IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR EAST PLANT,
INDIANA HARBOR WEST PLANT, AND
BURNS HARBOR PLANT.

And ArcelorMittal Case No. 109

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010 (Indiana Harbor East),
LOCAL UNION 1011 (Indiana Harbor West).
And LOCAL UNION 6787 (Burns Harbor Plant)

OPINION AND AWARD

Background

These three cases concern Layoff Minimization Plans implemented by ArcelorMittal USA plants at Indiana Harbor East (IHE), Indiana Harbor West (IHW), and Burns Harbor, Indiana. The cases were tried separately, although the parties stipulated that the testimony of Vice President for Supply Chain Management Gary Mohr and Vice President for Labor Relations Patrick Parker would apply to all three cases. The case between Indiana Harbor East and Local Union 1010 was tried on June 25 and 26, 2020; the Indiana Harbor West-Local Union 1011 case was tried on the afternoon of June 26, 2020; and the Burns Harbor-Local Union 6787 case was tried on June 30, 2020. In all three cases, Richard Swanson represented the Company and Mike Millsap presented the Union's case. The parties filed written closing arguments on July 8, 2020.

These cases arise under Article 8, Section A.2 of the September 1, 2018 BLA:

Section A. Employment Security

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2. Layoff Minimization Plan

The Company agrees that, prior to implementing any layoffs, it shall review and discuss with the Union

a. documentation of a clear and compelling business need for the layoffs (Need).

b. the impact of the layoffs on the bargaining unit, including the number of employees to be laid off and the duration (Impact); and

c. a Layoff Minimization Plan which shall contain at least the following elements:

(1) a reduction in the use of Outside Entities;

(2) the elimination of the purchase or use of semi-finished and hot-rolled steel from outside vendors that can reasonably be produced by the Company;

(3) the minimization of the use of overtime;

(4) a program of voluntary layoffs;

(5) the use of productive alternate work assignments to reduce the number of layoffs; and

(6) a meaningful program of shared sacrifice, including senior management.

(7) Any plan suggested by the Local Union to create the opportunity for Employees to exercise seniority to bump junior Employees on jobs within a pool of sufficient Labor Grade 1 positions to provide meaningful protection from long term layoff for senior Employees

3. Employee protections

Reference to the elements of a Layoff Minimization Plan in Paragraph 2 above shall not be construed to impair in any way protection afforded to employees under other provisions of this Agreement.

4. Union Response

   The Union shall be provided with sufficient information to reach its own judgment on whether there is a Need, the appropriate Impact and to develop its own proposed Layoff Minimization Plan.

5. Dispute Resolution

   a. In the event the parties cannot reach agreement on whether there is a Need, the appropriate Impact and the terms of a Layoff Minimization Plan, the Company may implement its plan and the Union may submit their dispute to an expedited final offer arbitration under procedures to be developed by the parties. If the Company lays off Employees or takes other actions in violation of this Article, such Employees shall be made whole.

   b. The arbitrator's ruling shall address whether the Company demonstrated a Need and if it did, whose proposed Impact and Layoff Minimization Plan are more reasonable, given all the circumstances and the objectives of the parties.

The circumstances leading to these cases arose around mid-March, 2020, as the economic effects of the Covid-19 pandemic became manifest. Although ArcelorMittal USA had not necessarily expected great financial success in 2020, nothing in the record suggests that any of the locations involved in these cases began the year expecting to lay off employees. In at least two of the three locations involved, there were probationary employees working in the plants in March, which suggests they had recently hired employees. According to Gary Mohr, the Company's slab production data was the best indicator of how the plants were operating. Actual production figures for January through March 2020, showed the Company's overall performance as slightly above its business plan. Slab production, however, dropped by 36% in April, 40% in May, and was expected to remain substantially below the business plan for the remainder of 2020. Mohr said the Company's customers, including the automobile industry, reduced orders

substantially and, in some cases, refused delivery of product already made. Moreover, the price fell for the steel the Company continued to produce.

As reflected in Section A.2.a., above, prior to implementing any layoff the Company is obligated to discusses with the Union "documentation of a clear and compelling business need for the layoffs (Need)." There is no dispute that the Company gave the Union information about the effect of the pandemic on its business and that the parties discussed the situation. The Union does not contest the element of Need at any of the three locations at issue in this case. Even so, I allowed the Company to submit evidence about the impact of the pandemic at each of the three locations in response to the Company's assertion that the reasonableness of its layoff minimization plans could not be gauged in a vacuum. The Union also does not contest the Impact element of Article 8.A.2.b.

As will be developed more fully in the discussion of the individual cases, the parties discussed the layoff minimalization plan (LMP) elements outlined in the BLA beginning in early April, and the Company implemented its LMPs without agreement from the Union on or about April 17, 2020. In each instance, the Union submitted the final draft of its LMP after the Company had implemented its LMP. Pursuant to Section A.5, above, the Union invoked final offer arbitration at each location. On May 21, 2020, the parties signed a document titled "Memorandum of Agreement on Lay off Minimization Plan Final Offer Arbitration Procedural Matters under Article Eight Section A. of the September 1, 2018 Basic Labor Agreement" (MOA). It is not necessary to reproduce that entire document in this opinion. The parties selected the undersigned as the arbitrator for all three cases. The MOA also provided for a pre-hearing conference, which was conducted by video conference on June 15, 2020.[1] Pursuant to

[1] There was an earlier preliminary video conference on May 28, 2020.

the MOA, the parties submitted their final LMP proposals three days prior to the conference. In each case, the Company's proposed LMP was the one it had already implemented and the Union's proposed LMP was the one it had presented to the Company following implementation. The parties agreed to conduct the hearings by video conference and to the use of a court reporter. Over the Union's objection, I allowed the parties to submit their final arguments (or briefs) in writing seven days following the last hearing. With few exceptions, the parties submitted exhibits to me in advance of the hearing dates.

The Union argues that there are issues that must be addressed before any consideration of the reasonableness of the respective plans. The Union focuses on Article 8.A.3, quoted above, and argues that the Company's LMP impairs protections provided to employees under other provisions of the BLA. And, relying on *Arcelor Mittal Case No. 80*, the Union claims that because the Company has taken action in violation of Article 8, the employees who were laid off must be made whole. The Union identifies several alleged violations of employee rights under the BLA. I have not found merit in the Union's position. The reasons underlying that conclusion will be discussed in the various elements of the LMPs.

One alleged violation, however, applies generally to all three LMPs. The Union says the sole purpose of Article 8 is to protect employees during bad economic times; it is not intended to protect the Company's earnings or reduce its costs. I agree with the Union that the focus of Article 8.A.2 is the protection of employees, especially during circumstances that could cause displacement from work. But that does not mean the Company must ignore its own circumstances during bad economic periods. The extent to which the Company advances its own interests over, or to the detriment of, the economic interests of its employees may factor into the reasonableness of its LMP; but that does not mean the Company violates Section A.3 by taking

cost into account in formulating its LMP. Ultimately, both sides want the Company to survive difficult times and prosper. The allocation of scarce resources during bad times can include consideration of how the Company can protect itself to insure that survival. Thus, the Company's consideration of cost measures does not somehow violate its obligations under the Agreement. However, the manner in which it does so is a proper matter to consider in assessing the reasonableness of its LMP

I. Indiana Harbor East and Local Union 1010

Wendell Carter, Vice President and General Manager, ArcelorMittal Indiana Harbor, testified about the procedure used in the LMP negotiations at Indiana Harbor East. Carter said he had an email exchange with Steve Wagner, President of Local Union 1010, on March 24. This was shortly after the Company had decided to shut down a blast furnace at IHW that supplied hot metal to IHE. Carter said he told Wagner they would need to discuss an LMP and Wagner wanted to discuss voluntary layoffs. The parties first met on April 2. The Company gave the Union information about the effect of Covid-19 on its business, including projections for the future. Carter said he told the Union that the Company was going to terminate probationary employees. He also said the Company anticipated needing to lay off more than 200 employees, although the situation was too uncertain to accurately predict the total number or the duration of the layoffs. The parties met again on April 6, which is when the Company gave the Union its first draft-LMP. Either at that meeting or the one on April 2, the Company told the Union that it needed to finish the LMP negotiations by April 15 because it would not have work

for all of the employees beginning the following week.[2] Following discussion on April 6, the Company sent the Union a revised draft on April 7. The Union sent the Company a copy of its proposed LMP on April 11 and the Company gave the Union another version of its LMP. Carter said on April 15, the Company sent the Union an email saying the LMP needed to be finalized that day. There were apparently some discussions that day and the Company gave the Union the final version of its LMP at around 7:00 p.m. on April 15, which it subsequently implemented. The Union sent the Company its final LMP on April 17.

The Company's final LMP reads as follows:

1. The Company will be reducing the use of Outside Entities that perform work at, or for, the Indiana Harbor East plant as long as the work can be reasonably performed in a timely manner by Employees.

    a. Reduce the use for outside HVAC contractors by utilizing internal qualified craft employees.
    b. Reduce the use of outside Machine shops that perform Machine Shop Repair work.
    c. Reduce the use for outside hydraulic cylinder repairs.
    d. Reduce outside entities that perform Mobile Equipment Repairs.
    e. Reduce the use for outside entity that performs fabrication and repair work.
    f. Modify or eliminate internal pick systems to better utilize internal resources.
    g. Reduce the use of outside craft people by utilizing the operator-maintenance language contained in the BLA.

2. Indiana Harbor is not purchasing, or using, semi-finished and hot-rolled steel from outside vendors.

3. The Company will minimize the use of overtime.

    In addition, should the Company need to implement a non-normal work week schedule in an effort to reduce overtime, the Griever from the affected area and the Company have the authority to reach an agreement to do so prior to schedule being finalized.

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[2] Apparently, the Company was influenced by Article 5.C.1.b, which says the Company will make "every effort" to post a work schedule by 2:00 p.m. on Thursday of the preceding week, but in no event later than 2:00 p.m. Friday of the preceding week. April 15 was a Wednesday.

4. The Company will offer a program of Voluntary Layoffs ("VLO's") by department, under the following conditions:

   a. When overtime has been sufficiently reduced and before the Company implements ILO's for Employees with greater than 2 years in the department and
   b. No Employees with less than 2 years' service remain working in the department unless the Company deems them necessary due to operational needs within the Department
   c. Employees who elect to VLO will take their 2020 vacation as scheduled.
   d. There will not be VLO's for Craft Employees until capable Craft Employees can displace contractors that do not require special licensing.
   e. The Company reserves the right to deny VLO requests based on the Company's overall need. Employees who elect VLO's will have no rights to return to work and will remain laid off until, or unless, recalled by the Company.
   f. If there are no VLO's based on the criteria described above or if the number of VLO's is not sufficient in addressing the current production needs, Involuntary Layoffs (ILO's) will be immediately implemented in accordance with Article 5, Section (E) of the BLA.
   g. The Company reserves the right to recall Employees from VLO's and ILO's, as needed. No Employee shall, at any time, have the right to refuse recall from layoff.

5. The plant will look for Alternative Work Assignments for Employees in order to assist in the reduction of layoffs, which includes assigning displaced employees to janitorial, landscaping, snow removal and general plant housekeeping as required. In addition, train & schedule a COVID19 Hazards Deep Cleaning Crew to sanitize common areas throughout the Indiana Harbor East facilities.

6. The Company will continue to reduce salary costs through various means, including:

   a. Utilization of layoffs.
   b. Elimination of General Wage Increase
   c. Reduction of overtime
   d. Reduce contracted temporary management

7. Establish a Labor Grade 1 Pool of displaced employees from each department into one Pool.

In all three hearings, the parties focused on their respective proposals under elements 1-7 of Article 8.A.2.c. At IHE, there are no differences between elements 2, 6, and 7. Thus, the reasonableness of the two proposals will be determined by an analysis of element 1 (reduction of outside entities); element 3 (overtime minimization); element 4 (VLO); and element 5 (alternative work assignments).

Element 1. The Use of Outside Entities

The Union claims the Company's LMP violated the contracting out protections of the BLA through element 3's provision that the use of outside entities would be reduced "as long as the work can be reasonably performed in a timely manner by Employees." The Union points to Article 2.F, the contracting out language in the BLA, which gives the Company the right to contract out work to outside entities under certain circumstances. However, the Union says the inability of bargaining unit employees to perform work in a timely manner is not listed as an exception to the Guiding Principle.[3] Thus, the Union argues that the LMP violates Article 8.A.3 by seeking to increase the Company's ability to contract out work, thus undermining the protections afforded by Article 2.F.

Although the surge maintenance exception in Article 2.F.2.a.(2) might be affected by the ability of bargaining unit employees to complete work in a timely fashion, the Company's LMP does not limit its "timely fashion" criterion to surge maintenance work. However, that does not mean that the Company's LMP increases its ability to subcontract work. The Company does not have the right to unilaterally modify the language of Article 2.F, by imposing an LMP that increases the scope of contracting out exceptions. However, I do not understand the Company's LMP to mean that its use of outside entities will no longer be governed by Article 2.F. Whether

[3] Article 2.F.1.a. says, in part, "The Guiding Principle is that the Company will use Employees to perform any and all work they are or could be capable (in terms of skill and ability) of performing...."

under an LMP or not, the Company cannot contract out work the bargaining unit is capable of performing unless it satisfies the exception language of Article 2.F.2. The "timely manner" language in the LMP, as I read it and as I evaluate it in this opinion, pertains solely to recapturing work that has already been properly contracted out pursuant to Section 2.F.2, or which can be properly contracted out under one of the exceptions listed in that provision. Thus, the Company will recapture work it otherwise has the right to contract out if employees can perform it in a timely manner. Placing that limitation on work it will reclaim does not impair any employee rights under Article 2F. Nor is it unreasonable for the Company to consider whether the bargaining unit will be able to complete recaptured work when it needs to be done.

The Union also points to the Non-Core Functions letter on page 127 of the BLA, which reads as follows:

> - Notwithstanding any local understandings to the contrary, the Company may contract out non-core functions limited to, janitorial, mail activities, landscaping, snow removal, garbage and trash removal, railroad track repair and general plant housekeeping which is not directly associated with general labor work on a production facility.
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> - The Parties agree that any incumbents in jobs listed above will continue to perform such work until such time as the incumbent executes a successful bid to a permanent vacancy in the plant. Additionally, in the case of a layoff situation, Employees shall be assigned to such work (if being performed) before being laid off
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> - In addition this understanding does not waive the Company's obligations under Article Two Section F.5 and 8.

The Union understands the second bullet point to mean that employees will not be laid off until non-core work being performed by contractors has been assigned to the bargaining unit. The dispute in this case involves track repair work performed by a contractor called Tranco. There is no dispute that the track repair work has not been reclaimed from Tranco or that Tranco

employees are continuing to perform track repair work while bargaining unit employees are laid off. According to Carter, Tranco employees have specialized knowledge, special track inspection skills, and use specialized equipment owned by Tranco. Carter said the Company had assigned five bargaining unit employees to work with Tranco on track repair. I understood this to mean they were assigned at around the time the layoffs began and had not previously been assigned to track repair work.

The Union points to paragraph 5 of the Company's LMP, which says the Company will place displaced employees into the non-core work categories outlined in the Non-Core Functions letter, although paragraph 5 omits any mention of track repair work. As I understand the Union's contention, it views paragraph 5 as an attempt by the Company to avoid giving track repair work to displaced employees, thus impairing the right of bargaining unit employees to be assigned to non-core work, as required by the Non-Core Functions letter.

The Company cannot escape the requirements of the Non-Core Functions letter during the LMP process, absent agreement from the Union. Thus, the fact that paragraph 5 of the Company's unilaterally imposed LMP excludes any requirement to recapture track repair work is of no effect. Even so, I cannot find on this record that it was improper for the Company to retain some Tranco employees. Carter testified credibly that some of the work requires specialized knowledge that bargaining unit employees do not have and special equipment the Company does not own. Union witness John Wilkerson testified that some of the work requires neither special knowledge nor special equipment. But even the Union's proposed LMP seems to recognize that Tranco would be retrained, since its LMP proposes "reduce the need for Tranco" by training displaced employees to perform track repair, which is what the Company seems to be doing. Wilkerson said the Union's real intent was simply to retain Tranco supervisors to direct

bargaining unit employees, but that is not what the proposed LMP says. Moreover, retention or displacement of Tranco supervisors is beyond the scope of an LMP.

The record does not indicate the number of Tranco employees working in the plant. Although there is nothing unreasonable about the Union's proposal to train displaced employees to perform track repair work, the record does not indicate how extensive the training would be. Once conditions return to normal, the Company will have the right to contract out all track repair work, regardless of the capability of bargaining unit employees to do the work. Thus, it is not reasonable to expect the Company to undertake substantial training or to purchase equipment it will not need once the LMP expires. In any event, the Company has assigned some employees to track repair work who presumably are learning how to perform work that can be assigned to bargaining unit employees. Thus, I find the Company's proposal concerning Tranco not to impair employee rights and to be reasonable.

Both the Company and Union LMPs include proposals to reduce the need for outside entities to perform HVAC, machine shop, hydraulic cylinder, and mobile equipment repair work. It is difficult to evaluate which proposals are more reasonable since they propose similar measures. The Company criticizes the Union's proposal on machine shop work because it would require recapturing work that had already begun. But Union witnesses denied that was the intent or that there had been any such discussion. Moreover, the proposal says the parties would "review and recall" the work, which I understand to mean that the parties would review which work was appropriate for recall. But, as the Company's brief points out, the Union's proposal for fabrication work includes recapturing "any current fabrication" and other work, without exception. This is not reasonable. The Union also proposes the return of work performed by Phoenix/Fritz/Beemsterboer. The scope of this work is not clear to me. Moreover, the Union

apparently signed an agreement with the Company allowing the work to be contracted out, although some of it apparently has been reclaimed. In any event, while the proposal was reasonable, on this record I cannot find that it was unreasonable for the Company to refuse to recall all of the work. I think the Union's proposal to assign craft employees across seniority unit lines is reasonable. But the Company's LMP does not preclude such assignments, and it allows the Company to determine whether the different skill sets can be accommodated in making such assignments.

I find that both parties' outside entities proposals were reasonable. With the caveat about the meaning of the "timely manner" language, I find that the balance of reasonableness on this element tips slightly in the Company's favor.

Element 3. Minimization in the Use of Overtime

The Union faults the Company's paragraph 3 by asserting that it does not reflect any actual plan. Rather, Article 8.A.2.c. requires that an LMP contain an element concerning "the minimization of the use of overtime" and the Company's LMP simply says "The Company will minimize the use of overtime." In contrast, the Union's LMP says overtime will be minimized by assigning displaced production workers to assist craft employees on equipment repairs; by scheduling displaced workers on each turn to perform labor work and fill in for report offs; and by developing a Covid-19 deep cleaning crew to sanitize work areas. Although it is unclear how this last element would minimize overtime, it need not be considered in assessing the relative reasonableness of the two LMPs because the Company made an almost identical proposal in paragraph 5, which addresses alternative work assignments to reduce the number of layoffs.

The Union's two other proposals could seemingly have some effect on overtime. The proposal to schedule displaced employees in order to replace report-offs is reasonable, assuming

there is some rational basis for predicting the number of absences that might occur on each turn. But any such scheduling would presumably have to be conservative in order to prevent having employees perform unneeded labor work if there were insufficient report-offs, or if the scheduled employees were unable to perform the kind of work created by absences. More substantial is the Union's proposal to schedule displaced employees to assist maintenance workers on equipment repairs. As the Union points out, the job descriptions for productions employees in Appendix D contain language about performing and assisting in maintenance tasks. Moreover, Union witness John Wilkerson testified credibly that the Company had previously used new employees with under two years of service for similar purposes. I do not understand the Union's proposal to mean that production employees would need to be trained to perform technical tasks or to require that they be proficient enough to work on their own.

It is true, as the Union claims, that the Company's LMP offers no actual plan for reducing overtime. It seems likely, however, that there were discussions of specific plans during the LMP negotiations. Moreover, it would not be fair to conclude that the Company had no plans for reducing overtime. The Company introduced evidence that it has substantially reduced the use of overtime over the past three months, which suggests that it had some design about how that was to be accomplished. Still, whatever the Company's plans were, it imposed them unilaterally without reducing them to writing in its LMP. The Union was entitled to notice via the LMP about what the Company actually planned to do. It was not required to give the Company discretion to do whatever it wanted.

But the remainder of the Company's overtime proposal causes even more difficulty. Part of paragraph 3 permits the griever of an affected area and the Company to reduce overtime by reaching an agreement to implement a non-normal work week. This, the Union claims,

undermines the protections afforded by Article 5.C.6, which permits the Company to adopt "schedules other than Normal Workday and Work Week" only with the approval of the Local Union President and 60% of the employees affected by the schedule.

The Union argues that inclusion of this provision means the Union prevails, even without consideration of the reasonableness of the proposals. Thus, the Union points to Article 8.A.3, which says the elements of an LMP "shall not be construed to impair in any way any protection afforded to Employees under other provisions of this Agreement." The Union relies on *ArcelorMittal Case No. 80*, in which the Company had unilaterally implemented an LMP that included a mandatory 32-hour work week, notwithstanding Article 5.C.4, which said employees scheduled to work "will receive...an opportunity to earn at least forty (40) hours of pay...." I rejected the Company's claim that it had secured the right to schedule 32 hours in bargaining, and found that its unilaterally implemented LMP violated Article 5.C.4. In *Case No. 80*, there were only two areas of disagreement between the parties' respective LMPs, the 32-hour work week and the program of shared sacrifice required by Article 5.A.2.c.(6). However, the opinion notes that the focus in the arbitration hearing was the 32-hour work week provision. There is no discussion in the opinion of the shared sacrifice disagreement. It is fair to conclude, then, that the 32-hour provision was the principal – and probably the only – consideration in determining which plan was more reasonable. Thus, I said, "Because the Company's plan includes a mandatory 32-hour work week, which the Company has no right to impose, I must find that the Union's plan is more reasonable."

ArcelorMittal Case No. 80 does not say that any consideration of the reasonableness of a plan would be pre-empted if an employee right was, or could be, impaired by an LMP. Rather, the extent to which any impairment can be or has been unilaterally imposed is a factor in the

reasonableness determination. The Company discounts the significance of the non-normal work week language, pointing out that no such schedule has been adopted, and that the Local Union President can, and has, told grievers not to agree. Nonetheless, I find it significant that the Company willingly implemented an LMP that it had to know contained language that violated an express provision of the BLA. Nothing in Article 8.A requires the parties to bargain to impasse about a particular LMP before it can be implemented. Thus, it would have been easy enough for the Company to have excluded this language from the LMP it implemented on April 16. Although the Company's action was not as significant as the circumstances in *Case No. 80*, where it actually imposed a schedule forbidden by the contract, the inclusion of the non-normal work week language still diminishes the reasonableness of its LMP.

The inclusion of the non-normal work week language and the Company's lack of specificity about is plan to reduce overtime convince me that with respect to the overtime element, the Union's LMP is more reasonable.

Element 4. Program of Voluntary Layoffs.

The parties' VLO proposals represent the principal difference between their LMPs, and are the hardest to evaluate. At the outset, I reject the Union's claim that the Company impaired employee rights in violation of Article 8.A.3 by its proposal to exclude employees with less than two years of service from a VLO. Similarly, the Company did not violate Article 8.A.3 by its proposal to limit any employee from taking a VLO until all employees with under two years of service had been laid off (unless retained for a departmental need). As both parties recognize, the BLA mentions voluntary layoffs only in connection with an LMP. Thus, while Article 8, Section A.2 can reasonably be read to mean that an LMP must include "a program of voluntary layoffs," it places no restriction on what that program must contain. Nor, contrary to the Union's

contention, does it say that all employees in the bargaining unit must be eligible for a VLO. The contract routinely distinguishes between groups of employees, especially in the allocation of benefits. In Article 8 itself, in fact, the BLA disqualifies employees with less than two years of service from SUB benefits. Nothing in Article 8 or elsewhere prevents implementation of an LMP that limits the availability of VLOs. Such limitations are simply factors to be considered in assessing the reasonableness of the LMP.

I turn now to the reasonableness of the Company's VLO proposal. It is true, as the Union points out, that not permitting VLOs until all employees with under two years of service have been laid off could affect the availability of VLOs for more senior employees in the department. The Company's two-year limitation is not unreasonable, and is consistent with its legitimate interest in controlling the level of SUB payments. However, one purpose of a VLO is to allow employees with substantial SUB entitlement to elect a voluntary layoff to protect employees whose relatively low seniority would have caused them to be laid off involuntarily. Employees with under two years of seniority are especially vulnerable. It is true that very low service employees have limitations on their employment security. The 40-hour pay objective expressed in Article 8.A.1 applies only to employees with three or more years of service, and employees cannot receive SUB pay until they have at least two years of service. But that does not mean the more reasonable course is to deny such employees any protection in the event a layoff is needed. Article 8.A.2 is intended to protect employees when layoffs are necessary, and employees with no SUB benefits are among the most vulnerable when the workforce contracts. Thus, I find that the Company's insistence that VLOs are not available until all employees with less than two years of service have been involuntarily laid off to detract from the reasonableness of its LMP.

In addition to the VLO terms found in the Company's LMP document given to the Union on the evening of April 15, and submitted in advance of this arbitration, the parties dispute whether the Company's LMP includes terms found in a Voluntary Layoff Form the Company requires employees to sign. The Company denies that the form is part of the LMP. Rather, Vice President Parker testified that the Company created the form so employees would understand the terms and conditions of the VLO they were going to take. And, it is clear that the form recites some of the terms outlined in the Company's LMP, including that an employee on a VLO would remain on layoff unless or until recalled by the Company. But there are other matters that are not expressed in the LMP. For example, the form says the employee understands that the $600 per week unemployment benefit (Federal Pandemic Unemployment Compensation or FPUC) would be considered part of the state unemployment compensation benefit that is offset from Supplemental Unemployment Benefits received pursuant to Article 8.B. The Union has filed grievances over the Company's reduction of the FPUC payments from SUB benefits, and they are moving through the grievance procedure.

I reject the Union's claim that the VLO form provision concerning FPUC is part of the LMP. As I understand the Company's position, the FPUC term merely reflects the Company's interpretation of Article 8.B.2.c., which says the amount an employee receives as a weekly benefit from SUB (as determined by a schedule in Article 8.B.2.a.) "may be offset ... by the amount of state unemployment benefits...." The Company's brief characterizes the FPUC payment as "a part of every state's unemployment compensation program." Whether that characterization is correct is a classic contract interpretation issue that is beyond the scope of this final offer arbitration. However the language might ultimately be interpreted, neither the VLO form nor the Company's LMP will have any effect on how Article 8.b.2.c. affects the FPUC

payments. Thus, if the FPUC payment is determined not to be an element of state unemployment compensation benefits, the Company cannot change that contract interpretation by having individual employees sign a VLO form with a contrary interpretation. And, if the payment is considered to be part of the state unemployment compensation benefit, the Union cannot avoid the effect of Article 8.b.2.c. simply by refusing to agree to the VLO form.[4]

However, I find that the VLO form contains one term that must be considered part of the LMP. As the Company points out, there is no mention of a VLO in the BLA, save in Article 8's language about an LMP. Thus, any terms controlling a VLO must be considered part of the LMP, which is undoubtedly why the Company sent the VLO form to the Union along with the LMP. The term at issue is the declaration that employees on a VLO will be recalled in the inverse order of seniority. This is obviously a term governing how VLOs will be taken not found elsewhere in the BLA and, as such, is part of the Company's LMP. The Union argues that this provision violates employee rights under Article 5.E.1.c, which says that "In all cases of...recalls after layoff" the Company will consider ability to perform the work and "plant continuous service," with continuous service controlling if ability is "relatively equal." Thus, the Union says *ArcelorMittal Case No. 80* requires a decision in the Union's favor without regard to reasonableness, the same argument it made with respect to the Company's non-normal work week provision in its LMP. The Company says this does not change the seniority provision of Article 5.E.1.c. That language, the Company argues, controls involuntary layoffs. The

[4] Nothing said in this opinion is intended to express an opinion about how the FPUC payment should be characterized. In particular, my finding that the Company's LMPs are more reasonable should not be read as an endorsement of the reasonableness of the Company's interpretation of Article 8.B.2.c. My task is to determine which of two competing plans is more reasonable. Making that decision does not necessarily mean that each facet of the prevailing plan is reasonable.

Company says it does not apply to VLOs, where the employee actually wanted to be laid off and should be permitted to remain in that status according to his or her seniority.

It is probably fair to believe that, absent the VLO form, employees on VLO would have been recalled in seniority order, with the most senor employees returning first. The language of Article 5.E.1.c, after all, says "in all cases" of layoff, which is broad enough to include employees laid off both involuntarily and voluntarily. But it is also reasonable to assume that the "all cases" language was drafted principally to deal with involuntary layoffs. Voluntary layoffs are created only by an LMP and, as such, are governed by its terms. Thus, I do not understand the inverse-order-of-seniority language in the Company's VLO form to undermine or conflict with any provision of employee rights under the BLA. But the language is subject to a reasonableness analysis, as is every other term of an LMP.

It is not entirely unreasonable to believe that employees who volunteered for layoff want to remain off work, at least if the layoffs are relatively short in duration. But it is more realistic to view the inverse-order-of-seniority recall as part of the Company's effort to avoid paying substantial SUB benefits. Similarly, the Company's LMP creates no limit on the duration of a VLO and prohibits employees from terminating a VLO of their own accord. Parker described the experience under previous LMPs when employees returned from VLOs for short periods in order to renew SUB benefits that had decreased or expired. According to the Company, this created both administrative and financial burdens, the latter because employees on VLO never exhausted their SUB benefits. Parker said this denied the Company the benefit of its bargain in reducing and ultimately eliminating SUB payments over a period of time.

The Union's VLO does not contemplate allowing an employee to return to work of his own accord. However, the Union's LMP caps VLOs at 6 months, after which an employee

could return and, presumably, subsequently take another VLO.[5] The top SUB payment rate (e.g., 80% of an employee's base rate) is reduced after about six months (26 weeks) to 60%. Thus, the Union's VLO proposal contemplates allowing employees to effectively avoid a reduction in SUB payments, provided the employee returns to work after 26 weeks and subsequently takes another VLO. It is true, as the Union contends, that the Company was not able to achieve the language in the USS-USW contract that limits an employee's ability to renew SUB payment eligibility merely by returning to work. But it doesn't follow that employees should be able to remain off work indefinitely at the highest SUB pay level, or, for that matter, at any SUB pay level. The negotiated structure, after all, contemplated that at certain points, SUB pay would reduce or be eliminated. That does not mean it was unreasonable for the Union to try to structure a plan that permitted employees to retain maximum SUB benefits. But it was reasonable for the Company to design an LMP that sought to retain its bargain of diminishing SUB benefits, even when employees elect a voluntary layoff.

There are also factors in the employees' favor that add to the reasonableness of recalling VLO employees in the inverse order of seniority. At the time the LMP was imposed, and even by the time of the arbitration hearing, it was not clear how long the economic crisis would last or how long employees would be laid off. But it would not have been unreasonable to believe that it would not last more than a year, during which period employees with ten or more years of service would retain substantial SUB benefits. The Company's LMP allows involuntarily laid off employees to be recalled first. These are less senior workers who have smaller SUB payments or, in the case of employees with less than two years of service, none at all. And, even those junior employees who have SUB benefits are more likely to be younger and have children

[5] Although the Union's proposal calls for six month VLOs, its LMP proposal says the plan itself would expire on July 31, 2020. Thus, the effective length of a VLO could turn out to be less than four months.

at home. As the Union's brief acknowledges, they may be less likely to endure a long layoff, even with some SUB protection. Thus, recalling them first is a benefit to bargaining unit employees, even if it also serves the Company's interest in avoiding the renewal of SUB payments. I find that the Company's inverse-order-of-seniority VLO recall adds to the reasonableness of its VLO proposal.

It was also reasonable for the Company to seek to allocate VLOs by department. I understand the Union's claim that doing so plan- wide might allow the greatest number of senior employees to take a VLO. And, it is probably fair to believe that the most senior employees are nearer the age which constitutes a risk factor for serious consequences from Covid-19. But age is not the only risk factor for people who contract the virus. And, there was no evidence that evaluating service length by department was likely to exclude any significant number of senior employees from taking a VLO. There was no evidence, for example, that most employees in a particular department were relatively low service while most employees in other departments were relatively senior, situations that might lead to disparities. Although there was no testimony about skill set requirements among departments, it is fair to observe that not all departments operate the same equipment or machinery and that substantial training is sometimes necessary to gain proficiency. It may also be fair to assume that the most senior employees in departments are among the most skilled. The Company obviously has a substantial interest in retaining employees who can safely and efficiently staff its operations.

The Company's LMP requires employees to take their vacations as scheduled, even if they occur during a VLO. The Union's proposal requires employees to take their vacations prior to or during the layoff. Both opinions avoid the problem the Company experienced during earlier layoffs, when employees put off their vacations while on a VLO, thus creating serious

administrative problems in trying to accommodate vacation entitlement after VLOs ended and before the end of the year. But the Union's proposal to front-load vacations could create both timing and funding issues. The Company's proposal on this issue is more reasonable.

Although there are some problems on both sides, on balance, I find the Company's VLO proposal to be more reasonable.

Element 5 The Use of Productive Alternate Work Assignments to Reduce the Number of Layoffs.

The parties' proposals are similar for this element. They both require the Company to assign non-core work to displaced employees and they both contemplate finding other work displaced employees can perform. The Company's proposal includes creation of a Covid-19 hazards cleaning crew, which the Union put in its element 3 proposal. The only real difference between the proposals for this element is that the Company excludes track repair from the non-core work that will be retrieved. I have already discussed the reasonableness of this proposal in the section on outside entities and need not repeat here what I said there. I find that both parties' proposals for element 5 are reasonable, with no advantage to either side.

Conclusion, Indiana Harbor East

As mentioned in footnote 4, above, my task in this case is to determine which of the LMPs is more reasonable. Each plan contains several elements, some of which contain similar proposals, and some of which make disparate proposals. I cannot implement a plan on an element-by-element basis, and I have no discretion to impose a solution neither party proposed. On balance, and given the sudden and unexpected nature of the economic crisis, as well as the uncertainly about how deep it would get or how long it would last, I find that at Indiana Harbor East, the Company's LMP was more reasonable.

II. Indiana Harbor West and Local Union 1011

There were about 950 bargaining unit employees at IHW when the crisis began. Carter said the Company anticipated laying off more than70 employees, although he could not predict a definite count and could not establish a likely period for the layoffs. The parties began discussions of an LMP formally on April 3. On April 1, the Company had sent the Union an email listing the employees who would be affected by the decision to shut down No. 4 blast furnace. The parties met for the second time on April 6, which is when the Company gave the Union the first draft of its LMP. The Union responded on April 7, apparently with its initial LMP draft. The Company sent the second draft of its LMP the same day. The Union then sent the Company additional ideas for recapturing work on April 8, and the Company responded on the 9th with a revised draft. The Union responded to that draft on April 13 and the parties met again on April 14. The next day, April 15, the Company sent its final draft, which it implemented on April 17. The Union send its final draft to the Company on April 23. However, according to Carter, the draft the Union submitted on June 10 in advance of this arbitration made some changes from the April 23 draft. As was true for IHE, the Company had informed the Union early in the discussions that it needed to complete work on the LMP by April 15.

Element 1, Outside Entities

The LMP the Company implemented at Indiana Harbor West is almost the same as the one it used for Indiana Harbor East. There is a difference only in element 1, which concerns the use of outside entities. The IHE LMP had seven specific actions the Company planned to take (lettered a. through g.); in contrast, there are only two specific measures for IHW:

> a. Reduce the use for outside HVAC contractors by utilizing internal qualified craft employees.

b. Reduce the use of outside craft people by utilizing the operator-maintenance language contained in the BLA.

Both of these actions are also included in the IHE LMP. It is not clear why the Company did not include in the IHW plan the other items specified in the IHE plan, although some of them may not have application to the activities performed at IHW. However, Carter testified that there have been discussions with the Union about other actions, and that the Company had used bargaining unit craftsmen to do some work that would otherwise have been contracted out.

The Union's LMP says, "The Company will reduce the use of outside entities that perform work at or for Indiana Harbor West; including but not limited to on-going training to properly perform work covered by those entities." (Cross out omitted). The only specific reference is to on-going training. Carter said the Company did not intend to train employees for work that required specific licensure. Local 1011 President Jaime Quiroz said he told Carter the Union was not asking that employees be trained for those jobs. Rather, he said the proposal related to training the Company had been doing for several years. But there was no evidence that the Company had terminated any training programs or laid off employees from those programs. As it did for IHE, the Company submitted an exhibit for IHW indicating that it had significantly reduced the number the contractor FTEs since it implemented its LMP. Carter acknowledged on cross examination that most of this reduction was the result of assigning non-core work to the bargaining unit, as required by the Non-Core Functions letter in the BLA. Even so, the Company's plans and actions in consultation with the Union seem reasonable and there is nothing in the Union's LMP proposal about outside entities that suggests it would have recaptured more work or necessitated fewer layoffs.

As was true with IHE, the Union says the Company's inclusion of the "timely manner" language in its IHW LMP requires a finding that the LMP is unreasonable. I reject that argument

for the reasons explained in the IHE section of the opinion. I also adopt the same understanding of the timely-manner language that I explained for IHE. On balance, I find the outside entities proposals to favor the Company.

Element 3, Minimization of Overtime

There is no dispute about Element 2. Element 3 of the Company's LMP is identical to its IHE LMP. It simply says "The Company will minimize the use of overtime" and has the language that allows the Company and a griever to agree to a non-normal work schedule. That language is no more appropriate in this LMP than it was at IHE.[6] Moreover, while the Company introduced an exhibit showing that it has, in fact, reduced overtime, its "plan" contains no specific information. The Union's LMP is less specific than the plan submitted by Local 1010 for IHE. It does set a goal of keeping overtime below 3%, which Carter said would not have been possible, given IHW's use of some alternative work schedules that include built-in overtime. Quiroz's explanation of the 3% goal was, frankly, confusing. Nevertheless, given the lack of specificity in the Company's plan and the inclusion of the non-normal work schedule language, I find the Union's overtime proposal is more reasonable than the Company's.

Element 4, VLO

Like the Company, the Union proposes that VLOs be handled by department. The Union also follows the Company's plan to have employees on VLO take their vacations as scheduled and it limits the ability of craft employees to take VLOs prior to the elimination of outside entities. The principal difference between the Company and Union VLO proposals is that the Union would limit them to 12 weeks, absent agreement otherwise. Quiroz testified that the

[6] For the reasons explained in the analysis of the IHE LMP, I find that the non-normal work week schedule language does not violate Article 8.A.3 and that *ArcelorMittal Case No. 80* does not require that the case be decided in the Union's favor.

Union proposed 12 weeks because that was the procedure the parties used during the last layoff and he believed it worked well. On the whole, Local 1011's VLO proposal is superior to the one offered by Local 1010 for IHE. But Local 1011's VLO scheme would continue to allow employees to return to work after 12 weeks, renew their SUB benefits, and then take a second VLO. For the reasons explained in the IHE portion of the opinion, I find that the Company's VLO proposal is more reasonable.

My comments concerning the Company's position on FPUC are intended to apply to IHW and Local 1011 as well. The same is true of my interpretation of the inverse order of seniority recall contained in the Company's VLO form, and the Union's claim that the Company violated Article 8.A.3 by excluding employees with less than two years of service from VLOs.

Element 5, Alternate Work Assignments

The Union wants the Company to use alternative work assignments to reduce overtime as well as layoffs and to have further conversations after implementation of an LMP. The Company says there have been such conversations, leading to alternative assignments. I find no substantial area of disagreement in the parties' element 5 proposals. There is no dispute between the parties about elements 6 or 7

Conclusion for Indiana Harbor West

Given the circumstances facing the parties, I find that the LMP submitted by the Company was more reasonable.

III. Burns Harbor and Local 6787

There are significant differences between the Company's Burns Harbor LMP and the ones implemented at the Indiana Harbor facilities. Jean Louis Muller, Vice President and General Manager of Burns Harbor, said the parties had agreed to an LMP during the last layoffs, and he initially started negotiations with that form in mind. Substantial changes were made in discussions with the Union that began on April 6, although Company officials had also met with Local Union President Pete Trinidad on March 26. In the March 26 meeting, Muller said he conveyed the need to reduce costs and the parties agreed to changes in the alternate work schedule. In subsequent meetings, the Company continued to share information about the Company's financial problems. The Company made its first draft LMP proposal on April 15 or 16, which is when it also advised the Union that the parties needed to reach agreement by April 17. Trinidad said prior to April 16, the Company had said it wanted to act quickly, but it was not until the 16th that the Company announced the April 17 deadline. In discussions throughout the 16th, there were several exchanges of LMP versions. The Company sent the Union a proposal at about 8:00 p.m. on the 16th and, after some discussions, a final version at about 11:00 p.m. I understood Muller's testimony to mean that he thought they were close to a final agreement and that he was surprised or disappointed (or both) when Trinidad told him on April 17 that he could not agree to the draft. The Company began implementing its LMP that day.

The Union requested information concerning the Company's use of outside entities on April 16, asserting that it could not formulate its own LMP until it received a response. The LMP the Union submitted for this proceeding – which is dated April 16, 2020 – does not have a proposal for element 1 concerning the use of outside entities. It says simply the Union had made an information request and that it could not finalize a proposal until it received a response.

Muller said it was not possible to respond to the Union's information request in short order. The Company gave the Union some of the information it requested on April 20 and the rest of it on May 28.

There is no dispute about element 2 and, unlike the Indiana Harbor locations, no dispute between these parties over element 3, concerning minimizing the use of overtime. The parties agreed – and the LMP the Company implemented reflects – that the Company will minimize the use of overtime and that it will share information about overtime utilization with the Union on a weekly basis. The Company introduced an exhibit indicating that overtime has been substantially reduced. The Burns Harbor LMP does not include the language concerning agreement to a non-normal work week, which was in both of the LMPs from Indiana Harbor, and which adversely affected the Company's proposals on element 3.

Element 4 concerns VLOs, which the Burns Harbor parties call Temporary Reductions in Force (TRIF). Like the Indiana Harbor LMPs, the Company's Burns Harbor LMP includes a requirement that employees with less than two years will be laid off in a department before the department's other employees can take a VLO. The Union's LMP agrees that layoffs will be by department, but the Union did not agree to the under two-year requirement. The parties also agreed that employees on a VLO would take vacations as scheduled. The Union's LMP says that employees will have no right to return to work and will remain off until or unless recalled by the Company. This tracks the Company's language; however, the Union's VLO form, which it considers part of its LMP proposal, says that employees will elect whether to remain on a VLO for periods of 8, 12, 18, or 24 weeks. Muller said this was the form the parties used in a previous LMP, but that it was not acceptable to the Company because of the uncertainty surrounding the current situation. For the same reason, Mueller said the Company also could not agree to a

provision on the form that said employees were subject to recall with a one-week notice. Muller said the situation changed weekly and the proposal was unworkable. In addition, the Company VLO form says employees will be recalled in the inverse order of seniority which, as at Indiana Harbor, must be considered part of its LMP. On balance, and largely for the reasons explained for the Indiana Harbor locations, I find the VLO issue to favor the Company. There is no dispute about elements 5 and 6.

As was true of the Indiana Harbor locations, Local 6787 argues that some parts of the Company's LMP impair employee protections in violation of Article 8.A.3. The Union raises the same arguments as its Indiana Harbor counterparts concerning the "timely manner" language under element 1, the VLO restrictions on employees with less than two years of service under element 4, and the offset of FPUC from SUB benefits. I reject those claims for the same reasons explained in the analysis of the Indiana Harbor plans. However, the Union raises an additional issue from element 7 of the Company's LMP:

> A plantwide Labor Grade 1 pool of regressed Employees will be made up of those Employees from identified departments who, by seniority, could not retain a position in his/her home department as a result of reduced operations. These employees will be used to fill temporary vacancies throughout the plant as needed, displace non-core contractors as possible and/or reduce overtime in departments throughout the plant.

Local 6787 Grievance Chairman Dave Williams said the provision violated employee protections because, under the BLA, employees have the right to promote to temporary vacancies by seniority. Thus, if there was a temporary vacancy in a labor grade 4 job within a line of progression (LOP), the senior labor grade 3 employee in the LOP could fill it. But, as the Union sees the Company's LMP, the Company could simply take any employee out of the labor pool to fill the jobs in violation of the seniority rights of employees.

The Union's reading is not the only plausible interpretation of element 7 of the Company's LMP. The language could also be read to mean that employees in the labor grade 1 pool would fill the temporary vacancy that remains once temporary promotions within an LOP have been accomplished. If, as Williams surmised, an LG 3 employee moved up to fill an LG 4 temporary vacancy within an LOP, then there would be a resulting temporary vacancy in an LG 3 job or, if there were a series of temporary promotions, in some lower labor grade job in the LOP. Ultimately, the resulting vacancy would be filled by an employee from the labor grade 1 pool created by element 7. This would not violate employee protections. In the absence of evidence about what the Company has actually done under its element 7 language, I interpret the language to be consistent with employee seniority protections. I also find this to add to the reasonableness of the Company's LMP

Union Request for Information

The Union's principal claim is that the Company failed to provide information it needed in order to develop its LMP. In particular, the Union requested information about the use of outside entities on April 16, which the Company responded to in part on April 20 – three days after it implemented its LMP – and in part on May 28. As noted above, the Company first approached Trinidad with concerns about the effect of Covid-19 on its operations on March 26. There were discussions about layoffs beginning on April 6, but the Company did not give the Union a draft LMP until April 15 or 16. The Union responded with its own draft on April 16, which said the Union was deferring a proposal on outside entities pending the Company's response to its request for information. According to Trinidad, the Company did not tell him it needed to implement an LMP by April 17 until after the Union had sent its information request

on April 16. I don't question the Company's claim that it was unable to respond to the Union's information request immediately, although it is not clear why it should have taken until May 28 to complete its response.

The Union relies on *USS-48,235*, in which the USS-USW Board of Arbitration considered, among other things, whether the company had given the union an adequate opportunity to respond to the company's proposed LMP before implementing it and laying off employees. In that case, the company claimed an urgent need to lay off maintenance employees. The parties discussed the circumstances for about three months before the company proposed LMPs for its two bargaining units on August 17 and 18, 2016. On August 18, the company posted schedules showing layoffs for the following week, which it implemented on August 21. The union then sought arbitration, complaining, in part, that the company did not provide the union with sufficient information to develop its own LMP. One of the local unions submitted an information request on April 16, which the Company responded to on April 17. Other requests were submitted on August 18 and August 23. The Board noted that the parties had had discussions about how to avoid the need for layoffs over the previous three months. But it said:

> In the Board's view, however, paragraphs 4 and 5 of Article 8-A contemplate that the Union will submit its own proposed LMP as a response to the Company's LMP and that only after it then is determined that the parties cannot reach joint agreement on the terms of an LMP that the Company is authorized to implement its LMP.... But the Union has to be provided sufficient time after receiving the Company's LMP and any additional information it reasonably needs to submit its own LMP for the Company's consideration before layoffs can be effected.

The Company says *USS-48,235* has no direct application to the instant case. It is true that a Board of Arbitration decision is not binding in ArcelorMittal-USW cases. However, the pertinent LMP language is identical and decisions concerning standard industry language have

often been given significant weight. But even without *USS-48,235*, the structure of Article 8.A.2 is clear – prior to implementing any layoffs, the Company is required to discuss with the Union an LMP that contains the seven elements specified in Article 8.2.c. This means the Company is required to formulate an LMP and review it with the Union. Article 8.A.4 requires the Company to give the Union sufficient time and information to develop its own plan in response to the Company's plan. Then, if the parties cannot agree, the Company can implement its plan and the Union can submit the dispute to expedited arbitration.

It is true, as the Company claims, that the Union could have requested the information earlier in the process. But the Company did not give the Union a first draft of its plan until late on April 15 or April 16. The Union's response was to ask for information about the Company's use of outside entities and to submit its own plan, absent an outside entities element. Although the Union knew the Company was anxious to implement layoffs, Trinidad testified credibly that the Company did not declare it wanted a final plan by April 17 until after the Union had requested information on April 16. The Company's brief claims that it responded to the Union's request in a timely manner, but that ignores the fact that its first response to the request was on April 20, two days after it had implemented its LMP. In these circumstances, there is no way the Union could have formulated a plan prior to the Company's implementation of its own plan. I understand the Company's need to move quickly, but if it had developed a draft LMP earlier – as the Company did at the Indiana Harbor locations, for example – the Union would have had an opportunity to review the proposal and request information earlier in April. The Company could also have told the Union earlier that it needed to have a plan in place by April 17. The Company's failure to give the Union adequate time to respond is of particular importance, given the subject at issue. The use of outside entities is frequently an issue in layoff cases, when

unions seek to have bargaining unit employees recapture work being performed by outsiders. The Union was entitled to a fair opportunity to review the Company's use of outside entities and to develop a proposal to claim some of that work. The Company claims the lack of information about outside entities did not impair the Union's ability to formulate a proposal. But that bare assertion is not convincing, especially given the procedures adopted by Article 8.A.2 and the Union's right to the information it requested.

I find, then, that the Company violated Article 8.A.2 when it delayed submitting its LMP and failed to respond to the Union's request for information in time for the Union to submit its own LMP before the Company acted unilaterally. The question then becomes one of remedy. The Union focuses on Article 8.A.4.a., which says, "If the Company lays off employees or takes other actions in violation of this article, such employees shall be made whole." That was the remedy the Board of Arbitration imposed in *USS-48,235*. As I understand that decision, by the time of arbitration all of the laid off employees had been reinstated, so the remedial issue covered only the time they were off work. In this case, however, employees remain on layoff and, while the outlook remains uncertain, the Company's forecasts suggest that layoffs may continue throughout much if not all of the year.

As the Board of Arbitration noted in in interpretation of the identical LMP language, "How all of these provisions of Article 8-A mesh is not fully spelled out, particularly in terms of timing." Article 8.A.5 a. says, however, that the final offer arbitration over the LMPs will be conducted "under procedures to be developed by the parties." In the instant case, the parties developed those procedures in large part through the May 21, 2020 MOA. Of particular importance is paragraph 4, which says:

> The parties will schedule a pre-hearing meeting...with the Arbitrator as soon as possible...to address and resolve any

> remaining pre-hearing differences, including dates, and location, a discussion regarding the possibility of a video-conference hearing and whether the filing of post-hearing briefs is needed. The hearing will be scheduled no less than seven (7) days after the pre-hearing meeting. *The parties will exchange final pre-arbitration proposed LMPs three (3) days before the conference with the Arbitrator*, with copies to the Arbitrator. (italics added)

In a preliminary video conference on May 28, 2020, the parties agreed that the pre-hearing conference would be held on June 15 and that they would submit their final pre-arbitration LMPs on June 10, 2020. On that day, both parties submitted the LMPs they had relied on in April. Thus, the Company submitted the LMP it gave the Union on April 16 and implemented on April 17, and the Union submitted its April 16 LMP draft that deferred a proposal on outside entities pending the receipt of information.

I find agreement to exchange "*final* pre-arbitration *proposed* LMPs" (italics added) to be significant. This did not mean simply that the parties were required to exchange the LMPs they had already given each other on April 16. Otherwise, there would have been no reason to provide for "final pre-arbitration proposed LMPs." Moreover, paragraph 4's reference to "final pre-arbitration LMPs" stands in contrast to paragraph 2, which says "The parties have exchanged LMP proposals and the Company has implemented its proposed LMP." I understand this to mean that the "final pre-arbitration proposed LMPs" required by paragraph 4 did not have to be identical to the LMPs referenced in paragraph 2. As I mentioned to the parties during the preliminary video conference on May 28, final offer arbitration contemplates that final offers will seek to bridge the gap remaining after negotiations have ceased. At the least, the process can be used to narrow the areas of disagreement. That does not preclude the parties from submitting their earlier offers. But the adoption of the final offer arbitration process, and particularly the reference to "final pre-arbitration proposed LMPs" shortly before the arbitration

hearing, suggests that the parties understood the process would be dynamic and did not have to be confined to a reasonableness assessment of what they did in April. It also suggests that they intended for me to decide which of their "final pre-arbitration proposed LMPs" was more reasonable. This is an important consideration in fashioning a remedy in the case.

As noted, it was reasonable for the Union to defer action on the outside entities element of its LMP in its April 16 draft. But that does not mean it was reasonable for the Union to remain static throughout the process, especially in view of the agreement to submit pre-arbitration proposed LMPs. By May 28, the Company had responded to the Union's information request on outside entities. The Union claimed there were issues with the response that it wanted to address with the Company, but it had not done so by the June 10 submission deadline or, for that matter, by the date of the arbitration on June 30. Had it acted prior to the deadline, I would be able to determine whether its final pre-arbitration proposed LMP was more reasonable than the Company's. But I cannot find that the incomplete LMP it tendered on April 16 and then submitted as its final pre-arbitration LMP is more reasonable than the Company's LMP.

That does not mean that the Company's failure to act during the April LMP negotiations can be ignored. Despite its inaction in May, after the LMP had already been implemented, I cannot say that the Union would not have submitted a proposed LMP (including an outside entities element) if the Company had acted earlier in April. The parties, after all, were making progress in their negotiations of other parts of the LMP. Thus, I find that employees involuntarily laid off in April are, pursuant to Article 8.A.5.a, to be made whole up to and including May 28, 2020.[7] From that point forward, the Company's LMP will remain in effect as the more reasonable one submitted in advance of the arbitration hearing.

[7] Although the Union would ordinarily be entitled to a reasonable time to respond to the Company's LMP following receipt of the information, the fact that the Union took no action after May 28 persuades me to

AWARD

For the reasons explained in the opinion, I issue the following awards:

1. The Company's LMP was more reasonable at Indiana Harbor East.

2. The Company's LMP was more reasonable at Indiana Harbor West.

3. The Company violated Article 8.A.4 by failing to issue a timely response to the Union's request for information concerning the use of outside entities. However, given the procedure the parties adopted in their MOA, I find that the remedy is limited to make-whole relief for employees involuntarily laid off between April 18 and May 28. I also find that the Company's final proposed pre-arbitration LMP is more reasonable than the Union's and that it is to remain in effect.

4. I will retain jurisdiction for a period of 90 days to resolve any disputes concerning the remedy.

Terry A. Bethel

Terry A. Bethel, Arbitrator
August 3, 2020

terminate make-whole relief as of that day. Ordinary principles of mitigation will be applied to make-whole relief, including subtraction of any money received from unemployment or SUB benefits.