IN THE MATTER OF AN ARBITRATION
UNDER THE *LABOUR RELATIONS CODE*, RSBC 1996 c. 244

Between

CITY OF VANCOUVER
(FIRE AND RESCUE SERVICES)

(the "Employer")

-and-

VANCOUVER FIREFIGHTERS' UNION, LOCAL 18

(the "Union")

(HUSAR Overtime Grievance - Calgary Floods 2013)

ARBITRATOR:	John B. Hall
APPEARANCES:	J. Najeeb Hassan, for the Employer Allan E. Black, QC and Kas Pavanantharajah, Articled Student, for the Union
HEARING:	January 6-8, 22 & 28-29, and February 5, 2016 Vancouver, BC
AWARD:	April 6, 2016

AWARD

I. INTRODUCTION

The City of Vancouver has a Heavy Urban Search and Rescue (HUSAR) Task Force. It is a special operations team comprised of members with fire suppression, emergency response, search and rescue, medical and engineering backgrounds. The Task Force (or HUSAR Team) rescues victims from major structural collapses and other hazards. There are four such teams in Canada, and the Vancouver Task Force is also known as CAN-TF1. Its fire suppression members are drawn from the City's Fire and Rescue Services, and are represented by the Union. When they are deployed as part of the HUSAR Team, the members remain subject to the Union's Collective Agreement with the Employer.

The Union has two outstanding grievances respecting the deployment of its members as part of the HUSAR Team. The first grievance concerns a situation at Johnson's Landing near Kaslo, British Columbia during July of 2012. The second grievance results from a deployment to Calgary, Alberta during June/July of 2013 following the heavy flooding in and around that City. This award addresses the Calgary Floods situation. Another arbitrator has been appointed to hear the first grievance.

The immediate grievance raises four issues, and they are presented by the Union in essentially these terms:

(a) Whether the Employer must pay all Union members deployed to Calgary as part of the HUSAR Team for all the hours they were ordered to remain at the Base of Operations during their off duty time.

(b) Whether the Employer must pay Union members deployed to Calgary as part of the HUSAR Team "callout pay" in accordance with Article 8 of the Collective Agreement.

(c) Whether the Employer has the obligation under the Collective Agreement to call Union members of the HUSAR Team into work in order of seniority, and whether a member who was not called in seniority order as a result of an Employer error should be compensated.

(d) Whether the Employer's rescheduling of the vacation of Union members deployed as part of the HUSAR Team to Calgary with less than a day's notice was an unreasonable exercise of its management rights, and whether the Employer must compensate those members for the wages and time lost.

Although the Employer would address the issues in a different order, there is no material divergence over the substance of the matters in dispute.

In general terms, and to the extent not indicated by the statement of issues, the Union submits the Employer breached Article 6 (Overtime), Article 7 (Extra Shifts) and Article 8 (Callout) of the Collective Agreement by failing to adequately compensate members deployed to the Calgary Floods. It submits further that the Employer breached Article 13.6 (General Conditions) by failing to call members eligible for HUSAR deployment in seniority order, and by refusing to compensate one member who was not called due to an Employer error.

The Employer maintains the grievance is without merit and should be dismissed. It submits that the Calgary deployment was not a "callout" within the meaning of Article 8, and that all Union members were paid in accordance with the Collective Agreement. Further, it says there is no obligation to offer HUSAR deployment opportunities based on seniority and that has not been done historically. Finally, the rescheduling of vacation coincided with the closest point in time to when the vacation had originally been scheduled for the Union's members, and was not an unreasonable exercise of management rights.

The parties' arguments will be explored more fully in the context of each issue as they are examined separately in the course of this award. In the event the grievance

succeeds in whole or in part, the Union requests an arbitral retention of jurisdiction over implementation.

II. GENERAL BACKGROUND

The four HUSAR Teams in Canada are: Vancouver (CAN-TF1), Calgary (CAN-TF2), Toronto (CAN-TF3) and Manitoba (CAN-TF4). According to a Government of Canada website, the main elements of HUSAR are based on "Task Force interoperability and modularity, as well as 24/7 operational readiness to deploy on short notice in response to domestic incidents".

The Vancouver HUSAR Team was formed in the mid-1990s. It has undergone various charges since its creation, including an increase in the number of firefighters and an increase in the level of their training. In 2010, the Employer restructured its Technical Rescue team into the HUSAR Team, and sought to increase the number of participants. At the time, Jim Young was the Task Force Leader and he played a leading role in the recruitment of new members. He first approached Union members who were already trained in rope rescue and worked at Fire Halls #6 and #7. He talked to the crews on each shift and, as part of his message, made it clear that HUSAR deployment was "totally voluntary". As he testified, "life does get in the way" and ultimately it is voluntary. Mr. Young told the crews that if they had no interest in going on deployment then "the HUSAR Team is not a good fit".

As part of the restructuring, the Employer mandated training in four core disciplines: Technical Rope Rescue, Structural Collapse Rescue, Trench Rescue and Confined Space Rescue. The training allows the HUSAR Team to be effective with as few as 12 members. The Employer has continued to recruit new HUSAR Team members through posted training opportunities. The selected members receive training in the four core disciplines and "participate in HUSAR training and deployments as required and as

available". Members of the Team are generally located at Fire Halls #1 and #9, aside from those who are also part of the HazMat Team.

The Vancouver HUSAR Team has been deployed on four occasions: to the North Vancouver mudslide in January 2005; to Hurricane Katrina in August/September 2005; to Johnson's Landing in July 2012; and to the Calgary Floods in June/July 2013. At the time of the deployment now in issue, the Vancouver Task Force had about 120 members, with about 70 being firefighters represented by the Union.

At the time of the 2005 deployments, Tim Armstrong was the Task Force Leader. He testified that seniority was not a consideration for either North Vancouver (where some Team members "self-deployed") or Hurricane Katrina. In both instances, the Task Force rostered all available Team members who were qualified for deployment. Neither of those deployments was treated as a "callout" under the Collective Agreement. As indicated above, there is a grievance outstanding in respect of the Johnson's Landing deployment. Individual HUSAR Team members have never been required to accept a deployment, and the Union accepts its members were "given a choice" about whether to accept the Calgary deployment. That is, they were not directed or required to participate.

III. THE CALGARY FLOODS DEPLOYMENT

The initial aspects of the deployment will be examined more closely in the contexts of considering whether it constituted a "callout" for purposes of Article 8 and addressing the Union's arguments regarding seniority. A total of 30 Union members were deployed to Calgary in two "waves" in order to assist with the aftermath of the flooding. The first group of 17 firefighters left Vancouver on June 27, and the second group of 13 firefighters left two days later on June 29, 2013. All of the members returned from Calgary on July 2, 2013. Some of the members had been on duty at the time of their deployment; others had been off-duty, including some who were on vacation.

The HUSAR Team members worked every day of the Calgary deployment. They were paid a minimum of 12 hours per day, regardless of the numbers of hours worked. On a regularly scheduled work day, the members were paid straight time rates for the first 12 hours and 1½ times their hourly rate thereafter. On a regularly scheduled day off, the members were paid 1½ times their hourly rate for all time worked. They were paid for the July 1 holiday in accordance with the Collective Agreement, and were also paid for travel time to and from the deployment. Members scheduled to work on the night shift on the day the Team returned or the following day shift were given their shifts off with pay. The City of Vancouver Fire and Rescue Services invoiced the Calgary Emergency Management Agency and received payment for wages and other expenses associated with the deployment of CAN-TF1 during the floods.

The Calgary assignment for the Vancouver HUSAR Team involved primarily recovery efforts. More particularly, the members were mainly monitoring pumps to remove water from underpasses and parking lots. As Mr. Young described the exercise, they were pumping water from "the wrong side of the dyke to the right side". They were also accompanying building inspectors on door-to-door inspections. The operations were carried out on a 24/7 basis, with the members typically assigned to either a 12 hour day shift or a 12 hour night shift.

While in Calgary, the Vancouver HUSAR Team members stayed at the Base of Operations (referred to as the "BOO") which was established at the Calgary Fire Department Training Academy. The Academy is located away from the downtown area, and was not affected by the flooding. Other response teams received their assignments at the BOO as well, including the Calgary HUSAR Team and some Edmonton firefighters who were assisting in the operation. Those who resided in Calgary went home when off-duty, while the Edmonton firefighters also stayed at the Base of Operations.

Several sleeping tents were set up outside on the tarmac adjacent to the main buildings at the Academy, each with around eight to ten sleeping cots with sleeping bags. Most of the residents of the BOO slept in the tents, but there were some members on

night rotation who slept in some classrooms inside the building. Washroom and shower facilities were set up outside, with generators to power them. Tents were located near the generators and the washrooms. The generators ran all night and were audible from the tents. The kitchen and dining areas were located inside the Academy building.

The chief complaints regarding these arrangements were the noise from the generators and the heat in the tents caused by the prevailing weather conditions. There was also noise from sucker trucks emptying out the porta potties in the morning. One Union witness described the conditions as being "extremely hot in the tent" and the snoring of other occupants made it hard to sleep. There was also noise from persons using the porta potties. Mr. Young acknowledged that it was not a "comfortable situation". He said efforts were made to alleviate the two main complaints by bringing in barriers for the generators and fans for the heat. The food was, by all accounts, quite acceptable.

There were limited opportunities for recreational activities at the BOO outside of working hours. There was a single television in the eating area, but the volume could not be turned up without disturbing others. There was also a gym with two treadmills and some weights, and picnic tables along the outside of one building. Otherwise, the Team members were essentially limited to reading, although a wireless internet connection was established at some point.

The Union's assertion that the Employer must pay Team members for off-duty hours results from the fact that they were confined to the BOO during that period. The order was given by Mr. Young. His direction to staff was that, unless engaged on operational assignment, they had to stay within the boundaries of the Fire Training Academy. His primary reason was to "keep the Team whole". Mr. Young explained at arbitration that this resulted from his sense of responsibility for the Team members while on deployment, and he described the direction as a "best practice". There were no restrictions on activities while at the BOO, aside from a further direction that Team members not consume alcohol. There were no equivalent limitations placed on the

Edmonton firefighters and, as noted, members of the Calgary HUSAR Team returned to their local residences when not on duty. The Edmonton firefighters apparently frequented a nearby mall during off-duty hours. The mall tenants were open for business as usual, and included restaurants and a pub.

Mr. Young confirmed in cross-examination that the direction for Vancouver HUSAR Team members to remain at the BOO when not on duty was intended to keep the group "whole". He elaborated that having the members available if necessary was an important component of the direction. However, he expressed an "overwhelming responsibility" for the welfare of the 50 staff he had "taken on the road" and this was the main reason. He ultimately stated: "My sense of responsibilities to the Team and then availability were the two major components". In terms of "availability", Mr. Young indicated this meant having Team members ready for callout on short notice or for demobilization (i.e., return to Vancouver). He stated at one point that, while safety is always a concern, it was not "the number one issue" for confining the Team to the Base of Operations.

The prohibition on alcohol resulted from discussions Mr. Young had previously participated in at the National level with other Task Forces. He described an agreement at that level to have a "dry camp" because "… it is more professional and [speaks] to availability and my responsibility to the Team". Mr. Young did invoke safety as a reason on this front, but also acknowledged members would not be available for deployment if they had been drinking.

Evidence regarding the Hurricane Katrina deployment established that HUSAR Team members stayed at their base (an elementary school) when not on duty, and were not paid for those hours. However, unlike the circumstances in Calgary, the attendant conditions in Louisiana were described by one participant as "a war zone" (for instance, the Team had a police escort because some persons were shooting at rescuers). Moreover, the Employer had not ordered members to remain at the base in 2005 as local authorities had established a dusk to dawn curfew.

In seeking to resist the Union's claim for compensation attributable to off-duty hours in Calgary, the Employer submits pay and overtime pay compensates employees for time "worked". It submits in this case, "… the HUSAR employees were not working while they slept, ate, relaxed, watched TV, read newspapers and engaged in other recreational activities during their non-scheduled hours at the [BOO]" (written argument at para. 191). It submits further:

> There is ample evidence that the employees were free to do as they pleased during off-duty time at the Base. Moreover, the employees were isolated geographically on a 10-acre facility in an industrial part of Calgary with no means of transportation, cut off by a busy thoroughfare. They were working 12 to 14 hour days and were expected to report to their next shift refreshed and ready to work. They were in a city under disaster evacuation, still subject to a state of emergency.
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> The employees were not on call or on duty during their time at the Base, nor did the Employer exert any control over them. The HUSAR employees were free to do as they saw fit during their non-scheduled hours at the Base. It therefore cannot be said that they were working. The Union's claim for 24 hour pay must therefore fail. (*ibid*, at paras. 192-193)

The Employer relies on three decisions where similar claims have been denied. The first, *Martin v. Canada (Treasury Board)*, [1990] FCJ No. 939, is a relatively brief judgment of the Federal Court of Appeal. The grievor was a game warden who was required to perform backcountry patrols on horseback in remote areas several times a year. This could involve him being away from home for up to nine consecutive days. The grievor maintained he was "a captive employee 24 hours a day" while on patrol, and was thus entitled to be paid overtime regardless of what he was doing. The Court upheld the adjudicator's dismissal of the grievance, and drew particular attention to the final two sentences of his conclusion: "None of what the grievor experienced was unusual or unexpected. It was all part of the normal routine for which he was hired" (p. 2).

The judgment in *Canada (Attorney General) v. Paton*, [1990] 1 FC 351, was also delivered by the Federal Court of Appeal. The Public Service Staff Relations Board had

held the respondent was entitled to overtime pay for the entire period he was onboard a ship while on special assignment with the Department of Fisheries and Oceans. While onboard the vessel, the respondent was subject to the ship's "standing orders" which imposed certain limitations on his activities. However, he was not expected to be on call to perform duties when requested. The applicant employer argued the Board had failed to apply a collective agreement provision governing the rates of pay for employees assigned to perform duties on a vessel which also served as the employee's living quarters.

The Court in *Paton* began its analysis by noting that "work" can involve what has been called "captive time", or "time that normally would be non-working such as sleeping … and the like" (para. 14). However, it agreed with the applicant that the Board had overlooked a clause which governed precisely the type of situation at issue. The relevant language stipulated that an employee was to receive the greater of his or her regular pay for the day and pay for "actual hours worked". The Court concluded further that "captive time" on the ship was not to be treated as actual hours worked, and allowed the application.

Both *Martin* and *Paton* were considered in *BC Ferry Services Inc. -and- British Columbia Ferry and Marine Workers' Union* (2007), 91 CLAS 114 (Ready). The issue there was pay for time spent by live-aboard employees who were off-duty, but required to remain onboard northern vessels in order for the employer to comply with requirements of the *Canada Shipping Act*. The union argued that the employees were "working" and entitled to pay under either of two collective agreement provisions. The employer disagreed, and submitted live-aboard employees accepting a "tour of duty" were required to fulfill crew complement obligations without pay on their off-duty hours.

The evidence in *BC Ferries* established that live-aboard employees received 14 consecutive days of pay "with a built-in 27% differential (premium)", followed by 14 consecutive days off. This was a critical element in Arbitrator Ready's disposition of the grievance:

> In the case at hand, the Employer has implemented restrictions on off-duty employees that are bona fide in relation to safety requirements established by the ship's license and the *Canada Shipping Act*. Furthermore, the evidence and the Collective Agreement are, in my view, clear: live-aboard employees are only entitled to pay for time worked on-duty and where they are actually called upon to perform duties during their off-duty hours. The other hours where they are off-duty and confined to the vessel, *are compensated by the overall package for this category of employee, which includes regular pay, differential pay, meals and accommodation, the 14-day rotation, etc*. There is no foundation in the Collective Agreement to suggest any difference between off-duty hours at sea and similar time where the ferry is in port. (para. 30; italics added)

All of the foregoing authorities can be readily distinguished. Unlike *Martin,* the circumstances experienced by the Union's members in Calgary were not part of their "normal routine". The *Paton* award actually supports the Union's position here to the extent it recognizes "work" can involve "captive time". But, unlike the present Collective Agreement, there was a provision in *Paton* expressly limiting pay to the greater of regular pay and pay for "actual hours worked". Finally, *BC Ferries* can be differentiated on at least two grounds. First, the requirement to remain onboard resulted from federal regulations (somewhat akin to the Louisiana curfew) and was not initiated by the Employer. And second, the circumstances were again addressed by collective agreement language which included a premium that "compensated [employees] accordingly" for the time they lived aboard the vessels on which they were working (para. 33).

I find greater guidance can be drawn from the Union's authorities. Depending on the precise language of the collective agreement, arbitrators have frequently adopted a broad meaning of the term "work", and have held it may include "off-duty hours in circumstances when the employees were under the control of the company (for example, when they were confined to the Company's premises)": Brown & Beatty, *Canadian Labour Arbitration*, at para. 8:2130 (footnotes omitted).

An early case on point is *Re International Nickel Company of Canada Ltd. and Canadian Guards Association, Local 105* (1977), 16 LAC (2d) 422 (H.D. Brown). Plant protection officers had remained in the company's mines during a strike on a 24-hour basis. The association argued they should be paid for the whole period as they were confined to the premises and on call at all times, although sleeping time was available. The majority of the arbitration board held the company was required to apply the overtime provision and pay time and one-half for all hours in excess of the scheduled 12 hours a day. It noted the conditions in which the grievors were required to sleep and eat "were much less desirable than would exist at their homes" (para. 20). But, the "key factor [was] that the guards were restricted during the period of time they were required to be at the mine, to the property of the company and were under its control throughout that whole period" (*ibid*).

The foregoing award was followed in *Denison Mines Ltd. and National Security Officers' Assn*. (1988), 2 LAC (4th) 389 (Springate). The facts and outcome are summarized in the headnote:

> The union grieved that its members were entitled to compensation for all of the time they remained on the employer's property during a strike. The union represented the security officers at the employer's property. The production employees, who were represented by a different union, engaged in a lawful strike. Union employees remained on the employer's property for an extended period of time to provide security during the strike. The employer paid the employees only for the time during which they were on duty, arguing that the employees were free to go home at night if they so chose. The union sought payment for all of the time the employees were on the employer's property during the strike.
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> HELD: The employees reasonably believed that they were not free to come and go from the employer's property at their leisure. The employees were not free to engage in their normal leisure pursuits or to sleep in their own beds. While sleeping accommodations were provided, they were not private and employees were subject to noise from the coming and going of others. The employees were on a working basis throughout the time they were on the employer's premises. The employees were entitled to be paid for the entire time they were on the employer's premises according to the overtime provisions of the collective agreement. Grievance allowed.

After quoting from the reasoning in *International Nickel*, Arbitrator Springate wrote in *Denison Mines*:

> Likewise in the instant case the security officers were confined to the company's premises for 24 hours per day. The officers were not called upon to provide any security services outside of their shift times. The fact that they were required to stay on the company's premises, however, means that they would have been readily available to do so if required. A reasonable inference is that this was one of the reasons why the officers were required to remain behind the picket lines. The security officers were not free to go home, to see their friends and family, to engage in their normal leisure pursuits or to sleep in their own beds. While sleeping accommodations were provided, they were not private and employees were subject to noise from the coming and going of others. Having regard to all of these considerations, I am satisfied that the security officers were on a working basis throughout the time they were on the company's premises. It follows that they were entitled to be paid for all of the time involved. This includes overtime pay pursuant to the requirements of art. 17 of the collective agreement. (para. 18)

This passage bears more than a passing resemblance to the circumstances encountered by the Vancouver HUSAR Team members at the Calgary Base of Operations. For instance, and in addition to what has been recounted already, Kevin Main was part of the deployment and testified his daughter lives in Calgary. Due to the confinement order, he was unable to go to her home and check for damage. Instead, his daughter drove to the BOO where he had to visit with her in the parking lot.

Other awards cited by the Union support its position that employees are entitled to be paid for time when they are confined to their employer's property. For example, in *Ottawa Civic Hospital and Retail Wholesale Canada, Local 414 (Unpaid Lunch Grievance)* (1996), 61 LAC (4th) 101 (R. Brown), it was stated: "Silence [in a collective agreement] is not sufficient to negate the entitlement to payment recognized by the arbitral jurisprudence which equates confinement to the premises with work" (para. 18). Similarly, in *Religious Hospitallers of Hotel-Dieu of St Joseph of the Diocese of London and Service Employees' Union, Local 210* (1983), 11 LAC (3d) 151 (Saltman), employees who were required to remain on the hospital premises for the duration of an

otherwise unpaid lunch break were to be paid "for this period *of time worked* at overtime rates" (para. 20; italics added). The lunch period in the latter award was considered to be "time worked" even though permission to leave the premises might be granted by the employer (para. 18).

The Union does not take issue with the Employer's reasons for confining the Vancouver HUSAR Team to the BOO in Calgary. But, because its members were under the control and direction of the Employer, it submits they are "entitled to be paid for the entire period of their confinement … in accordance with the overtime and extra shift provisions of the Collective Agreement" (written argument at paras. 93-94). I find this position is sound in law having regard to the evidence. The members were not able to do whatever they chose at the BOO. They were not free to visit their friends and family; engage in their normal leisure pursuits; consume alcohol; or sleep in their own beds. Although sleeping arrangements were provided, the tents were hot and uncomfortable; they were filled with seven to nine other members of the Team; and some of the tents were located close to generators and toilets with resulting noise throughout the night. Moreover, and most compellingly, the HUSAR Team was confined to the BOO in order to serve the Employer's interests. The two main reasons were Mr. Young's laudable desire to "keep the Team whole", based on his feelings of responsibility, and for purposes of "availability". The prevailing conditions in the vicinity of the BOO (as described fully at arbitration) did not present a pressing concern over safety, and Mr. Young candidly conceded this was a lesser reason for the confinement order.

In answer to the first issue raised by the grievance, I find the Employer must compensate the Union's HUSAR Team members at the applicable overtime rate for the hours they were ordered to remain at the Base of Operations despite being off-duty.

IV. CALLOUT

The Calgary deployment occurred after Mr. Young heard about the flooding and "reached out" to his counterpart in that City to offer assistance. It was initially not anticipated that the Vancouver HUSAR Team would be needed, although two staff were sent on June 22 as observers. As conditions in Calgary worsened, Mr. Young received a return call asking if Vancouver could muster a team. While he could not offer a guarantee, Mr. Young believed this could be arranged and the Calgary contact advised "official channels" would be pursued with such a request. This ultimately resulted in Mr. Young and others receiving a "task number" during the afternoon of June 27 for the deployment.

Prior to receiving the task number, Mr. Young created a list of firefighters on the Vancouver HUSAR Team based on seniority (the steps he took will be described more fully in the next part of this award). He identified Lieutenant Steve Bauer at Hall #1 as someone who could implement the alert, and Mr. Bauer went to the Operations Centre at Chess Street during the morning of June 27 for that purpose. Mr. Bauer testified that he was instructed to call members on the list to see who was available for deployment. The members had a choice, and some indicated they were not available. Later in the morning, Mr. Bauer received a direction to stand down, and returned to Hall #1. He subsequently received a call to return to Chess Street, and resumed calling Team members, starting at the top of the list. At that point, members who were available were instructed by Mr. Bauer to show up at Chess Street as soon as they could.

Mr. Young recalled more details about the activation. He testified that he told Mr. Bauer to start at the top of the list and telephone members in order. Mr. Bauer could leave a message (although the members had a limited period of time to return the call) and he was to continue until the requisite number of individuals had been identified. Mr. Young stated he told Mr. Bauer to inform members who answered "yes" that they needed to be prepared to be gone 10 days, and to get to the assembly point by 1830 hours. He

also made it "very clear" to Mr. Bauer that staff were not being ordered to report for the deployment.

Mr. Young testified further that the modular restructuring of the Vancouver HUSAR Team means it can be effective with as few as a dozen members. If he had not been able to activate that number for Calgary, he would have called his counterpart with the "bad news" and stood down. His counterpart already had another Task Force on standby, and was waiting for disposition of the Vancouver Team. The alternate arrangements were not necessary, and Calgary's initial request for 30 members was met with representation from all of the Vancouver agencies. Seventeen firefighters went to Calgary on June 27 as part of the "first wave".

Mr. Young instructed Mr. Bauer during the evening of June 27 to keep calling other firefighters on the list he had created to see if they would be available should the "second wave" be activated. The message to staff at that point was that this was a "wait and see situation", and they were to advise if their availability changed. At some point, a script was produced for purposes of calling Team members to determine availability. It was developed with Mr. Young's input from Calgary (he had left Vancouver with the first group), although it was not used by Mr. Bauer. The text of the script read:

> [Thirty-three] HUSAR team members have been sent to Calgary as part of the first wave of deployment for up to ten days. There is a potential for up to 20 additional team members to be deployed to provide further assistance as a second wave of relief over the next ten days. The deployment of this second group will be wholly dependant on situational need. Members will not be activated (deployed) until Calgary requests these additional resources. This could happen later today or not at all. On June 27th we gathered names for availability for potential deployment for this second wave. At this time we do not have confirmation from Calgary EOC on the second wave. We are maintaining a volunteer availability list for potential deployment based on seniority. Please note there is no callout compensation. Please contact the DOC at 604-654-0624 if you elect to leave your name or remove your name from this availability list. You may resubmit your name if your availability changes.

> Upon confirmation of an additional request for resources from Calgary team members on the availability list will be officially activated and deployed based on seniority.

The second group was in fact deployed and left Vancouver on June 29.

The Union submits the deployment to Calgary of HUSAR Team members who were not on duty at the time constituted a "callout" within the meaning of Article 8. The language reads in part:

> 8. CALLOUT
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> (a) Callout is defined as:
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> (i) the mandatory emergency call back of off duty staff by the Fire Chief or designate to increase overall staffing levels due to the needs of the Department for the response to an emergency incident. Following the initial twenty-four (24) hours of the response, where the Fire Chief or designate determines that an incident requires a sustained increase in staffing for a temporary period of time that can be pre-scheduled, such additional shifts shall no longer be deemed callout and shall instead be compensated as in Clause 7 (Extra Shifts).
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> (ii) the call back of an off duty staff member(s) to replace an employee(s) who is on shift, but who becomes absent while on shift through illness or injury, where in the opinion of the Employer, call back is necessary.
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> (b) An employee called out as defined in (a) above shall be paid at the rate of two (2) times their regular rate of pay, with a minimum of three (3) hours at the rate of double the employee's regular rate of pay. Where an employee is called out within two (2) hours of the start of their shift, then the three (3) hour minimum does not apply.

On the Union's interpretation of this provision, the word "mandatory" means "a request *or* requirement to attend a callout subject always to the ability to decline" (written

argument at para. 99; italics in original). The Union's position is based primarily on past practice evidence, which is submitted to raise a *bona fide* doubt about the meaning of the word as used in this Article of the Collective Agreement. It says the evidence establishes a longstanding practice of a callout being framed as a request to attend, dependant on availability, and never as an order. The Union also points to evidence led by the Employer to the effect that employees must respond to a callout subject only to a limited number of discretionary compelling reasons. The Union says adopting the Employer's interpretation of "mandatory" and reading in those exceptions would effectively amend the provision, contrary to the limits of arbitral jurisdiction.

The applicable "rules" of collective agreement interpretation are reflected in the arguments of both parties: see the summary found at paragraph 27 of *Pacific Press -and- GCIU, Local 25-C*, [1995] BCCAAA No. 637 (Bird). Nor is there any debate over the possible use of extrinsic evidence in the form of past practice as an aid to interpretation: see *Nanaimo Times Ltd. and GCUI, Local 525-M*, BCLRB No. B40/96; and *John Bertram & Sons Co. and International Association of Machinists, Local 1740* (1967), 18 LAC 362 (P.C. Weiler). What is quite remarkable, however, is the dramatic disconnect between what the parties respectively portray as the practice surrounding what constitutes a "callout" under their Collective Agreement.

There was considerable evidence from a number of individuals on this subject. While there were some minor variations within the two sides, the respective views can be captured fairly succinctly. According to the Union's witnesses, a callout is a "request" rather than a "requirement" to attend work. Members are called and asked whether they are available for duty. They have the opportunity to decline the callout, and may do so for personal reasons such a spending time with family. Union witnesses testified further to never having been ordered to attend a callout, and to never receiving an adverse consequence as a result of declining an opportunity.

The Employer's witnesses were all members of the bargaining unit at some stage of their careers (some as recently as last year), and conveyed quite a different

understanding of the obligation when a callout is received -- as opposed to being offered the opportunity to voluntarily work overtime or an extra shift under Articles 6 and 7 of the Collective Agreement. The general consensus of these witnesses was that firefighters must respond to a callout unless they are too ill, have been drinking, or have child care obligations. Absent one of those reasons, firefighters are "expected to attend" when asked if they are available, and callout was characterized as a "mandatory or urgent need for staff immediately". The Employer's witnesses expressed genuine surprise over this aspect of the Union's evidence, and one surmised the difference may be "a generational thing".

I find the foregoing disconnect precludes the Union relying on evidence of past practice in order to construe the word "mandatory" in Article 8 as effectively meaning a request for voluntary participation. The divergent understandings expressed by the parties' respective witnesses mean the Union cannot satisfy most elements of the *John Bertram* test. Further, a callout within the City cannot be equated to a HUSAR Team deployment. As stated in *BCTF*, cited below, ". . . past practice must at least involve previous occasions when the same issue arose" (para. 33).

Nor do I agree with the Union's submission that "[m]embers were asked if they were available to deploy with the HUSAR Team to Calgary, much like they are asked if they are available to attend any callout" (written argument at para. 117). To the extent that one might conceivably resort to past practice (a point to be revisited shortly), the evidence reveals at least two critical distinctions between the usual hallmarks of a "callout" and the circumstances of the Calgary deployment.

The first distinction concerns the time-sensitivity of the event. Article 8 defines "callout" in part as "the mandatory emergency call back of off-duty staff … due to the needs of the Department for the response to an emergency incident". Leaving aside the basis on which a callback might be declined, even the Union's witnesses uniformly described reporting for duty *immediately* once a callback was accepted. In contrast, members of the HUSAR Team were called initially to determine their availability and

later, when the activation was confirmed, they were given a period of time to muster at Chess Street. There was certainly some urgency at that point, but it cannot be elevated to the "emergency" nature of a typical callout such as a large fire. This is confirmed by Mr. Young's unchallenged evidence that he would have "stood down" the Team if there were insufficient resources for deployment.

The second distinction arises from the manner in which Mr. Bauer determined whether HUSAR Team members were prepared to deploy to Calgary. Both the Union's and the Employer's witnesses described the usual internal process that applies where a callout is authorized (which is quite different from the path followed by Mr. Young), and it culminates in a very formal telephone communication to the member that follows a set format. Among other components, the members are asked expressly if they are available for "callout". This effectively signals that the opportunity will be paid at the double time rate, and not the 1½ times rate applicable to overtime and extra shifts. Mr. Bauer did not follow this protocol and did not even use the word "callout" when telephoning Team members to determine their availablility.

Thus, if it were permissible to consider past practice in the interpretation of Article 8, I find the evidence lends support to the Employer's position. The usual hallmarks of a callback under that provision cannot be located in the context of the Calgary deployment. I note as well that no member of the HUSAR Team received double time in respect of the Hurricane Katrina deployment, and the Union did not file a grievance.

In any event, I am ultimately not persuaded that the extrinsic evidence gives rise to some doubt over the meaning of the word "mandatory" in Article 8 (see *Nanaimo Times*, at para. 30); nor does the Collective Agreement language lack a "clear preponderance in favour of one meaning, stemming from the words and structure of the agreement as seen in their labour relations content" (the first *John Bertram* limitation). In terms of the latter, Article 8 has existed in its present form since the parties' 2003-

2006 Collective Agreement. Callout was found at Article 7 of the 2000-2002 Collective Agreement, which provided in part:

> 7. CALLOUT
>
> (a) Except as provided in Clause 6, an employee reporting for work on the call of the Employer at any time other than the employee's regular working hours shall be paid at the rate of double his/her regular rate of pay for the entire period spent at his/her place of work in response to the call, with a minimum of 3 hours at the rate of double the employee's regular rate of pay.

The Employer did not lead *viva voce* evidence about collective bargaining related to the 2003-2006 Collective Agreement. Nonetheless, I do not understand this to be an impediment to taking arbitral notice of the contractual amendment, and the Union did not object to the Employer's reference to the prior Collective Agreements in final argument. And, it seems self-evident that now Article 8 was substantively amended to incorporate the concept of callout being a "mandatory" request in "response to an emergency event".

Continuing with the collective bargaining context, the Employer's interpretation of Article 8 is consistent with the prevailing case law and, under the tenth *Pacific Press* rule of interpretation, parties are "presumed to know about relevant jurisprudence". While any outcome must be predicated on the specific words being examined, past awards have distinguished between voluntary and compulsory overtime for purposes of the associated premium. As explained in *Bowater Pulp & Paper Canada Inc. v. CEP, Local 257* (2003), 71 C.L.A.S. 370 (Surdykowski):

> The purpose of overtime premium payments is to reward employees who work other than their regularly scheduled hours under their collective agreement, and to discourage the employer from having employees work such other or extra hours without good reason. Call-ins (or call-outs or call-backs) are a form of overtime that requires employees to come to work at a time when they would not normally be there, typically with little advance notice. Accordingly, this form of overtime often attracts an additional overtime premium, either in the form of a guaranteed minimum payment or otherwise. The purpose of call-in premiums is to compensate

> employees for the additional inconvenience, disruption or expense that is deemed to be (and not necessarily actually) associated with coming into work outside of employees' regularly scheduled hours of work on short notice. *The jurisprudence suggests that it may be important to distinguish between compulsory and voluntary overtime for the purpose of determining the overtime premium that employees are entitled to under a particular collective agreement*. However, it is also clear for the jurisprudence that an employee's entitlement in that respect depends entirely upon the words of the particular agreement. (para. 19; italics added)

In *Lantic Sugar Ltd, and Bakery, Confectionary & Tobacco Workers International Union, Local 443* (1995), 51 LAC (4th) 257 (Brown), the callout pay clause spoke to circumstances where an employee was "requested to return to work" outside a scheduled shift. The grievor had been ordered to return to work, and the union argued this was a violation of the callout clause because it only allowed the employer to "request" the grievor come in to work. After reviewing a number of authorities, the arbitration board stated: "In none of the cases is there any indication that a call-out is a voluntary matter that an employee has a right to refuse" (para. 53). It went on to conclude that the relevant provision was not "explicit enough to render call-outs to be voluntary" (para. 55).

Here, of course, Article 8 points entirely in the direction of callouts not being voluntary due to the express definition of the term. I am not persuaded by the Union's submission that the limited exceptions recognition by the Employer imbues the word "mandatory" with any degree of ambiguity, or necessitates a re-writing of Article 8 in order to accommodate the exceptions. The Union relies on the *Merriam Webster Dictionary* definition of the word: "required by law or rule: obligatory". The *Concise Oxford English Dictionary* contains a similar definition: "required by law or mandate; compulsory". The same reference defines "obligatory" to mean "compulsory". All of these definitions align with the arbitral approach which distinguishes between voluntary and compulsory overtime (subject, as always, to the specific language of the collective agreement). I find the limited exceptions to callout described by the Employer's witnesses do not detract from the distinction. Indeed, as the Employer acknowledged in

final reply, it would be an unreasonable exercise of management rights to insist that a firefighter who was seriously ill, or who had been drinking, must nonetheless attend an emergency incident. I am not dissuaded from this conclusion by the Union's further arguments based on the Employer's failure to formulate a Standard Operating Guideline setting out the permissible exceptions.

I am not prepared to attribute any interpretive significance to two Operational Guidelines introduced by the Union regarding activation of the Vancouver "USAR" team. The documents admittedly contain procedures for deployment "on a call-out basis". However, both are undated, and appear on their face to be of some vintage. The capacities of the team are described quite differently than the present four core disciplines (e.g. there is a reference to "Canine Search & Handlers); the procedure includes "E-Communication Fire Dispatch" (which the Employer advised is no longer part of the process); and callout is by "page" (suggesting a pre-cellphone era). Most critically, it cannot be determined if the two Guidelines were prepared before the Collective Agreement was amended to make callout "mandatory".

The Union's remaining arguments in respect of the second issue seek to invoke the equitable doctrine of estoppel. This plea must fail for reasons related closely to the grounds for rejecting the Union's resort to past practice. Even if one characterizes an inquiry as to whether a firefighter is available for call out as "a request" (the Union's position), this does not inherently remove the compulsory nature of the inquiry: *Lantic Sugar Ltd.* Moreover, on the evidence, it cannot be established that the Employer ever made a representation to the effect that callout is voluntary and may be declined at the discretion of a firefighter. Nor can it be said that a representation arose by silence, as the evidence amply demonstrates management was not aware of how current members of the bargaining unit view their Article 8 responsibilities. There was accordingly no obligation for the Employer to inform the Union that it interprets the Collective Agreement in accordance with the plain and ordinary meaning of the language.

The requirement of unequivocal representation by words or conduct is a question of fact, and is a necessary element of the modern doctrine of estoppel: *B.C. Rail Ltd.*, IRC No. C152/92 (affirmed in BCLRB No. B128/93); *Insurance Corp. of British Columbia and Office & Professional Employees' International Union, Local 378* (2002), 106 LAC (4th) 97 (Hall); and *Pacific Pallet Ltd. and United Steelworkers, Local 2009 (Contracting-Out Grievance)*, [2011] BCCAAA No. 103 (Taylor). I am unable to find the requisite representation in this case, and there is accordingly no need to consider the remaining elements of reliance and detriment.

In answer to the second issue raised by the grievance, I find Article 8 applies when the Employer initiates a compulsory or non-voluntary callback of off-duty staff. As off-duty members of the Union called for the Calgary deployment had the option of declining the opportunity, they did not receive a "mandatory emergency call back" and are not entitled to double time under that provision. However, to the extent that HUSAR Team members worked outside of their regularly scheduled shifts, I accept the Union's alternative position at paragraph 148 of its written argument that Article 7 (Extra Shifts) applied, and its members did in fact receive overtime compensation on that basis.

V. SENIORITY

The third issue raised by the grievance is whether the Employer is required to call members of the HUSAR Team for deployment in order of seniority. The issue obviously raises a significant point of principle, and the application of seniority in the workplace was canvassed extensively during the hearing. However, the immediate dispute ultimately reduces to a question of whether one member of the Team should be compensated because he was not called in seniority order for the Calgary deployment due to an error by the Employer.

As recounted above, for purposes of the Calgary deployment, Mr. Young created a list of firefighters on the Vancouver HUSAR Team based on seniority. He generated

the list from an existing software program by inputting the names of the Team's firefighters and "seniority". He pasted the result into an Excel spreadsheet, and added telephone numbers and other information. This list was then given to Mr. Bauer, along with the instructions to start telephoning from the top of the list (i.e. with the most senior member of the Team) and to see how many members he could roster. Unlike the Johnson's Landing deployment, there was no need to fill certain positions based on specific skill sets.

Mr. Young was asked at the end of his direct examination whether a stand-alone seniority list for purposes of HUSAR deployment existed at the time of the Calgary floods, and replied: "Not that I'm aware of". He had testified earlier that his Excel list was laid out "in a particular way so it was convenient for the person tasked with calling Team members for deployment". As a long term bargaining unit member he understood the Union's position on the importance of seniority, and felt this was "the path of least resistance". Mr. Young added that, by using seniority, "I'd get 'buy-in' with everybody if I did it that way". He did not give any thought to whether he was creating any rights or entitlements at the time, and was later informed by the Fire Chief that he was not required to offer HUSAR deployment opportunities based on seniority.

In cross-examination, Mr. Young characterized seniority as a "cornerstone philosophy of the Local", and elaborated on why he created the list on this basis:

> … I was trying to choose the path of least resistance and it did not affect my ability to manage the Team. [If] I can support the Union I do it, but not to create an entitlement. In the Department, you line up to eat by seniority [and] do everything by seniority. I was in the Company for 24 years and that's not lost on me. I have to manage the Team -- if I can, and can [also] support seniority, I will do that.

Mr. Bauer called the Team members on the list in seniority order as instructed. The forty-eighth name was Neil Austin. Mr. Bauer called the associated number on the list and, when no one answered, left a message for Mr. Austin to contact him if he was

available for the deployment. Unfortunately, for some reason that was not explained at arbitration, the number on the list for Mr. Austin was not correct.

Mr. Austin was nonetheless aware of the deployment as he was on duty at Hall #9 and observed other members of the Team gathering their HUSAR gear. They told him they had been called and were being deployed. Mr. Austin testified that he expected a call when "[his] name came up in seniority". He initially believed he had not been called because he did not have enough seniority, but then noticed some more junior members also gathering their gear. He telephoned Chuck Stanford who was the Chief Training Officer at the time, and is now an Assistant Fire Chief. Mr. Austin told Mr. Stanford he was available, and provided his correct email address and cell number. According to Mr. Austin, the junior HUSAR Team members had not left Vancouver at that point.

Mr. Stanford testified to receiving the telephone call from Mr. Austin in the "early morning". Although he did not give a date, I find it was most likely June 29 before the second wave was deployed. Mr. Stanford knew the calls to the HUSAR Team had been made and the members selected. He was "at a loss" to explain why Mr. Austin had not been called, and said he would get in contact with Mr. Young (who he knew was in charge of the deployment). He also took Mr. Austin's telephone number and email address. Mr. Stanford believed he called Mr. Young immediately after speaking with Mr. Austin. He reached Mr. Young in Calgary, and told him that Mr. Austin had not been called for deployment "when in all likelihood he should have been called". In cross-examination, Mr. Stanford stated Mr. Austin should have been called "because of the list they used, [but] they did not get ahold of him for some reason".

Somewhat surprisingly, neither counsel questioned Mr. Young about this telephone call from Mr. Stanford. Thus, I do not have any explanation as to why Mr. Austin was not (or could not have been) included at that stage as part of the second deployment.

Mr. Austin spoke with Mr. Bauer some time after the incident. Mr. Bauer testified that Mr. Austin was "angry with [me]", despite his explanation of having called him and left a message. This would have been Mr. Austin's first opportunity for deployment, as he was not called for Johnson's Landing during the prior year. He testified that the HUSAR Team is "a big part" of why he joined the Fire Department, and he was "excited" at the prospect of going to Calgary.

Mr. Young was the Chair of a Union committee which developed a policy in 2003 regarding the assignment of "Overtime/Extra Duty". I find the current version of the policy is well understood and applied in Vancouver Fire Halls. For example, an email sent in June 2013 by the Assistant Chief of Operations to Battalion Chiefs and others directed in part: "We encourage Fire Halls to review the current *accepted* practice of 'Hiring Extra Duty'" (italics added). This email was quoted by the Union when the Employer disputed the assignment of overtime pursuant to the policy in 2014. The current version of the policy reads:

> The intent of this policy is to create a fair distribution of extra duty shifts between all halls whenever possible. It is the policy of Local #18 that when hiring members for extra duty shifts under normal circumstances;
>
> A) Members will be hired first from within the hall where the shift is to be worked.
> B) Members with 3 or more extra duty shifts in that calendar year will not be asked to work until halls have been canvassed through the B/C's office.
> C) Members to be offered the extra duty shift in order of the most senior member, with the fewest number of extra-duty shifts in that calendar year
> D) An overtime list shall be kept in the Capt's office to reference and record the distribution of extra duty shifts.
> E) No preference will be given to the shift on duty at the time of calling

Thus, as confirmed by more than one witness, the policy does not assign extra duty shifts strictly in accordance with bargaining unit seniority, and an opportunity is offered first within the Hall where it arises. Further, senior firefighters who have

received an overtime shift will be bypassed if less senior members at a Hall have a fewer number of extra duty shifts. As explained by current Union President Rob Weeks, the policy is intended to serve as a "fair, equitable and transparent" method for allocating premium shifts.

Another workplace document canvassed at some length is the Employer's Operational Guideline headed "Call Out Method". The version tendered in evidence is undated, and outlines "… the procedure for calling out off-duty personnel for a Four Alarm or greater". While most witnesses were not familiar with the document itself, they had seen a version of the table it contains posted in Captains offices in most Fire Halls. The parties agree this call out method does not apply to a HUSAR deployment (nor would this even be possible given the terms). But the point emphasized by the Union is that the Operational Guideline inherently represents a "seniority driven" procedure.

More generally, the evidence as a whole reflects Mr. Young's description of seniority as a "cornerstone philosophy" of the Union. He was not the only witness to observe that firefighters "eat by seniority".

The Union's position that HUSAR deployments must be assigned to employees in seniority order is founded on the oft-quoted passage from *Tung-Sol of Canada Ltd. v. United Electrical, Radio and Machine Workers of America, Local 512* (1964), 15 LAC 161 (Reville):

> Seniority is one of the most important and far-reaching benefits which the trade union movement has been able to secure for its members by virtue of the collective bargaining process. An employee's seniority under the terms of a collective agreement gives rise to such important rights as relief from lay-off, right to recall to employment, vacations and vacation pay, and pension rights, to name only a few. It follows, therefore, that an employee's seniority should only be affected by very clear language in the collective agreement concerned and that arbitrators should construe the collective agreement with the utmost strictness wherever it is contended that an employee's seniority has been forfeited, truncated or abridged under the relevant sections of the collective agreement. (para. 3)

The Employer counters by submitting there is no language in the Collective Agreement which restricts its management right to distribute HUSAR opportunities. The parties have addressed the role of seniority in two areas: Article 13.1 (Promotions) and Article 19 (Layoff and Recall). However, there is no mention of seniority in any of Article 6 (Overtime), Article 7 (Extra Shifts) and Article 8 (Callout). The Employer points to a passage in Brown & Beatty, *Canadian Labour Arbitration*, for the proposition that employers are free to make decisions without regard to seniority absent an express contractual restriction:

> 6:2000 - APPLICATION OF SENIORITY
>
> The scope and significance of seniority rights are largely determined by the specific provisions of each collective agreement. Should an agreement not make any provision for the accumulation of seniority rights, an employer would be free to promote, transfer and lay off employees without regard to length of service. Similarly, if a collective agreement provides that an employer is required, either exclusively or in combination with other factors, to have regard to an employee's seniority for certain purposes but does not include in that list of purposes layoffs, demotions, transfers, shift assignments or recalls from strikes, seniority rights would have no application in those contexts […]

The Employer relies as well on awards where arbitrators have allowed management to make overtime assignments without regard to seniority provided its rights have not been circumscribed by terms of the collective agreement: see *York Disposal Services Ltd. and Teamsters Local Union No. 419* (2007), 91 CLAS 302 (Luborsky); and *Canadian Pacific Ltd. and Brotherhood of Maintenance of Way Employees*, 1983 CarswellNat 1099 (Kates). Arbitrators have found in other cases that, where a collective agreement contains a seniority requirement regarding certain provisions, it does not extend the application of seniority to the entire collective agreement: see, for instance, *UFCW, Local 175 and Pinty's Delicious Foods Inc.* (2012), 219 LAC (4th) 197 (Dissanayake). These and other authorities result in the following submissions:

> The Employer's collective agreement with the Union does not contain <u>any</u> reference to HUSAR deployments being allocated on the basis of seniority. As noted above, the Collective Agreement does require that

> the Employer consider seniority concerning certain matters such as promotions (Article 13.1), layoff and recall to work (Article 19). Given these other references to seniority, had the parties intended to have the allocation of HUSAR opportunities carried out by seniority, the Collective Agreement would provide for that as it expressly does in a number of other circumstances.
>
> Furthermore, as noted above, nowhere in articles 6, 7 or 8 is there any reference to seniority. (written argument at paras. 138 & 139)

The Union acknowledges there is no provision of the Collective Agreement which expressly addresses the application of seniority in the assignment of work. However, it submits the parties have negotiated a clause that requires the Employer to apply seniority for that purpose, and it points to the following language:

> 13.6 General
>
> It is agreed that any general conditions presently in force but which are not specifically mentioned in the Agreement shall continue in full force and effect for the duration of this contract.

The Union notes arbitrators have defined the word "condition" in a similar context to include a "benefit, privilege or practice" the "continuance of which the employees have come to expect": *Vancouver Municipal and Regional Employees' Union and Emily Carr College of Art and Design* (1988), 10 CLAS 69 (Hickling), at para. 82. It submits the assignment of extra work in seniority order is a benefit that firefighters have come to expect.

Article 13.6 has been examined in at least two prior awards. In *Vancouver (City) -and- Vancouver Fire Fighters' Union, Local 18* (1995), 52 LAC (4th) 89 (Munroe), the Union grieved the Employer's scheduling practices around classroom training for firefighters. The training was not mandatory, but firefighters attended as many classes as possible to prepare for and pass an exam that was required in order to be considered for promotion. As a result of the Employer's rescheduling, the on-duty time spent by classroom participants was reduced to zero. The Union argued the past scheduling

practices comprised a "general condition" and could not be altered without its concurrence. The arbitration board made these observations about the clause:

> Broadly construed, Article 13.6 likely would be capable of producing the result sought by the union in the prosecution of this grievance. However, we think that a certain amount of caution must be exercised in one's approach to a vaguely-expansive "general conditions" clause like Article 13.6 especially where, as here, its potential application may have an impact on other more clearly-expressed aspects of the parties' total bargain. Of some assistance in deciding this case is the following phrase in Article 13.6: "...but which is not specifically mentioned in the Agreement." In our view, the dispute between the parties in the instant case is properly reduced, in the final analysis, to this question: whether an underlying intention of Article 13.6 was that the employer would be limited in the exercise of its fundamental management rights - the scheduling and re-scheduling of the work force to achieve desired efficiencies - beyond the specifically-negotiated limitations in that respect as contained in Article 5 (Hours of Work). (para. 22)

The board went on to find that the Employer's longstanding practice of providing training opportunities for eligible officers was a "general condition" within the meaning of the clause. However, interpreting Article 13.6 in the manner proposed by the Union would have imposed an additional fetter on the traditional management right of scheduling beyond those specifically negotiated by the parties in Article 5, and this additional fetter would not have been "insignificant" (para. 22).

The second award is *Vancouver (City) Fire and Rescue Services -and- Vancouver Firefighters' Union, Local 18*, [2006] BCCAAA No. 114 (Gordon), (the "*Travel Time* award"). The grievance there involved a compensation claim for five members of the HazMat Instructors Group who travelled to and from Alberta to participate in an advanced training program. The Collective Agreement did not expressly address compensation for training-related travel time. The Employer argued the training program was not compulsory and did not constitute "work" under the Collective Agreement; therefore, the associated travel time could not be seen as "required work" attracting compensation. The Employer also noted it had not previously compensated employees for travel time even if the travel occurred on scheduled days off.

Arbitrator Gordon made these observations about Article 13.6 as it related to the Employer's practice:

> Second, the evidence of past practice identifies only a relatively limited number of recent instances where employees have not been compensated for training-related travel time. And, importantly, the undisputed fact is that no one in authority in the Union had any knowledge of the Employer's non-compensation policy and practice. In my view, in these undisputed circumstances, the Employer is not entitled to rely on the practice evidence to assert the existence of a "general condition not specifically mentioned in the collective agreement" for the purpose of Article 13.6. I find that, in order to constitute a "general condition" under Article 13.6, both parties to the collective agreement must surely be aware of, and acknowledge, the practice said to be the "general condition", as well as its status as "presently in force." (para. 38)

The grievance ultimately succeeded due, in part, to the "… well-established general arbitral principle that time spent by employees traveling to and from distant training locations on scheduled days off or outside their regular hours of work should be viewed as compensable work for the purposes of collective agreements" (para. 61).

Once again, the Union submits the assignment of work "… in a accordance with the seniority model is an established practice of the Employer which the employees have come to expect" (written argument at para. 144). That may be true to a certain degree. But, to the extent that such "general conditions" *may* presently exist, the application of seniority is manifestly subject to other considerations depending on the context. To take the most prominent example canvassed at arbitration, the Union's policy regarding "Overtime/Extra Duty" simply could not be followed or applied in the circumstances of a HUSAR deployment. More generally, none of the existing "conditions" involve firefighters being assigned work in strict order of bargaining unit-wide seniority, which is the procedure being sought by the grievance. All available and qualified HUSAR Team members were deployed to North Vancouver and Hurricane Katrina, so there were no lost opportunities. Nonetheless, the limited evidence respecting those deployments indicates

the main consideration was qualifications (or skill sets), and no thought was given to seniority.

In my view, the fact that Mr. Young had to create a list for the specific purpose of the Calgary activation speaks volumes about whether there was a general condition "presently in force" that both parties were aware of and had acknowledged: again, see paragraph 38 of the *Travel Time* award. Further, the present circumstances bear little resemblance to the facts in *Hayes Forest Services Ltd. -and- United Steelworkers of America, Local 1-85*, [2005] BCCAAA 110 (Kinzie), where a successor employer was required on the basis of estoppel to follow a "longstanding practice" of allocating overtime opportunities in accordance with incumbency and then by seniority. Put simply, there is no practice "presently in force" -- let alone one of longstanding duration -- regarding HUSAR deployments. The Union is accordingly unable to rely on Article 13.6 as a contractual basis for requiring the Employer to activate members of the Team in seniority order.

On the other hand, the equities of the situation tilt strongly in favour of Mr. Austin. Regardless of whether there was a contractual obligation, Mr. Young intended to call members of the HUSAR Team by seniority and communicated that direction to Mr. Bauer. The objective of calling members by seniority was affirmed by the script associated with the second wave, which read in part:

> … We are maintaining a volunteer availability list for potential deployment *based on seniority*. …
>
> Upon confirmation of an additional request for resources from Calgary team members on the availability list will be officially activated and deployed *based on seniority*. (italics added)

The evidence as a whole supports a finding that Mr. Austin would have been called and offered an opportunity to join the second wave but for the Employer's error. Unfortunately for him, however, the answer to this aspect of the grievance cannot be founded on the equities of the situation: see the *Travel Time* award at paragraph 39.

Additionally, the record does not allow me to determine whether the Employer had a reasonable opportunity to "correct" its error before the more junior members of the Team left Vancouver -- assuming such an obligation arose in the circumstances (the point was not addressed by either party). Thus, and with considerable reluctance, I must dismiss the Union's claim on behalf of Mr. Austin.

VI. VACATION

Some of the HUSAR Team members who deployed to Calgary were on vacation at the time of the activation. The Employer changed their status from "Vacation" to "Out to Others" for the duration of the deployment. The change of status allowed the Employer to pay the members straight time for hours worked on their regular scheduled days and premium pay for the hours worked on their regular days off, rather than premium time for all hours. The grievance does not challenge this aspect of the Employer's actions related to vacation.

An email was sent to Battalion Chiefs and others on June 30, 2013 identifying all of the HUSAR Team members who had been deployed, and indicating who had been or was going on vacation. In respect of those members, the email advised: "[They] have been recalled off their vacation and will require any shifts lost to be rescheduled, beginning with the first day they were taken off vacation". Assistant Chief of Operations Jeff Wilkinson sent another email to the Battalion Chiefs on July 2 (i.e., the day the HUSAR Team returned from Calgary) to advise of the demobilization and the schedule for return to regular duty. It stated in part: "The members below who are noted on vacation who deployed while on vacation will have their vacation dates readjusted in a subsequent email". The "subsequent email" was sent to Battalion Chiefs two days later on July 4 and gave these directions:

> Be advised the members listed below have had their Vacations rescheduled due to the HUSAR deployment to Alberta. Please contact them to ensure they are notified of their altered dates. Please check the

> Fire Net Vacation report for details. You will need to alter your boards and lists to reflect the same.

As indicated by these communications, the Employer unilaterally rescheduled the members' vacations, and they were not consulted about the new dates.

One of the Team members who had been on vacation at the time of the Calgary deployment was Shawn Dighton. The scheduled dates were June 9 through July 11. After returning to Vancouver on July 2, he resumed his vacation and expected to return to work on July 12. He was called by someone at the Hall the day prior, and he confirmed his intention to return the next day. About 5-10 minutes later, he received another call advising that his vacation had been extended and he was not to return until July 19. Mr. Dighton was upset at not knowing his vacation had been changed and only finding out the night before his anticipated return to work. His fiancée had travelled to Calgary about two or three days earlier, and he could have accompanied her if advised sooner by the Employer. In the result, he was not able to make arrangements for the vacation time and filled the days with "make work projects" instead. He testified that he would have preferred to have been at work.

Another firefighter affected by the vacation rescheduling was Kevin Main. He had been scheduled to return to work on either July 6 or 7 and telephoned the Hall the night before. Only at that point was he told that his vacation had been extended. He testified to being "surprised" and "annoyed" by the change, although he was not "upset". Had Mr. Main been told earlier, he would have remained in Calgary to see his daughter who had come to visit him at the Base of Operations.

A third member who had his vacation rescheduled was now Assistant Chief Scott Morrison. He testified to being "fine" with having the time added to his vacation when he returned to Vancouver.

Both parties referred at arbitration to a Memorandum of Agreement regarding Vacation Scheduling. Three of the paragraphs address the rescheduling of vacation:

Vacation Change

10. The parties recognize that scheduled vacations will, from time to time, need to be adjusted after the vacation schedule is published to meet bona fide operational requirements, which include but are not limited to employee promotions, employee movement to specialty teams or groups, employee increased vacation eligibility, and staffing requirements.

11. The Employer's first consideration when making vacation changes will be operational requirements, *but the Employer will act reasonably when considering and implementing such changes and will consider* predictability, seniority, *employee preferences,* and the principles of fairness.

12. The Employer will schedule new vacation dates, and those dates will be as close as practicable to the previously scheduled vacation dates unless the employee provides written agreement to different dates. (italics added)

The Memorandum was concluded in June of 2014 and, accordingly, was not in effect at the time of the Calgary Floods. Nonetheless, it was the uncontested evidence of President Weeks that the document "in the main" reflects practices that had been in place before it was signed. More specifically, he testified that the Employer "always worked in concert with employees when rescheduling vacation".

Assistant Chief of Operations Wilkinson confirmed in cross-examination that paragraphs 10-12 quoted above "in general" reflect the pre-2014 practice, and suggested paragraph 12 "is very close to what was done on the Calgary Floods". He also testified that where scheduled vacation conflicts with dates for the Company Officer Training Program, the Employer will reschedule vacation outside the parameters of the Program "and, at the same time, try to accommodate staff wishes to have specific dates where possible". This evidence was confirmed in cross-examination; that is, the rescheduling of vacation due to the Program takes into account the wishes of employees and operational needs. Mr. Wilkinson acknowledged employees "were not specifically asked" about the vacation changes related to the Calgary Floods; nor did his emails to the Battalion Chiefs

suggest the members should be consulted. He maintained, however, that what the Employer did "wasn't unreasonable" because only "one or two days" were moved.

The Union argues to the contrary. It submits the Employer must act reasonably in changing an employee's previously scheduled vacation dates. What was done here did not follow the practice of consulting with members and the Employer provided an unreasonable amount of notice. By way of remedy, the Union seeks an order that the Employer:

> Pay all members who were called in from their vacation at a premium rate (150%) for compensable hours during the deployment and reimburse *or* reschedule the vacation days lost as a result of deployment, or any other actions that [are deemed] reasonable as result of the Employer's breach of its long standing practice. (written argument at para. 157)

The Employer submits it had the authority to unilaterally reschedule vacation and did not breach the Collective Agreement. Further, if its decision is subject to review for arbitrariness and reasonableness, that test is met -- particularly as the vacations were rescheduled to the nearest possible dates upon the return from deployment and were during the "peak vacation period". Alternatively, if the rescheduling did contravene the Collective Agreement, the Employer argues only declaratory relief should be granted as the employees have no losses or damages to compensate.

Subject always to restrictions negotiated in a collective agreement, there can be no serious debate over an employer's authority to schedule employee vacations having regard to legitimate business reasons: *BCTF and CEP, Local 464* (2006), 99 CLAS 71 (Germaine), citing, among other authorities, *United Parcel Service Canada Ltd. and Teamsters Union, Local 141* (1981), 29 LAC (2d) 202 (Burkett). Arbitrator Germaine went on to reason:

> In short, absent any contract term to the contrary, management has the authority to schedule vacations for legitimate business reasons and, if management acts on such reasons, it is not open to an arbitrator to review the schedules according to her or his own notion of fairness. *Contract*

> *Clauses*, supra, expresses the principle in these terms: "Unless the agreement gives the employees a say in the matter, management has a right to schedule vacations at a time satisfactory to it" (page 17-24). … (para. 44)

In my view, this statement must be tempered by the overriding obligation of the Employer to exercise its management rights in a manner that is neither arbitrary nor unreasonable: *U.R.W., Local 189 and Goodyear Tire & Rubber Co. of Canada, Ltd.* (1964), 15 LAC 34 (Reville). In this regard, it has been held that an employer must give reasonable notice of both the scheduling and rescheduling of vacation: *Re Maritime Electric Company and International Brotherhood of Electrical Workers Local 1432, Unit 3*, [1979] PEIJ No. 69; upheld on judicial review, [1980] PEIJ No. 114 (PEI SC, Appeal Division). The underlying award in that proceeding held "[i]t is manifestly unfair to tell an employee on Thursday that he cannot have his vacation the following Tuesday". Here of course, at least three employees received only one day's notice of the unilateral change in their vacation schedule. I appreciate that the Battalion Chiefs are in the bargaining unit and effectively received an order from the Assistant Chief of Operations on July 4 to notify members of the change. However, the email gave no direction on how quickly they should be "notified of their altered dates", and management must ultimately accept responsibility for the lack of timely notice.

I find as well that employees do "have a say in the matter" when it comes to vacation rescheduling due to the Employer's operational requirements. That opportunity previously existed by practice, and now arises under the Memorandum of Agreement when the Vacation Change provisions are read as a whole. I find in any event that the failure to consult with returning members of the HUSAR Team was an unreasonable exercise of the Employer's scheduling rights. As the Union submits, vacation time is important to its members:

> Firefighters have a work schedule that follows an eight day rotation, which includes five calendar days on and three days off. This means that every work week starts on a different day and that firefighters receive one out of eight weekends off. This often causes a real constraint on family time. As a result, vacations are an extremely important period of time for members

> to spend with family, decompress and reconnect. The ability to plan days off is paramount in utilizing that time appropriately (written argument at para. 155)

On the evidence before me, the Employer's actions negatively impacted Mr. Dighton. He could have joined his fiancée had he known beforehand, and instead filled his days with what he described as "nothingness". Mr. Main could have remained in Calgary with his daughter. Neither was able to plan ahead and make arrangements for how the unexpected time would be utilized.

This brings me to the Employer's alternative argument that only declaratory relief should be granted. It relies on various awards where arbitrators have not awarded additional vacation time or vacation pay following a breach because the employees have already received and been compensated for their vacation entitlement. Awarding damages would accordingly be a "double payment", although the employer is "put on notice"' for the future: see *Air Canada and Canadian Airline Employees' Association* (1978), 19 LAC (2d) 240 (Shime); *Mitchell Press -and- Communications, Energy & Paperworkers Union, Local 226*, [1995] BCCAAA No. 642 (Bruce); and *St. Boniface General Hospital -and- Manitoba Association of Health Care Professionals*, [2009] MGAD No. 15 (Peltz). In two awards, damages were awarded, but only for the out of pocket expenses incurred by the employee due to the employer's unilateral cancellation of vacation in violation of the collective agreement: *Labatt's Alberta Brewery -and- Brewery, Beverage & Soft Drink Workers, Local 250* (1996), 53 LAC (4th) 158 (Melnyk); and *Family and Children's Services of Renfrew County -and- City of Pembroke and Ontario Public Employees' Union, Local 459* (1985), 20 LAC (3d) 359 (Devlin).

I accept the Employer's argument that awarding monetary compensation in either of the forms requested by the Union would go beyond the normal principle for awarding damages: see Brown & Beatty, *Canadian Labour Arbitration*, at para. 2:1503. But nor will a declaration by itself fully recognize the loss incurred by some members of the HUSAR Team. More specifically, it will not compensate employees such as Messrs.

Dighton and Main who were not consulted regarding their preferences and lost the potential of using their remaining vacation entitlement with family members due to the lack of timely notice from the Employer of the rescheduled dates. As awarding monetary damages under the "lost opportunity" principle was not raised by either party at arbitration, the subject is remitted for discussion with an arbitral reservation of jurisdiction to fix a final amount if necessary. I have determined as well that the Employer should extend to all affected employees the option offered in final argument of rescheduling the applicable vacation entitlement for another time but without additional pay.

VII. CONCLUSION

I will not repeat the interpretive conclusions set out above respecting the four issues raised by the Union's grievance. In the result, the Union has succeeded on the first issue and achieved partial success on the final issue. I reserve jurisdiction to determine any differences related to implementation of this award, including the amount of compensation owing to individual employees.

DATED and effective at Vancouver, British Columbia on April 6, 2016.

JOHN B. HALL
Arbitrator