine and surface operations that have led to different 80/20 overtime equalization practices evolving in each. The Company acknowledges and has accepted the different practices, which, again, are Union driven, but the practice in the mine is irrelevant to resolving the instant grievances regarding the practice on the surface.

B. The Union's Past Practice For Auditing 80/20 Overtime For Surface Production Created A Binding Obligation On the Parties.

Arbitrators have long recognized that parties' practices can impose binding obligations on the parties and become part of the contract. To establish a binding past practice, the practice must be unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time as a fixed and establish practice accepted by both parties. In other words, "the way of operating must be so frequent and regular and repetitious so as to establish a mutual understanding that the way of operating will continue in the future."

The overwhelming weight of the evidence in this case demonstrates that the Union's Surface Production 80/20 overtime audit practice is indeed a binding past practice. The Union has the requisite knowledge of the past practice. While the Union witnesses argued at the hearing that they were unaware of how Mr. Paoli audited, even if true that would not excuse the Union from being bound by the practice. Arbitrators have acknowledged that stewards are representatives of the union and the chief steward's knowledge is attributed to the union.

Therefore, the approach Mr. Paoli practiced – which the Union conceded through Union President Martinez likely existed before he became steward – is attributable to the Union since Mr. Paoli was an appointed representative of the Union. As LR Director Lohstreter explained during the hearing, "if I can't depend on, when I'm dealing with a chief steward, that what he says, what he does, what he exhibits, if I can't depend that that's not the position of the Union, you know, the whole process falls apart. Who do I depend on as the Union?"

To the extent the Union witnesses claimed they were unaware of how Mr. Paoli audited, they simply could have asked him. Vice President Madura acknowledged that, as Vice President of the Union, he was in a position to ask Mr. Paoli how he conducted his audits while Mr. Paoli was employed. The Union witnesses could have also asked Mr. Paoli about his audit method at the hearing since Vice President Madura acknowledged that Mr. Paoli was in the building with

the Union on the day the Union presented its testimony and Vice President Madura spoke to him.

Both Union President Martinez and Chief Steward Winn acknowledged that by the time the instant grievances were moved to arbitration, they understood that the audit method they were proposing was different from the practice established by the Union and continued by Mr. Paoli.

Chief Steward Winn admitted that he was moving the grievance forward with the understanding that his proposed audit method is different than the one established by Mr. Paoli's past practice. Therefore, even if one were to accept that at some point in time the Union was unaware of the Union's method before and during Mr. Paoli's time as chief steward, both Union President Martinez and Chief Steward Winn acknowledged that they were pursuing a grievance that seeks to unilaterally change an established past practice.

Chief Steward Winn claimed he was "unaware if Dave [Paoli] did any audits," but then also acknowledged that his approach was different from the past practice continued by Mr. Paoli. How could Chief Steward Winn know his approach was different from Mr. Paoli's without also knowing the method Mr. Paoli used? Chief Steward Winn's testimony regarding lack of knowledge is incoherent and undercut by his own statements to the contrary, calling into question Chief Steward Winn's credibility as a witness.

The Company had effectively turned over the audit practice to the Union entirely. This was an act of trust, not an attempt at deception and not required by the contract. The Union is the party that conducts the audits, not the Company, because the Company has allowed it to be so through and including the arbitration hearing. The Company opened its books and gave the Union unfettered access to the records it needed to conduct the overtime audits. Often, the Company would allow Mr. Paoli and the Union free reign to access the Company's filing cabinets whenever they wanted. The practice could not have been more transparent to the Union, as the Union was the one was the one driving it.

The Company also presented evidence that the Union consistently applied and enforced the audit practice for at least 30 years. The Company presented testimony and exhibits of grievances that describe and support how Mr. Paoli was conducting audits dating back to 1994, but again, as Union President Martinez acknowledged during the hearing, the prior audit method had existed even before Mr. Paoli took became Chief Union Steward, suggesting the prior audit method goes back even further than 1994.

In 1994, the Company denied a grievance where the Union claimed an employee was outside the 20% spread because the spread was due to the Company not being able to reach the employee on multiple occasions to offer overtime, which is consistent with Mr. Paoli's auditing method. Nowhere in the 1994 grievance is there any suggestion by either party that this was a new or novel approach to 80/20 auditing. Instead, they focused on factual compliance: were they called or not? The Company presented multiple instances from 2008, 2009, and 2012 of Mr. Paoli asking for call-out sheets and Mr. Paoli stating during grievance meetings that calling an employee is considered a reasonable effort for purposes of 80/20 overtime equalization. The fact

that Mr. Paoli and the Union requested call-out sheets demonstrates that the Union considered the Company's attempts to offer overtime to employees who were eligible and available and did not just take a hardline approach that any employee below the 80% cutoff was out of spread and owed money. If Mr. Paoli and the Union only looked at raw numbers, there would be no need to look at the call-out sheets. Two Genesis plant managers, Sturgess and Alkema, testified extensively regarding their first-hand experience going through the overtime audit process with Mr. Paoli and other Union stewards dating back to 2011 and 2009, respectively.

Perhaps most significant is the fact that while Mr. Paoli was the Chief Union Steward, the Company did not receive any grievances claiming that his audit method was incorrect or that he should be using the method now advanced by the Union. Neither party made any proposals in the most recent contract negotiations in 2019 to change the 80/20 overtime equalization language. It was not until Winn came on as the new Chief Steward on the surface and advanced his proposed audit method that the audit method became a disputed issue. This alone demonstrates that the Union's long standing practice was a mutually satisfactory understanding between the parties, which gave operating significance and practicality to the purely legal wording of the written contract.

The Company has established that a past practice has existed and that the Union was aware of it for some time, at least 30 years. Clearly, the practice has been in existence for a reasonable amount of time to show acceptance by both parties.

C. The Union Cannot Unilaterally Change The Binding Audit Practice Mid-Contract And Its Attempt to Do So Through Arbitration Is Impermissible.

The Union created a binding past practice on auditing Surface Production 80/20 overtime compliance and the Company has acquiesced and relied on this practice for nearly three decades. Having been in place since at least 1994, the practice has survived numerous contract negotiations without change to the relevant contract language. The overtime equalization language was introduced in the parties' contract following a 1969 arbitration award. In 1995, the language was changed from equalizing annually to quarterly, but other than that, the language has been unchanged for 27 years.

As arbitrators have held, "[t]here would have to be very strong and compelling reasons for an arbitrator to change the practice by which a contract provision has been interpreted in a plant over a period of several years and several contracts." None such exists here. Once Winn took over as Chief Union Steward on the surface, he decided he was going to perform the overtime audits the way he believed the contract read without regard for the established past practice. This is not a "compelling reason" - this is the Union saying we do not like our practice anymore and want to change it without negotiating over the change, which arbitrators routinely find impermissible. If the Union found the prior method unacceptable, it must change the wording of the contract through collective bargaining.

D. Applying The Parties' Past Practice Is Necessary Here To Give Meaning and Fill In the Gaps To Otherwise Ambiguous Contract Language.

Resorting to past practice is justified and necessary here to give meaning to otherwise ambiguous contract language. Arbitrators frequently rely on past practice to interpret ambiguous or unclear contract language. As Elkouri & Elkouri explains, "[t]he custom or past practice of the parties is the most widely used standard to interpret ambiguous and unclear contract language. It is easy to understand why, as the parties intent is most often manifested in their actions."

Here, the Union created a binding past practice regarding the method used to determine which hours would be considered outside the 20% overtime equalization spread to give effect to otherwise ambiguous language. The relevant contract language in Section XIII (4)(B)(1) reads as follows:

> The Company will make a reasonable effort to have total overtime among individuals in each overtime group with the same qualifications as equal as possible at the completion of each calendar quarter. The overtime will be equalized as near as possible, not to exceed a 20% spread from high to low within any specific overtime group. [Jt. Ex. 1, p. 21.]

This language was added to the parties' contract following a 1969 arbitration award where the arbitrator stated he believed a 20% spread from high to low overtime hours was reasonable. No one currently with the Union or the Company was involved in drafting this language. In 1995, the language was changed from equalizing annually to quarterly, but other than that, the language has been unchanged for 27 years. The audit method the Union developed for Surface Production, which has been in existence since at least 1994, harmonized the two sentences in Section XIII (4)(B)(1).

The language in Section XIII (4)(B)(1) is silent as to what constitutes a "reasonable effort" to equalize overtime. The Union developed a practical method of applying the contract language in a way that made logical business sense: it considered the Company calling an employee to offer overtime, even though the employee did not answer, a reasonable effort for purposes of 80/20 compliance and considered the hours offered towards the 20% spread. The reasoning makes logical sense. Per the contract, the Company cannot, and does not, charge employees for overtime hours offered when they do not answer their phone to the callout list.

When the Company "charges" an employee, it adds overtime hours to the employee's total on the overtime list and moves their position higher on that list. Since the Company does not charge when an employee does not answer the phone, that employee can stay low on the overtime list, continue to get called and purposefully not answer, and then receive a payout at the end of the quarter if the employee is out of balance. The Union's prior method adhered to by Mr. Paoli eliminated the irrational result of rewarding employees for not answering their phone and paying them for hours they chose not to work, which is why it was unopposed by the Company for nearly 30 years.

Furthermore, the contract language is ambiguous as to how to calculate the 20% spread

and which hours will be considered in any such calculation. Section XIII (4)(B)(1) contains various exceptions, but the exceptions merely note that disproportionate spreads in total overtime may develop in certain situations.

Exception (c) states that "[i]t is understood that a disproportionate spread in total overtime hours may develop at the end of the quarter if higher overtime employees work due to overtime refusals or no phone answer when calling during the last ten (10) days of the quarter." This exception simply accounts for overtime worked late in the quarter and that the Company does not have the same opportunities to balance as it did during the first 80 days of the quarter. Nothing about this exception is inconsistent with the long practiced method that Mr. Paoli continued in considering reasonable attempts, eligibility, or availability.

Exception (b) states that "[i]t is understood that a disproportionate spread in total overtime hours may develop due to an employee working a higher number of 'Preferred Overtime' hours . . ." The language merely acknowledges that a disproportionate spread may exist, but it does not explain how the parties are to account for that disproportionate spread when determining 80/20 compliance. The Union's practice filled in the gaps to the otherwise ambiguous language and subtracted Preferred Overtime hours from the 20% spread calculation as well. The practice, followed by Mr. Paoli and the Union, gave meaning to the otherwise passive contract language.

In addition to filling in gaps to otherwise ambiguous contract language, the Union's prior audit method also harmonizes the 80/20 overtime equalization language with the 12-hour schedule language in MOU 22, which states that the 12-hour schedules will be implemented on a cost neutral basis. The 12-hour schedules worked on a "cost-neutral" basis under the method Mr. Paoli continued to employ because that method does not count hours where the employee was unavailable to work the overtime shift in the first place as part of the hours outside the 20% spread. The audit method the Union is now pushing is clearly not cost neutral and it would cost the Company millions of dollars per year. The method historically applied by the Union and allowed by the Company permits the Company to maintain its 12-hour rotating schedules for Surface Production and give effect to MOU 22, while the method pushed by Chief Steward Winn would require the Company to abandon the 12-hour schedules and return to 8-hour schedules on the surface. An interpretation that gives meaning to the parties' intent is favored over interpretations that lead to unreasonable or harsh results.

E. The Union's Attempt To Distance Itself From Chief Steward Winn's Audit Method At The Hearing Is Telling, But Impermissible.

Multiple times throughout the hearing, the Union's advocate asked the Company witnesses questions implying that Chief Steward Winn does not speak for the Union and/or that it does not endorse his audit method. For example, LR Director Lohstreter testified about a conversation with Chief Steward Winn where Winn made it very clear his audit method was to multiply the high person's overtime hours by .80 and pay everyone below that cutoff number, and that Chief Steward Winn was not moving off that method. In yet another instance, the Union representative implied through his questioning that paying everyone below the 80% cutoff is not

the Union's position. Thus, it is evident that the Union is trying to distance itself from the audit method advanced by Chief Steward Winn, suggesting that even the Union leadership acknowledges Chief Steward Winn's practice is an impermissible departure from established past practice. The Union never called Chief Steward Winn as a rebuttal witness after the Company put on its evidence regarding the long-standing auditing method and Chief Steward Winn's admitted and stark departure from the same, despite the fact that the Union called two other rebuttal witnesses.

The Union cannot flip the burden and blame the Company for relying on the actions of its own chief steward, a representative of the Union, to escape liability for the chief steward's actions. Chief Steward Winn is the steward who filed and advanced to arbitration the instant grievances after he conducted overtime audits and he claimed individuals were out of the 20% spread. If the Union Executive Board disagreed with Chief Steward Winn's approach, it could have withdrawn the grievance at any time. As the Chief Steward, Winn is a representative of the Union and acts on its behalf. Thus, for the Union to argue that Chief Steward Winn does not speak for the Union is absurd and disingenuous, but speaks volumes to the fact that the Union agrees Chief Steward Winn's position is inconsistent with past practice.

F. The Union's Failure To Call Mr. Paoli As A Witness Speaks Volumes.

Mr. Paoli was in the building when the Union presented its case in chief, and Vice President Madura acknowledged speaking with him that day. Vice President Madura alluded to the fact that the Union did not call Mr. Paoli as a witness due to a family issue. Whatever the issue was, the Union clearly asked Mr. Paoli to be a potential witness; he was aware of the time and date; he showed up as requested and was in the building the day of the arbitration when the Union presented evidence. Under these circumstances the Union's failure to call him to testify plainly suggests that Mr. Paoli's testimony would not support the Union's argument. He could have easily rebutted the Company's arguments regarding his practice if he believed the Company's representations were inaccurate.

Even assuming Mr. Paoli had a family issue that conflicted with the Union's ability to call him as a witness when it planned on doing so, if the Union felt his testimony would have been helpful to its case, it could have found a way to have him testify. The Union could have called him as a witness earlier in the day or called him to testify remotely through Zoom, Teams, WebEx, or other similar technology. Arbitrators have allowed witnesses to testify via videoconferencing or remote means when it is impracticable for a witness to be present in person. The only logical conclusion for Mr. Paoli not testifying is that he would have confirmed the Company's arguments about his practice and that the parties mutually agreed to his and the Union's audit method for over 30 years.

Mr. Paoli's failure to testify compels an adverse inference that his testimony would not have supported the Union's argument, but rather would have corroborated the Company's arguments of a binding past practice. Arbitrators routinely draw adverse inferences in instances like this where the Union fails to call a key witness. In sum, the Union's failure to call Mr. Paoli when he was in the building during its case in chief presentation or offer any testimony about

how he audited is fatal to the Union's case and further illustrates that the Union cannot prove a contract violation.

COMPANY CONCLUSION

For all of the reasons set forth herein, the Union cannot meet its burden in showing that the Company violated the CBA or that the Company agreed to the Union's interpretation of the 80/20 overtime equalization language for Surface Production. The Company has been clear from the beginning that it will pay employees who are outside the 20% spread what is justly owed; the disagreement lies with the method used to calculate the employees outside the spread. The parties have a decades-old practice of determining what hours are considered outside spread, which the Union developed and the Company agreed to and relied on. The practice gave meaning to otherwise ambiguous contract language and harmonized business realities with the contractual overtime equalization language to create a mutually-beneficial practice for both parties, resulting in peace for nearly 30 years. The instant grievances and arbitration are the result of the Union's unilateral decision to ditch its own past practice mid-contract and implement a new auditing method at the behest of its new Union Chief Steward Winn. The Company never agreed to such change. As such, the grievances should be denied as the Union has failed to show a contractual violation.

FINDINGS

FINDINGS

The instant grievances from Surface Production reflect differences in how the parties view the “equalization” language and related provisions contained in Section XIII of the CBA and associated Memoranda. The Company relies upon past practices it contends apply and are binding in Surface Production. The Union stresses that the CBA applies to all employees working on the lease and offered evidence as to how Section XIII is applied in the mine and in Surface Maintenance, in addition to Surface Production.

While, as stated in Section II, the CBA applies to “employees working at the Company’s facility or facilities located at Westvaco and Granger, Wyoming” numerous sections of the CBA and additional memoranda contain differences to reflect the different needs of different departments. Examples include:

- Under state and federal law and under the CBA, underground miners may not work more than 16 consecutive hours and mandatory overtime is not permitted. Maintenance workers can be forced to work overtime (MOA #10).
- Section XIII.C.1 defines Preferred Overtime differently for mine employees than it does for Surface Maintenance, shift workers and shipping department employees.
- Weekend phone coverage is treated differently for Mine Services (MOU #16), Mine Maintenance (MOU #18) and Surface Maintenance (MOU #53).

Further, there may be discernible boundaries for practices that arise as a way of responding to production and maintenance needs in different areas. One practice that is useful and readily accepted in one department or area may not be needed or applicable in another area.

Both parties recognize the concept of a binding past practice. The Company maintains that in Surface Production a binding past practice governing how the 80/20 spread is calculated at the end of each quarter was established when Mr. Paoli served as the Union Chief Steward. The Union denies knowledge of any such past practice and questions whether the actions of a Chief Steward could bind the Union going forward.

The Chief Steward is the person designated by the Union to file and settle grievances, among other duties. In Surface Production, that duty means that the Chief Steward responds to employee complaints about being bypassed and other alleged improper assignments of overtime. The record evidence supports a finding that Mr. Paoli would respond to complaints from individual employees and would audit how overtime was being distributed on a quarterly basis to ensure that the Company was complying with Section XIII. His manner of doing so, if unequivocal, clearly enunciated and acted upon, and readily ascertainable over a reasonable period of time, would establish a practice binding on the Union.

The evidence supports a finding that the Surface Production past practice for auditing the 80/20 spread when Mr. Paoli was Chief Steward had three elements. First, Mr. Paoli examined the total number of overtime hours within the group and determined whether the total hours worked by each employee fell within the 80/20 spread, i.e., the "Totality Method". Second, Mr. Paoli treated phone calls made to employees on the group list as a "reasonable effort" to make total overtime within each overtime group "as equal as possible at the completion of each calendar quarter." Crucially, he treated a phone call made as an "opportunity" for the employee to work the overtime and, therefore, deducted such hours from the total hours of overtime in making the 80/20 calculation, i.e., the "Reasonable Effort" practice. Third, Mr. Paoli deducted all Preferred Hours from the 80/20 spread calculation, i.e., the "Preferred Hours" practice. Fourth, Mr. Paoli consistently held the Company to its obligation to canvas from low to high, i.e., the "Low to High" practice.

1. The "Totality Method" Practice Was Changed to the "Qualifications Method" By Agreement

The 1963 CBA provided for equalization of overtime within departments and there was a past practice of equalizing overtime by crews within each department. In October 23, 1966, new language in the CBA changed "department" to "group." Section X.6.A.2 thus provided, in part, for all employees:

> The Company will make a reasonable effort to distribute overtime as equally as possible among the qualified employees within the respective overtime group.… [Union 4, pg. 2.]

In a Surface Maintenance grievance filed on May 1, 1969, the Union insisted on equalization within overtime groups. The Company stated that for at least 15 years overtime had been

equalized *by maintenance crews* based on *individual employee skills or qualifications* and further advised it had until the end of the year to equalize overtime.

In his May 9, 1969-decision, Arbitrator Harry Seligson found that the prior practice of equalizing overtime by crews was no longer acquiesced in by the Union after October 23, 1966. The unit for equalization became the group. There is no evidence that, thereafter, equalization was based on skills or qualifications for any employees, despite the "among qualified employees" language. The "Totality Method" was used within overtime groups.

On this point the above-quoted language from Section X of the 1966 CBA appears substantively unchanged in the current CBA in Section XIII.B.1:

> *The Company will make a reasonable effort* to have total overtime among individuals *in each overtime group with the same qualifications as equal as possible* at the completion of each calendar quarter.

The parties held numerous meetings during 2020 and 2021 to discuss overtime distribution issues. Although they were in agreement that the "Totality Method" had been used consistently in the past, they now agreed, going forward, that for each group equalization of the overtime list would be based on qualifications, i.e., the "Qualifications Method." Representatives of both parties viewed the "Qualifications Method" as being more consistent with the language of the CBA in Section XIII.B.1, even though some individuals on each side preferred the "Totality Method". To adjust to the "Qualifications Method", the Company made changes to the software that generates the lists supervisors use to assign overtime. That new system went into operation on January 1, 2022.

This was a mutually agreed to change in the past practice of using the "Totality Method" established after the 1969 Award and continued when Mr. Paoli was Chief Steward. Of course, if they wish to do so, the parties can go back to the "Totality Method", by mutual agreement. Which method is used is not a question to be decided in this arbitration proceeding.

2. The "Reasonable Effort" Practice

To examine the basis of the "Reasonable Effort" approach used by Mr. Paoli, it is useful to return to the foundational 1969 arbitration decision. There, the Union did not contend there must be absolute equality of overtime distribution among employees. It sought reasonable equalization.

Arbitrator Seligson analyzed the details of the grievances to determine whether the resulting spread was "reasonable." He established the following "reasonable" guideline:

> Excluding holdover and charged overtime at time of entry into the group, the obligation to equalize would then be confined to call-in and hours refused. If in these categories the Company maintains no

> more than a 20 percent spread between the high man and the other employees in the overtime group, it will have satisfied the provisions of Section X, 6 A(2). [Union 4, pgs. 5-6.]

There is no mention in that decision of how missed phone calls would be treated. The 20 percent spread was subsequently incorporated by the parties into the CBA and currently appears in Section XIII.4.B.

In #BI-94-3 the Foreman stated that frequently "we encountered no one home or get an answering machine. We are not allowed, by procedures, to charge the individual when this happens. We also can make no determination as to whether an answering machine is being used screen calls." The Resident Manager stated:

> The process of overtime equalization works only if several conditions occur. First, supervision has to use the system by calling the low person on the list and then working up the list in order until the overtime need is met. Second, the hourly people in the overtime group must generally want to work overtime. Third, the overtime group must all have the qualifications to work the jobs requiring overtime. [Union 6, pg. 5.]

Grievance #BI-94-3 was resolved by a Consent Agreement in which three distinct categories of overtime were recognized: A) Preferred; B) Other-Qualified; and C) Other. (Union 7.) The Consent Agreement went on to state:

> (2) For purposes of distributing overtime in callout and holdover situations, relevant existing contractual provisions shall be applied, and the low man shall be offered the opportunity to work all other overtime . . . [Union 7, pg. 1.]

The Union endorsed the Team approach and parties agreed to meet to clarify which work will be classified as "Other" for the purposes of distributing overtime consistent with the 80-20 equalization system. The Union agreed to impress on employees the importance of becoming qualified in this many jobs as possible. Finally, the parties stated their intention to audit on a quarterly rather than an annual basis in order that timely adjustments could be made.

Section XIII.4.D contains a number of provisions governing how employees are "charged" for overtime. When an employee is "charged" for overtime their relative position on the list may change and the number of hours is changed. That is, they will not be as low on the list because their hours would rise. Section XIII.4.D.1 states the obvious, i.e., that employees who accept overtime assignments will be charged for overtime hours paid. Section XIII.4.D.2 charges employees permanently assigned to a new overtime group the average hours for the group at that time. That provision also covers employees off work or on light duty for a period of over 30 calendar days. Section XIII.4.D.3 charges employees who decline overtime for hours paid to their replacement.

Section XIII.4.D.4 contains other provisions regarding charging overtime. Most relevant here are the provisions contained in paragraphs D.4.a, D.4.b and D.4.d. dealing with telephones. If someone answers the employee's telephone, the employee is charged for the hours paid to their replacement. If an employee has no phone and they are eligible for call-in overtime, they will be charged for the hours paid to their replacement. However, employees who have a telephone will not be charged if there is no answer. In #SO-94-4, for example, management was not able to reach the grievant on several occasions to offer overtime and he was not charged for those hours.

Section XIII.4.D thus defines how hours are charged to an employee for purposes of specifying where that employee is placed on the list when overtime is to be assigned. Section XIII.4.D does not address how the 80/20 spread is calculated.

To calculate the 80/20 spread the number of overtime hours first must be identified. The record evidence supports the Company's position that Mr. Paoli did not include overtime hours that the Company attempted to offer to employees by making phone calls to them and receiving no answer because he viewed those phone calls as a reasonable effort consistent with Section XIII.B.1. That was the practice he applied when auditing the 80/20 spread.

3. The Preferred Hours Practice

The Union contends that deducting all Preferred Hours is contrary to Section XIII.B.2.b. Under that provision "Preferred Overtime hours" may only be deducted if they create a "disproportionate spread" in total overtime hours. Further, according to the Union, deducting all "Preferred Overtime hours" would cause more people to be outside the 80/20 spread.

Although President Martinez testified that there had never been a practice of removing all preferred hours, as with the "Reasonable Effort" practice discussed above, Mr. Paoli's method of conducting end of the quarter audits did establish a practice of deducting Preferred Hours from the 80/20 calculation for Surface Operations. Union 20, a year-end report for Mechanical Maintenance, does show that Preferred Overtime hours were not deducted for an employee because he did not create a disproportionate spread. However, a different practice applied and overtime would have been equalized on an annual basis, not a quarterly basis as is done in Surface Operations. Similarly, Vice President Madura's testimony that mine management is not trying to deduct all Preferred Overtime establishes that a different practice existed in the mine.

In #GSO-08-116 the grievant at the Granger plant was outside the spread in the second quarter. The joint review identified some discrepancies. In denying the grievance the Business Leader Tim Bradley stated:

> After reviewing the overtime records for the 2nd quarter we believe that [the grievant] was within a shift of the 80/20 spread. Recognizing the potential for operators to fall outside of the 80/20 spread by your-hand, I will reiterate to the Granger coordinators the importance of maintaining overtime equity such that, by year

> end, all operators are within the 80/20 spread.
>
> As there was a reasonable attempt to provide equitable opportunities for overtime work, per the Labor Agreement, to maintain and 80/20 spread, I am denying this grievance. [Company 16, pg. 2.]

The notes of the September 30, 2008-meeting include the following, after a series of calculations:

> [Tim Bradley] anything preferred we will follow the contract
>
> [?] Highest w/ "Other OT – subtracted out preferred & qualified
>
> [Dave Paoli] If you take out their pref you have to take out her pref" [Company 16, pg. 3.]

As testified to by LR Manager Lohstreter, without contradiction, this was consistent with what he found to be Mr. Paoli's approach to opportunities and keeping the 80/20 in balance. (Tr. 476.)

In grievance #DI-21-113 the grievant was not offered his preferred shift due to a misread schedule. The Vice President's response states, in relevant part:

> Preferred overtime is an administrative process to give first choice to the employee working a job at the end of the day.… This does, however, not mean an employee gets paid if they are bypassed for a preferred opportunity.
>
> The Company does not take administering this process incorrectly lightly. However, the Collective Bargaining Agreement provides no remedy for missed preferred overtime and only requires that the Company makes a reasonable effort to have total overtime among individuals within the same qualifications to be as equal as possible not exceeding 20% at the end of the calendar quarter. This is the exclusive remedy for missed overtime under the CBA and has been so since 1969. [Union 3, pg. 3.]

LR Manager Lohstreter also testified, without contradiction, that there is "very little preferred on the surface operations on the 12-hour shifts . . . And [while], hypothetically, people with certain qualifications could create a disproportionate spread," he "can't think of what that might be . . . because we're running it by qualifications. So every one of these has the same qualification." (Tr. 552.) Chief Steward Martinez acknowledged that employees on 12-hour shifts cannot work a full preferred shift because they can't go past 16 hours.

Furthermore, according to the notes taken by HR Business Partner Casey at the June 15,

2022-meeting between the E-Board and management, HR Business Partner Kim Graham stated "Paoli didn't count pref." Her notes reflect that Chief Steward Winn responded "understands set past practice, but not the way the contract reads." (Company 1.)

4. The Canvassing "Low to High" Practice

The Union contends that the Company is obligated, by contract and practice, to canvass from low to high. The Company relies upon the "Reasonable Effort" practice but it rejects any obligation, under the contract or by practice, to canvass from low to high.

It bears repeating that, in 1994, in response to grievance #BI-94-3, the Resident Manager stated:

> The process of overtime equalization works only if several conditions occur. *First, supervision has to use the system by calling the low person on the list and then working up the list in order until the overtime need is met.* Second, the hourly people in the overtime group must generally want to work overtime. Third, the overtime group must all have the qualifications to work the jobs requiring overtime. [Union 6, pg. 5. *Emphasis supplied.*]

This demonstrates that management, long ago, recognized the importance of canvassing low to high.

In its brief to Arbitrator Winograd in Grievance No. MO-06-30 the Company further recognized that canvassing low to high was necessary to meet the equalization goal, stating that the:

> Company looks carefully at overtime hours throughout the quarter. Unless special circumstances exist, employees with the lowest number of overtime hours are offered overtime work opportunities first, with the goal towards equalizing to the 80-20 formula.
>
> * * *
>
> ... it seems clear from testimony at the hearing, as well as the contract language itself, that over time both the Union and the Company wanted to make certain that there was no favoritism being shown, and that overtime opportunities were to arise, they should be distributed as evenly and fairly as possible, and everyone should be given at least the opportunity to say yes or no. [Union 30, pgs. 6, and 20-21.]

At a grievance meeting on July 21, 2009, regarding #SU-09-46, Mr. Paoli told the Company officials that "if this goes to 3rd step, we would request phone records," a request that

would have enable the Union do a thorough audit. G. Smith said he would look into it and "make sure that no games are being played." The resolution was "to be consistent in offering OT shifts going forward." (Company 17, pg.4.)

At the grievance meeting for GSO-12-40 the notes reflect that Mr. Paoli stated "should ask low OT people first" and "– expect [management] to make reasonable attempts to [canvass]." (Company 15, pgs. 4 and 7.) The position Mr. Paoli was taking on behalf of the Union in 2012, was thus consistent with the position of the Company from 1994 and shows mutual acceptance of canvassing low to high.

Grievance #MM-21-004 alleged that "employees in overtime group were not called out in order to distribute overtime as equally as possible" when work was assigned on December 28, 2020. The Business Leader's reply states "In full and final settlement of [Grievant's] overtime imbalance the Company will pay…." (Union 27, pg. 2.) This is a further recognition, by the Company, that the overtime list is to be canvassed from low to high.

As far back as 2009 the Company's stated position in grievances was that "it is not the Company's intent to attempt to equalize overtime on an hourly, daily, or even weekly basis" (Company 17). However, the earliest indication on this record that the Company disputes the low to high practice is from 2021 in #SM-21-47. That is after the parties began discussing these issues, leading to the instant arbitration. There, the Area Maintenance Manager stated "There is no contract obligation to call employees for overtime in the order of the overtime list." (Union 5, pg. 2.) That is contrary to the Company's position in 1994 and 2006, and in other individual grievances, including those cited in Union 21.

The Company has emphasized that failing to follow the "Reasonable Effort" practice could result in employees manipulating the overtime assignment process by not answering their telephones so as to remain low on the list and, thus, receive a large payout at the end of each quarter. Permitting the Company to canvass without the low to high requirement similarly could result in the process being manipulated. The example given of 45 overtime hours being given to one employee, "employee A," and then 45 overtime hours being given to a second employee, "employee B," illustrates this point. If employee B were to go on medical leave 45 days into the quarter, that employee would have had no opportunity to work any overtime during the quarter. Whereas, if the list had been canvassed from low to high throughout the quarter, employee B would have had an equal opportunity to work one half of the first 45 overtime hours.

As was recognized by Arbitrator Winograd, special circumstances may exist under which employees with the lowest number of overtime hours would not be offered overtime work opportunities. In the absence of such special circumstances, to comply with the contractual requirement that the Company make a reasonable effort to distribute as evenly and fairly as possible so that everyone is given at least the opportunity to say yes or no and with the practice as discussed above, canvassing must be done from low to high.

ARBITRATOR'S CONCLUSION

The language of the CBA and associated memoranda, and the practices that have developed in various departments regarding the distribution of overtime, establish that both parties want a fair system of overtime equalization. In the mine and Surface Maintenance representatives of the parties meet regularly, during the quarter, to review overtime distribution so that the 80/20 spread is met at the end of the quarter. No explanation was offered as to why that approach is not being used in Surface Production,, although the importance of *maintaining* overtime equity *so that* all operators are within the 80/20 spread by the end of the year was recognized. (Company 16.) The undersigned Arbitrator has no authority to order Surface Production to adopt those practices.

The "Reasonable Effort" practice reduces that possibility that employees can manipulate the process by not answering their telephones to obtain a large payout at the end of the quarter. The canvassing "Low to High" practice reduces the possibility of favoritism being shown in assigned overtime hours and the transparency of that approach reduces friction in the workplace.

No details were provided about the five grievances submitted for this hearing. Accordingly, it is not possible, on this record, to determine what, if any, specific remedies are appropriate. Therefore, these grievances will be returned to the parties to discuss and arrive at remedies consistent with this Opinion.

AWARD

The grievances are returned to the parties to discuss and arrive at remedies consistent with this Opinion. The undersigned Arbitrator will retain jurisdiction for the sole purpose of providing more specificity regarding remedy. In the event that neither party makes such a request, my jurisdiction will terminate 90 days from the date of this Award.

Elizabeth Neumeier, Arbitrator

November 20, 2023