************************************	Grievant: Class
In the Matter of Arbitration Between:	**Issue: Finishing Dept. Incentive Plan**
ARCELORMITTAL USA,	**Arbitrator Docket No. 210303**
Burns Harbor,	**Gr. No. PW20-0007**
and	
UNITED STEELWORKERS,	
Local 6787.	Case 126
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BEFORE ARBITRATOR JEANNE M. VONHOF

INTRODUCTION

The undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. The hearing was held on March 25, 2021 via ZOOM.

Mr. Nathan Kilander, Labor Relations Representative, represented ArcelorMittal USA, Burns Harbor, hereinafter referred to as the Employer or the Company. Mr. Soumitra Agashe, Senior Division Manager, Hot Mill & Finishing, testified on behalf of the Employer.

Mr. Michael Millsap, District 7 USW, represented United Steelworkers Local 6787, hereinafter referred to as the Union or the Local. Mr. Pete Trinidad, President of the Local, testified on behalf of the Union.

Each party had a full and fair opportunity to present evidence at the hearing. Both parties made closing arguments at the hearing.

ISSUE:

Did the Company violate the Finishing Department Incentive Plan? If so, what shall the remedy be?

Relevant Contract Language

2010 Memorandum of Understanding Dated April 28, 2010

Attachment H – Finishing Production Bonus Plan

General

- If the plant is operating at a reduced level (TBD), the plan will pay 20%.

Background

On May 4, 2020 the Union filed this grievance claiming that the Company had violated the parties' agreement over a Modified Incentive Plan in the Finishing Department. A Memorandum of Understanding between the Parties entered into in 2010 established modified incentive rates for the Finishing Department, and states, "If the plant is operating at a reduced level (TBD), the plan will play 20%." The Union alleges in the grievance that "given the current downturn in economic conditions and its impact on our operations, the plant is operating at a reduced level. We feel this satisfies the (TBD) aspect of the aforementioned language within the Finishing plan. All affected employees should be made whole in all aspects." The Company denied the grievance stating, "the language relied upon for the grievance has not been determined to date."

The grievance was filed after the Company refused to implement the 20% incentive rate after the Company initiated layoffs in 2020. The Company sent the following letter to employees at that time, announcing impending layoffs and imposing a Layoff Minimization Plan (LMP),

"April 17, 2020

Re: Burns Harbor Layoff Minimization Plan

Both the Company and the Union (the "Parties") acknowledge that the current downturn in economic conditions, due to the Covid-19 virus, warrant immediate action in order to preserve the long-term sustainability of the ArcelorMittal, Burns Harbor plant. The impact to operations, as is currently known by Management, has been shared with the Union. The business climate is drastically changing, and it is impacting operations. Based on the current forecast, the Burns Harbor plant will be operating at a reduced schedule, due to a forecasted significant reduction in shipments.

The Parties unanimously support this Layoff Minimization Plan ("LMP") to avoid as many forced layoffs as possible. It's important to understand that should business conditions deteriorate further, or the number of voluntary layoffs is not sufficient, the Company may need to take additional actions, including but not limited to additional voluntary layoffs, and/or involuntary layoffs. However, we hope that effective implementation of this LMP will lessen such need.

The Parties agree to the following LMP for the Burns Harbor Plant. This LMP will be subject to regular discussion between the Parties as business and operating requirements continue to evolve at the plant.

a. Management has advised that many of our customers have unexpectedly and temporarily, closed their plants, due to the COVID-19 pandemic. The temporary closure of these customers has a direct impact on our overall business and requires us to lay off Employees. Billings for April for AMUSA are down over 25% from billings in the same period last year. Blast Furnace production for AMUSA is expected to be down 35% from the previous quarter. Slab production for the Burns Harbor plant is projected to be down 35% from Ql.

    b. Management has advised that based on the current / future production needs and the current hourly staffing level, staffing needs will fluctuate week to week ranging from as low as 50 Employees to as high as 400 Employees who will not be needed to meet production. The Parties will meet regularly to review business conditions. The Company will continue to review and discuss with the Union whether this LMP needs to be modified in view of such business conditions.

c. The Burns Harbor plant will Implement the below Layoff Minimization Plan in accordance with Article Eight Section A. Employment Security of the 2018 BLA. This Layoff Minimization Plan is based on the best information available to the Company and the Union at this time. This information is subject to change, and modification, as business conditions would dictate:

1. The Company will continue to reduce the use of Outside Entities that perform work at, or for, the Burns Harbor Plant if the work can be reasonably performed in a timely manner by Employees. The Company has received the Union's Information Request and agrees to provide the Union Information regarding contractors and will review this information with the Union in a timely manner.

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

3. The Company will minimize the use of overtime and agrees to review overtime utilization with the Union on a weekly basis to verify that a reduction is taking place.

4. The Company will offer a program of Voluntary Temporary Reductions in Force (TRIF's) in identified departments to be discussed with the Union and the CDC Guidelines will be considered during the discussion. Voluntary TRIF's will be offered under the following conditions:

    a. Employees with less than two (2) years of service will not remain working in a department unless the Company deems them necessary due to operational needs.

    b. Before the Company implements Involuntary Layoffs (ILO's) for Employees who have greater than two (2) years of service.

    c. Employees who elect Voluntary Temporary Reductions in Force (TRIF's) will be required to take their 2020 vacation as scheduled.

    d. The Company reserves the right to deny Voluntary Temporary Reductions in Force (TRIF) requests based on the Company's overall operating needs. Employees who elect Voluntary Temporary Reductions in Force (TRIF's) will have no rights to return to work and will remain laid off until, or unless, recalled by the Company.

    e. If there are no Voluntary Temporary Reductions In Force (TRIF's) based on the criteria described above or if the number of Voluntary Temporary Reductions in Force (TRIF's) is not sufficient in addressing the current production needs, Involuntary Layoffs (ILO's)

will be Implemented in accordance with Article 5, Section (E) of the BLA.

f. The Company reserves the right to recall Employees from Voluntary Temporary Reductions in Force (TRIF's) and Involuntary Layoffs (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 plant layoffs. As an example, the Company agrees to train a maximum of ten (10) Steel Producing Employees to perform identified assignments within the department.

   a. The Company may canvass Employees for volunteers to accept Scheduled Excused Days (SE Days) as allowed by individual departments and production requirements. By allowing an Employee to take an SE Day, the Company has met its obligations in accordance with the full week guarantee language in Article 5.c. 4. of the BLA.

   b. Division Managers and Zone Grievers will meet to discuss training opportunities that can be accomplished in a safe and efficient manner.

6. The Company will continue to reduce salaried costs through various means, including layoffs.

7. 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.

   a. An identified number of Maintenance Employees will be assigned to a Labor Grade 4 Craft Pool and will be utilized to eliminate overtime, displace contractors, work on outages and on special projects In departments throughout the Burns Harbor Plant.

This Agreement does not set precedent regarding any current or future issues, and the Parties reserve every right they may have under Article Eight of the 2018 BLA.

It is important to reiterate that we must always be diligent on continuous improvement with a focus on being a low cost and high-quality producer, safety, environment and on servicing our customers. These focus areas will allow us to achieve our strategic objectives of producing safe, sustainable steel, with on-time delivery to our customers. It is our belief that by working together in partnership, we can minimize the impact on the Bums Harbor plant operations.

We thank all our Employees and our Union-Management partnership for their efforts during this challenging period.

Confirmed:

Jean Louis Muller
Vice President/General Manager
ArcelorMittal Burns Harbor"

If the parties cannot reach agreement on the need, impact, or terms of a Layoff Minimization Plan, the Company may implement its plan and the Union may challenge it through an expedited final offer arbitration proceeding. The parties exercised that option here and Arbitrator Terry B. Bethel concluded that the Company's Plan was more reasonable.

The parties progressed this grievance through the second and third steps of the grievance procedure, with the Union filing Exceptions after the second step. The Union continued to argue that the "TBD" requirement of reduced operations had been met in this case, due to reduced schedules and the establishment of a labor pool, and therefore, the 20% rate was due. The Company continued to argue that the term "TBD" meant that the term "operating at a reduced level" had not been defined yet by the parties, and that the Union could not unilaterally decide when it had been met. In addition, the Company argued that the Company could not be held responsible for a reduction in operations that the Company had not caused.

Mr. Pete Trinidad testified at the arbitration hearing held in late March 2021 that he has served as President of Local 6787 for the past six years and as Vice President for nine years prior to that. He provided extensive testimony regarding the history of the negotiations between the parties leading to the language at issue in this grievance. He said that he has

participated in negotiating all agreements for the Union at this plant since the 2002 bargaining, when the plant was still part of Bethlehem Steel.

Trinidad stated that he negotiated the 2008 Burns Harbor Layoff Minimization Plan for the Union. In a Letter to the Union President dated November 26, 2008 and signed off on by both Union and Management representatives, the Company explained the need for the Plan, as follows, "The Parties may be addressing the worst economic crisis since the Great Depression...to preserve the Company's sustainability we must act promptly to reduce costs, conserve cash and protect continuing customers." Noting that "current market conditions have resulted in restricted operations at Burns Harbor since mid-October" the Letter stated that the Company had issued a WARN Notice of a pending "mass layoff." Trinidad testified that they were facing layoffs of as many as 2,400 Employees, and under these circumstances, the parties met and agreed to this 2008 Layoff Minimization Plan, authorized under Article 8 of the Basic Labor Agreement.

Under this 2008 Layoff Minimization Plan (LMP), all Employees were to receive an interim incentive rate of 20% and red circle rates were suspended. Trinidad stated that over half of the employees had red circle rates, and that some departments had incentive rates over 50% at that time. A program of Voluntary Temporary Reductions in Force (TRIF) of 490 Employees was offered, and if that number were not reached, Employees would be involuntarily laid off, up to 490 Employees, under the LMP. As many as 900 remaining Employees were placed on a 32-hour workweek.

Trinidad stated that the Burns Harbor plant was a "swing plant" at the time, where production was ramped up or slowed down with the ebbs and flows of the market. He said that the parties at Burns Harbor were concerned because orders were going to other plants

because of the Burns Harbor plant's high labor costs, and because the D Furnace was in the middle of being rebuilt. In hopes of stabilizing the work flow, the Union agreed to give up higher incentive rates and other wages and other contractual benefits. According to Trinidad, as soon as this agreement was signed, orders started to come back into Burns Harbor. He noted that the parties agreed that the Layoff Minimization Plan would be considered fulfilled and that restricted operations at Burns Harbor were to be ended when the Steel Producing Department scheduled or produced a weekly average of forty (40) or more heats per day.

According to Trinidad, the parties knew that the 2008 LMP would expire and they wanted to reach a more permanent agreement that would prevent the Burns Harbor plant from ever again facing what they faced in 2008. In April, 2010 the parties agreed to a Memorandum of Understanding, the stated purpose of which was to make Burns Harbor more competitive, both within ArcelorMittal and with outside competitors. In addition, the Agreement states that it is intended "to provide greater employment security opportunities for our Employees and a more viable long term sustainable operation at Burns Harbor."

In the MOU the Company agreed to restart the D Furnace within 120 days. The Agreement recognized that the Company had completed some capital improvements and maintenance projects and stated that in return the Union agreed to modify each of the six incentive plans in force as of September 1, 2008. The MOU also required the Company to make other capital improvements and investments. If the Company failed to make certain investments by a specified date, the Agreement required the Company to pay Employees the difference between the Modified Incentive Plans set forth in the MOU and 30%. Red circle rates were returned and the adoption of the 2010 MOU resulted in the termination of the 2008 Layoff Minimization Plan. Blast Furnaces C and D at Burns Harbor were given priority over

other Arcelor Blast Furnaces. Both the Company and the Union agreed to defend the plan.

Trinidad testified that this was a very important Agreement for both the Company and the Union. Union Employees would be taking cuts in pay, as much as 30% in incentive rates, in return for capital investments, and the opportunity to retire from a decent facility. Trinidad noted that because changes to wages were extensive, the parties agreed that the MOU must be ratified by the Union's members. According to Trinidad, the CEO of ArcelorMittal was "delighted" to sign the Agreement on site.

Trinidad testified about the language of Attachment H, the Finishing Department's Incentive Plan, which states, " If the plant is operating at a reduced level (TBD), the plan will play 20%." He said that the term "TBD" (To Be Determined) was used in several places in the MOU and its meaning depended upon where it was used. Generally he said that it was put into the Agreement for situations where the parties could not foresee in the present all of the circumstances that might affect a decision in the future. For example, in some cases he said that the term was used to designate a project where a later determination would be made about whether or when the project would go forward, and whether bargaining unit forces or contractors would perform some or all of the work. With regard to the "TBD" language at issue in this case, he testified that it meant that the parties would "determine that there were reduced operations, when we get there." He said that "TBD" represented a determination that was based upon the trust between the parties demonstrated by the MOU.

Trinidad explained that the incentive rates for the Finishing Department are based upon productivity and quality. He noted that the productivity rates used to determine the incentives are set high, at the rates achieved in the second quarter of 2008, when productivity was at an historic high rate. According to Trinidad, the Union agreed to tie incentive rates to this very high

productivity rate in order to make the Burns Harbor plant attractive to Arcelor. The quality factor is weighted heavily, because the Finishing Department is the last place where the product is touched by Employees. In some weeks Finishing Department Employees are paid incentive based solely upon quality rates.

President Trinidad said that in return for agreeing to these high productivity standards, the Union wanted a 20% incentive rate for the Finishing Department when conditions are bad. Trinidad testified that the Union sought this rate for this Department because the Finishing Department is dependent upon other departments to produce the product that is to be finished. If the plant is operating at a reduced rate, the other departments cannot get sufficient product to the Finishing Department to be finished and the Finishing Department often takes the biggest hit on incentive rates. He said that for this reason the Union negotiated this language in order to ensure that if there were a significant reduction in operations, the Employees in the Finishing Department would not be hurt worse than in 2008.

Trinidad testified that the Union had already negotiated a 20% incentive rate in 2008 when the recession hit, and did not want to negotiate a rate over again, if conditions got bad again. He said that there were too many unforeseen circumstances to determine exactly when the 20% rate in the Finishing Department would need to be invoked, but "we would know it when we saw it." He testified further that in the ten years since the 2010 MOU has been negotiated, the Union had never invoked the "reduced operations" clause until now.

Trinidad confirmed that the 2015 modifications to the MOU did not change the language in issue here. He said that in that Agreement, the parties agreed to changes in the product mix used to determine incentive rates, in order to raise the incentive payouts. There was no need to amend

this language, however, because the parties were not facing the kind of situation they are facing now.

According to Trinidad, there is no question that the current Layoff Minimization Plan demonstrates that there are reduced operations that trigger the 20% incentive guarantee. The Company notified the Union of layoffs due to the fact that the plant would be operating a reduced schedule, as a result of the downturn in economic conditions caused by the pandemic. Trinidad stated that the parties did not specifically discuss the Finishing Department's Incentive Plan guarantee when they negotiated the current Layoff Minimization Plan. Under questioning from the Company, Trinidad said that during discussions over the 2020 Layoff Minimization Plan, the parties at one point discussed a 15% incentive rate. However, he said that the Union already had an agreement for 20%, which they wanted to keep. He acknowledged that the language at issue here does not reference layoffs or a Layoff Minimization Plan as defining reduced operations.

Trinidad was asked about weeks in 2020 where Employees earned more than 20% in incentive pay. He said that the Company should probably pay 20% under the language at issue here. Under further questioning from the Union, Trinidad stated that the 20% is the minimum incentive rate to be paid during reduced operations. However, if Employees earn incentives of more than 20% they should receive the higher rate, he stated. This is not an overpayment, according to Trinidad, but rather earnings based upon performance, under the regular terms of the Incentive Plan.

Mr. Soumitra Agashe, Senior Division Manager, Hot Mill & Finishing, testified that he has worked at Burns Harbor since 2013. He confirmed that no changes were made in the 2015 Agreement to the language at issue here. He also testified that the language contains no reference to layoffs and no metrics for determining what the term "TBD" means.

Agashe presented a document demonstrating figures for the incentive rates paid in the Finishing Department for 2019 and 2020 through the third quarter of 2020. He testified that in 2019 the Finishing Department never paid an incentive of 30% or higher. However, for one week in May, 2020, the Employees received a 30.03% rate.

Agashe also testified that in 2020 there were a number of weeks where the rate was 20% or higher, because, he said, the figures are based upon tons per hour, not overall volume. According to Agashe, a reduced level of production would not necessarily reduce incentive payouts. The document shows many weeks in 2019 when the Finishing Department's incentive rates were above 20%. There are significantly fewer weeks in 2020 when they reached this level, especially after the layoffs went into effect.

Under questioning from the Union, Agashe stated that he was not at Burns Harbor when the parties negotiated the 2010 MOU and the language at issue here. He agreed that there were no layoffs in 2018-2019. He also acknowledged that in April and May, 2020 layoffs and reduced operations were just beginning, and product was still coming into the Finishing Department in May, when the 30% rate was achieved for a single week.

The Union's Position

- The purpose of the Layoff Minimization Plan language in the 2018 BLA is to bargain with the Union to minimize the number of employees to be laid off, if the Company decides that a layoff may be necessary. The language does not call for reductions in wages, incentives or red-circled rates, or for the crossing of seniority lines.

- In 2008 the country went into a recession, and the Company notified the Union that it was going to layoff over 2,400 employees, and that they were going to move most of the work out of the plant.

- That triggered layoff minimization discussions between the Parties.

- The Union does not deny that the incentive rates at this Plant were high in 2008, among the highest in the industry, averaging over 50%. In order to minimize layoffs, the Union agreed to cut incentives to 20%.

- The Parties in 2008 agreed to voluntary layoffs for 490 employees; reduced overtime; agreed to 32-hour workweeks and assigning employees across units; permitted more contracting out of work; eliminated guaranteed rates of pay and other provisions. These agreements resulted in keeping the number of layoffs at 490 rather than the projected 2,400 employees, and stopped the projected shutdown of most operations at the plant.

- The Company agreed to make an equal sacrifice. They did agree to suspend the hiring of 88 current open salaried positions, but not to lay off any salaried employees. Only the bargaining unit employees were required to take a pay cut to keep their jobs.

- The Parties knew that this LMP would not last forever, and that they would return to being a high-cost operation, and for this reason the Parties agreed in 2010 to the MOU.

- Of the two Witnesses at this arbitration, only the President of the Local, Pete Trinidad, could testify as to the meaning and intent of the 2010 MOU, because only he was present when it was negotiated.

- The preamble discusses Burns Harbor being competitive with the other Arcelor plants, and with outside competitors. The Union is not complaining about what the Union accepted in order to reduce labor costs through this Agreement, as they wished to avoid another situation like 2008. However, the parties recognized the magnitude of the changes represented by this Agreement and therefore, required ratification by the members.

- The Union and the Company also agreed that the first two new HSM Walking Beam Furnaces constructed in ArcelorMittal USA would be at the Burns Harbor Plant, in order to make the investments necessary to avoid another 2008, as well as other projects for safety, environmental compliance, quality and efficiency.

- The Union, in turn, agreed to give up about 50% of their incentive pay, by agreeing to target incentive goals to 25%.

- This Agreement required commitments to capital investment to remain competitive, and the Union agreed to help pay for it. Both the Company and the Union agreed to defend and support the terms of the MOU – not only a piece of it, but rather the entire Agreement.

- Appendix H of this Agreement states that, "If the plant is operating at a reduced level (TBD), the plan will pay 20%," which is the heart of the issue here.

- The Company is playing word games with an Agreement that the Parties bargained in good faith. What does a "reduced level" mean, if it doesn't mean a reduction? It means "less."

- The Company's only Witness said he had no idea what the language meant when it was negotiated, because he was not there.

- The document contains some "TBD" language because the Parties did not know when and under what circumstances the situation could possibly happen again.

- The Company argues that the Union did not raise the issue in 2015 when they did the amendments, but neither did the Company raise it, because it was not a concern at that time.

- The Company is arguing that "TBD" means nothing – meaning that the Union gave up 50% of its members' incentive pay, even more in Finishing, but the Company never has to pay even the minimum of 20%, because "TBD" means nothing.

- If the language is ambiguous, the Arbitrator should look at the intent of the Parties. President Trinidad was the only one present who could testify concerning intent, and he testified that it was intended to apply when there were reduced operations and "when we got to that point, we would know it."

- Incentive pay has gone up and down for 10 years on a weekly basis and the Union never made an argument that the operations were at reduced levels. The Company presented evidence that in 2019 there were some weeks that were lower than 20%, but there were no layoffs, or massive reductions in operations.

- In 2008 things were terrible at the plant. And in 2020 the Company also informed the Union that layoffs were necessary again because plant operations were facing major reductions. This is a good explanation for what "TBD" means. It is difficult to say when this language would apply if it does not apply in this situation.

- Out of all of incentive plans, the Finishing Plan took the worst hit. If the Union took such a big reduction during good times, they wanted the protection of 20% in bad times. This is what the MOU was intended to do.

- The Company's position denies the "quid pro quo" that was agreed to.

- The parties accomplished what they intended to do with reducing all six incentive plans. The Union is entitled to the protection they negotiated, in exchange for what they gave up.

- If the Arbitrator agrees with the Company, the Company will never have to say what "TBD" means, and what the Union got out of this deal is gone. The whole Company, salaried and bargaining unit, received the benefit of the investments the Company has made. It was a good thing to do, but it benefitted all the Employees.

- The Company has to offer some explanation of what "TBD" means. They cannot say that it never applies.

- There were no layoffs between 2010 and 2020 so there is no past practice under this language. There was no need to invoke the language and the Union did not do so.

- Incentives are variable compensation. The parties took away some of that variability, in order to minimize the losses for the parties to 20%, during periods of reduced operations.

- The Company presented evidence about an incentive rate of 30% for only one week over three or four years. The Layoff Minimization Plan did not go into effect until April. Many other weeks are lower than 20%; the language was meant to minimize the loss.

- As a remedy, the Union is requesting that the grievance be sustained, and that the 20% language be enforced.

The Company's Position

- The grievance relates to one sentence in the Burns Harbor Plant's Finishing Production Bonus Plan.

- The sentence includes the abbreviation "TBD" – "To Be Determined." This is a placeholder for future discussions to be held between the parties.

- This phrase has been in the Plan beginning with the framework for the Plan in 2010 and the revisions in 2015.

- The Parties agreed to the language as written. The meaning of "TBD" is plain and clear and does not permit one side or the other alone to define its meaning.

- The Union is requesting in this grievance that the Arbitrator grant them the unilateral authority to decide under what circumstances this sentence will apply.

- The Company disputes that the sentence was triggered because the plant was under a Layoff Minimization Plan. There is no reference to an LMP in the TBD sentence or anywhere in the Finishing Bonus Plan. Any metrics relied upon by the Union are not found in this sentence or in the Bonus Plan because the parties have not yet determined what it means.

- The Company disputes that Finishing Employees were denied the opportunity to earn at levels that existed prior to the pandemic. The Company paid the incentive at the rate calculated under the defined part of the Bonus Plan. In one week it was over 30%.

- The 2008 LMP has been satisfied and the 2020 LMP has been litigated to finality. The Union's case is an attempt at a second bite of the apple for these two LMP's.

- There are natural swings in orders and productivity on a month-to-month basis. There is no time period referenced in the Bonus Plan and there is no clear definition of a "reduced level."

- The language cannot mean that the Union when the language has been met, on a case-by-case or event-by-event basis. Such an interpretation would leave the Company at the Union's whim, and would build in an absolute 20% floor into the Bonus Plan, which was never agreed to by the Company.

- There is a clear conflict in the Union's evidence as to whether Employees are entitled to 20%; or the greater of 20% or whatever the Plan made.

- Finishing Employees had opportunities to earn at the same percentages they did before and after the pandemic.

- The incentive rate was comparable and at times exceeded the highest incentive rate paid in all of 2019, well before the pandemic.

- The TBD language indicates that the issue is for the Company and the Union to bargain over, and is not to be unilaterally determined by one side or the other.

- The Company relies upon the same arbitration awards introduced by the Union.

- This case is not a matter for the Arbitrator to create the language of the Plan – that is for the Parties to do.

- Under the circumstances at issue here, the Company did not violate the Agreement.

Findings and Decision

This is a dispute over the application of a provision of the Finishing Department's Incentive Plan, which states,

"If the plant is operating at a reduced level (TBD), the plan will pay 20%."

The Union argues that the plant was clearly operating at a reduced level when this grievance was filed. According to the Union, operations have been reduced as a result of the worldwide COVID-19 pandemic, as demonstrated by layoffs and the Layoff Minimization Plan imposed by the Company. The Company argues that the parties have not determined what a reduced level of operation is, under this language, and therefore, the Union has not established that the provision has been violated.

The Union President provided substantial testimony about the negotiation of this contract provision, in which he participated. The language is part of a 2010 Agreement, which arose out of the 2008 nationwide recession, and its effect on the Burns Harbor Plant. Burns Harbor was a "swing plant" at the time, which was utilized by the Company to handle ebbs and flows in the market. The plant had high labor costs, including very high incentive rates, some over 50%, as the Union concedes.

Union President Trinidad testified that the Union accepted substantial temporary wage cuts in 2008, in the 2008 Layoff Minimization Plan, including as much as a 30% decrease in certain incentive rates, in order to keep the plant operating and Employees working during the recession. In 2010 the parties agreed to make more permanent wage cuts, in modifications to the Incentive Plans, in exchange for substantial capital investment in the plant. Trinidad testified that the Union agreed to cuts in wages in order to prevent the plant facing the same uncertainty over its continued operation going forward that they faced in 2008.

Trinidad's testimony that Employees gave up wages to help pay for the investments that made the plant more sustainable is supported by the terms of the 2010 Agreement. The Agreement states that its goals are to make the plant more competitive, both within and outside the Company, and to provide employment security for Burns Harbor Employees by creating viable, long term sustainable operations at the plant. The Agreement states that the Union accepts modifications to all six incentive plans, in recognition of the Company making certain investments in the plant. The Agreement permits employees to recoup wages based upon higher incentive rates, as a penalty, if the Company failed to make certain additional improvements outlined in the Agreement by a certain date.

The language in the Finishing Department Plan at issue here is part of the 2010 Agreement, and must be interpreted in light of the overall Agreement, its purpose, and its quid pro quos. The Finishing Department Incentive Plan is the only one which has this provision establishing a 20% rate "if the plant is operating at a reduced level." Trinidad testified that the Finishing Department incentive rates often tend to be hit hardest in bad times, as employees in the Department have no control over the production of material coming into the Department. He said that the purpose of this Agreement provision was to minimize wage losses in the Department in bad times, because of what the Employees had already given up in wages in order to make operations more stable. He testified further that the Union sought this language so that they would not have to negotiate a rate again if bad times hit, as they were forced to do in 2008.

The purposes set forth in the MOU; its timing after the 2008 recession; as well as the terms of the Agreement, tend to support the Union's testimony. The Company did not present evidence about the bargaining history of the 2008 Layoff Minimization Plan or the 2010 MOU. Instead, the

Company argues that the term "TBD" is clear, and means that the parties must agree to what constitutes "operating at a reduced level" before the Union may enforce this language.

Incentive wages fluctuate constantly, on a weekly basis, due to fluctuations in the factors used to determine the rates. The Union recognizes and accepts this fact. The Union has not challenged rates that fell below 20% in the Department at any other point in time, even though this occurs regularly, as the figures for 2019 show. The Union has not used this language to establish a constant 20% guarantee for this Department, as the Company argues. However, the Union relies upon the significant reductions in operations and the layoffs put into place by the Company in 2020 in response to the worldwide pandemic as clear evidence that the plant was "operating at a reduced level" when the grievance was filed, so as to trigger the 20% rate. In addition, the evidence for 2020 shows far fewer weeks with incentive rates at or above 20% than before the pandemic, even with the anomaly of one week above 30% early in the pandemic.

The Company argues that if the parties had intended a Layoff Minimization Plan to define "operating at a reduced level," they would have said so in the Finishing Department Incentive Plan language, or they could have stated in the LMP that it triggered this language in the Incentive Plan. Imposing layoffs of this size and triggering Article 8's requirements for a Layoff Minimization Plan is unusual. Nevertheless, it is not the existence of the Layoff Minimization Plan in itself that triggers the language in the Finishing Plan, but rather the underlying conditions, the significant reduction in operations that caused the Company in this case to impose layoffs and formulate an LMP. In its April 17, 2020 letter, the Company laid out the need for layoffs and the Layoff Minimization Plan. The Company stated that billings for April 2020 were down 25% from the same period in 2019 and blast furnace and slab production were expected to be down 35% from the previous quarter. Management said that these conditions "require us to lay off Employees."

The Company predicted that as many as 400 Employees "will not be needed to meet production" in a given week. Voluntary Reductions in Force were instituted, with the Company reserving the right to impose involuntary layoffs, if the voluntary reductions did not reduce the work force sufficiently.

The Company argues that the Union may not unilaterally determine what a reduction in operations means under this language. However, the evidence demonstrates that the Company has significantly reduced operations. The Union cannot be prevented from relying upon this evidence to establish that the plant is "operating at a reduced level," when the Company has relied upon the same evidence to demonstrate the need for layoffs and a Layoff Minimization Plan. The Company already has, in effect, "determined" that the plant is operating at a reduced level, and therefore, its argument that the standards for determining reduced operations still need to be negotiated by the parties is not convincing.

The parties agree that they have never relied upon this Finishing Plan language in the past. The Company argues that this demonstrates that there is no past practice showing how the parties have applied this language, further evidence that its terms have not yet been determined. The Company also points out that the parties had an opportunity to spell out what constitutes operating at a reduced level when they amended the Agreement in 2015, but failed to do so.

The Union's failure to invoke this provision since 2010 demonstrates that the provision most likely was intended to be reserved for situations where there is a serious downturn in operations, as the provision arose in the aftermath of the 2008 recession, a serious worldwide economic event. The Union has not abused the language by invoking it for routine fluctuations in operations which cause the incentive rate to go below 20%. However, the Union's failure to invoke

the language in those situations should not be used against the Union to render the language meaningless when a serious reduction in operations arises.

Furthermore, the Union's waiting until now to activate this language supports its argument that the parties agreed to the term "TBD" because they could not foresee all the reasons for significant reductions in operations that would trigger the language, just as they did not see the 2008 recession coming. However, they could foresee that another situation like 2008 might occur, and that they would recognize it when it did. In 2010, when this language was negotiated, only a few scientists and Hollywood screenwriters could foresee that a pandemic ten years later would shut down or seriously reduce operations in businesses of all sizes all over the world.

The parties may not always agree on whether a downturn is serious enough to trigger this language. However, the pandemic is similar to the 2008 recession which gave rise to this language. If the reduced production and layoffs in response to this pandemic do not fall under the category of "operating at a reduced level," it is difficult to see what would fall into this category. The Union would never be able to rely upon this provision, and obtain the bargain it struck in 2010, if the Company could simply refuse to recognize this situation as "operating at a reduced level," or argue that it must be further defined in advance of the occurrence of such an event, despite the Company's own insistence that substantial plantwide reductions in operations in this case require significant layoffs.

The Company argues, however, that the Company may be held responsible only for "operating at a reduced level" when it has control over the circumstances causing the reduced operations. The language on its face does not state that only reduced operations resulting from conditions completely within the Company's control are covered by the language. Furthermore, the evidence demonstrates that this language came into the Agreement in response to the 2008

recession. The Union has invoked it only once, now, when there is a similar worldwide upheaval affecting production. The Arbitrator concludes that the parties did intend to require the Company to pay the 20% rate under these circumstances, even though the downturn in operations is not entirely within its control.

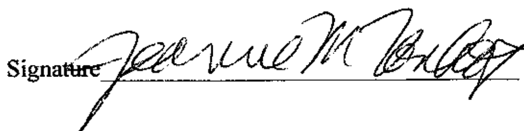
Therefore, the evidence demonstrates that the Company violated the 2010 MOU when it failed to pay Employees in the Finishing Department under this language, beginning in the Spring of 2020. Employees of the Finishing Department shall be made whole for their losses under the grievance. As for the scope of the remedy, the parties provided little information on the status of operations at the plant at the time of the arbitration hearing, nearly 10 months after the grievance was filed. The situation regarding operations may be different now, as well. Therefore, the period of time during which a remedy continues to be required under the Finishing Department language cannot be determined from the evidence before the Arbitrator. The remedy will, therefore, be remanded to the parties to determine if the plant is still operating at a reduced level, so as to continue the application of the Finishing Incentive Plan language, or has resumed normal operations, and if so, when that occurred.

The Company also argues that the Union presented contradictory information during the grievance procedure on whether the 20% was intended to be a floor or a ceiling for incentive payments under this language. The Arbitrator need not decide this issue in order to determine that the Company violated the Agreement when it failed to implement the Finishing Plan provision, which is the issue raised by the Union in its grievance and presented to the Arbitrator. To the extent that this remains an issue, the Arbitrator concludes that the issue may be addressed by the parties as part of their remedy determination.

The Arbitrator will retain jurisdiction over the remedy. However, the Arbitrator strongly encourages the parties to make their best efforts to determine and agree to the scope and limits of the Plan language, considering all the circumstances as they have developed over the course of this downturn in operations.

AWARD

The grievance is sustained. The Company violated the Finishing Department Incentive Plan when it failed to implement the language requiring payment of a 20% rate if the plant is operating at a reduced level. The remedy is remanded to the parties, as described above in the Findings and Decision section of this Award. The Arbitrator will retain jurisdiction solely over the remedy.



Jeanne M. Vonhof
Labor Arbitrator

Decided this 15th day of December 2021.