IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL STEEL COMPANY
COATESVILLE PLANT

And Mittal Award No. 26

UNITED STEELWORKERS, USW
LOCAL UNION 1165

OPINION AND AWARD

Introduction

This case involves the Union's claim that the Company violated the contracting out provisions of the 2005 Agreement. The case was tried in Coatesville, Pennsylvania on May 28, 2008. Patrick Parker represented the Company and Lew Dobson presented the case for the Union. There are no procedural arbitrability issues, although the Union did raise a notice issue. The parties submitted the case on closing argument.

Background

The contracting out provisions of the collective bargaining agreement include the Guiding Principle that the Company will use bargaining unit employees to perform work they are capable of doing. There is no question about capability in this case. The work can be contracted out, then, only if the Company meets one of the express exceptions of the Agreement. The Company owns more than 1200 chains, each of which must be inspected at least once a year. The Company cites three kinds of inspections required by OSHA Regulations. First, an

employee is required to inspect a chain each day it is used. That work has not been contracted out and is not an issue in this case. Second, there are periodic inspections:

> In addition to the [daily inspection], a thorough periodic inspection shall be made on a regular basis, to be determined on the basis of (A) frequency of sling use; (B) severity of service conditions; (C) nature of lifts being made; and (D) experience gained on the service life of slings used in similar circumstances. Such inspections shall in no event be at intervals greater than once every 12 months.

At some point, bargaining unit employees performed periodic inspections. However, much of that work has now been transferred to the contractor, who accompanies one or two bargaining unit employees on his inspection rounds. In this case, the Union challenges the Company's use of a contractor representative to inspect the chains.

The third type of inspection OSHA requires is proof-testing, which means the chains are load tested for strength. A Company witness described proof-testing as a "nondestructive tension test." This has to be done each time a chain is repaired. In addition, the other chains on the same sling have to be tested. The OSHA regulation says:

> The employer shall ensure that before use, each new, repaired, or reconditioned alloy steel chain sling, including all welded components in the sling assembly shall be proof tested by the sling manufacturer or equivalent entity in accordance with [certain regulations].

At one point, bargaining unit employees repaired the chains and, if necessary, they were sent off-site to a contractor – The James Walker Company – to be proof-tested. In this case the Union contests the Company's right to have a contractor do the repair and proof-testing off-site.

The Union contends that there is no exception to the contracting out provisions that would allow the contractor to perform the periodic inspection on-site. The only exceptions in the contract that allows contractors to perform work on-site are for new construction and surge maintenance, which the Company agrees do not apply to this case. The Company argues that having the contractor do the periodic inspection work is not contracting out because the vendor

does not charge for the on-site inspection; thus, the Company says no exception is necessary. In addition, the Company asserts that some of the inspection work is performed by the employees who accompany the contractor's inspector. Safety and Health Specialist Darrell Seitz testified that he did not know whether the bargaining unit employees accompanying the contractor's employee actually do any inspection. He said, however, that the bargaining unit employees would furnish information for items A, B, and C, quoted above. They would also assist in locating the chains that need inspected, and they would work with a crane operator to get the chains to the inspection point.

Joe Kurtz, the Company's Division Manager of Maintenance, said he is ultimately responsible for maintaining all of the chains. He said the chains come in a variety of lengths and sizes, and are used for multiple purposes, like making a chain sling. The Company chooses a timeframe for the periodic inspections, he said, and a contractor employee inspects the chains with safety representatives from the Company and Union. The contractor sometimes has an additional representative. Bargaining unit employees enter data from the inspection. On cross examination, Kurtz said he had not observed the periodic inspections, and did not know whether bargaining unit employees were doing any actual inspection. He also agreed that for a period of 7 years, bargaining unit employees inspected the chains and he was not aware of any deficiencies or accidents during that time. At one point there was apparently a mutual agreement that permitted the use of contractors for chain inspection, although the Union says this was a temporary arrangement.

Most of the evidence in the case was directed at the issues of repair work off-site and off-site proof-testing. The exception for fabrication and repair work performed outside the plant is in Article 2-F-2-b-1:

> Fabrication and Repair work may be performed by Outside Entities [aka contractors] only where the location of the work's performance is for a bona fide business purpose and the Company can demonstrate a meaningful sustainable economic advantage to having such work performed by an Outside Entity.
>
> In determining whether a meaningful sustainable economic advantage exists, neither lower wage rates, if any, of the Outside Entity, nor the lack of necessary equipment (unless the purchase, lease or use of such equipment would not be economically feasible) shall be a factor.

The Company introduced evidence that was intended to establish a bona fide business purpose for having the work done off-site, and a sustainable economic advantage for having the work performed by a contractor. Prior to the change complained of in this case, a bargaining unit employee inspected the chains and, if necessary, repaired them. The chains would then be sent off site for proof-testing. Kurtz testified that having work performed for less money was a bona fide business purpose for contracting it out. In addition, contracting out the repair and proof testing allowed the Company to insure it was in compliance with OSHA regulations.

Kurtz identified an exhibit he prepared for the purpose of demonstrating a sustainable economic advantage. He considered three scenarios: first, having bargaining unit employees inspect chains, repair chains, and send them out for proof-testing. This was the procedure used until the change complained of in this case. Second, Kurtz considered the cost of having the contractor do the periodic inspection, repair and proof-testing work, which is the current situation that prompted the Union's grievance. Finally, he considered the cost of having all of the work performed by bargaining unit employees, which is what the Union wants, and which would require the purchase of a testing machine. The calculations were based on 2006, when the contractor repaired an estimated 118 chains. However, from April 2007 to April 2008, the contractor repaired and tested only 77 chains.

Under the first alternative (inspection and repair inside, proof-testing outside) Kurtz calculated that bargaining unit employees averaged about 2190 man-hours per year, 1704 of which were spent repairing chains. The average repair time per chain was 14.44 hours. An additional 192 man-hours were devoted to having two bargaining unit employees accompany the contractor on chain inspections on-site. The contractor averaged about 324 hours per year in proof-testing and associated tasks. Kurtz calculated that this option would cost the Company $239,431 per year, or $2001.82 in repair cost per unit.

The Company's current practice – repair and testing both done by a contractor – reduces bargaining unit hours to about 400, almost half of which is devoted to in-house periodic inspection. An additional 92 hours is comprised of office and technical clerical work. This option reduces the Company's cost to $133,913 per year, or $1,040 repair cost per unit. On cross examination, Kurtz said he could not explain why the contractor estimated its repair time per unit as 1.75 hours, while the bargaining unit's time per unit was 14.44 hours. He said he merely took the 1704 hours the bargaining unit repairmen had reported and divided it by 118, the number of chains repaired. A bargaining unit employee testified that the 1704 hour figure included such things as finding and loading the chains, and then returning them; it was not all repair time.

The final option – which the Union says is the appropriate resolution to this case – is having bargaining unit employees do all of the work, including proof-testing. This would require the Company to purchase a testing machine, which would cost $184,000, including all installation costs. Kurtz accounted for this cost over a twelve year depreciation period. Under this scenario, bargaining unit employees would work about 3369 man-hours per year, and contractor hours would be reduced to a total of 183 hours. The total cost would be $291,417 with a repair cost per unit of $2,459. This estimate uses the repair time of 14.44 hours per item

repaired and 10.31 hours per unit tested. Although the record is unclear, Kurtz apparently arrived at the 10.31 hours per unit inspection time (significantly higher than the contractor's estimated inspection time of 1.25 hours per unit) by multiplying the contractor's average time by 6. On redirect he said he assumed if it took the bargaining unit 6 times as long to fix a chain, then it was reasonable to assume it would take 6 times as long to inspect it.

Kurtz said he believes his analysis documents a meaningful sustainable economic advantage from contracting out the repair and proof-testing work. Giving the repair work to a contractor has allowed the Company to reduce its inventory of repair parts, and has reduced the waiting time to receive parts to make a repair. There has also been a decrease in the cost of parts per repair. Kurtz said the contractor gives the Company a better response time and has eliminated the backlog that had developed when bargaining unit employees did the repair work. Kurtz also said if the Company were to buy the proof-testing machine, it would be unable to fully utilize it. The contractor proof-tested an estimated 118 chains for the Company in 2006, which took only about 85 hours. Finally, Kurtz said the vendor provides a warranty on its work, although he acknowledged that the Company has made only one claim, and it was for about $50 to $75.

On cross examination, Kurtz acknowledged that the backlog in chain repair work developed when the Company assigned one of the chain repair employees to other work. He also agreed that if the number of chains proof-tested goes up, the cost per unit will come down. The Union questioned how the contractor could inspect over 1200 chains in only 192 hours. Kurtz said he didn't know, but that the time was verified by the contractor.

Irwin Warner is an MTM who was performing chain inspection and repair prior to the Company's decision to contract it out. He said the routine was for him to get a list of chains that

needed inspection; he would locate the chain and do a visual inspection, tagging any faults. He would then remove a chain needing repair from the area to insure it wasn't used. He said he repaired chains as needed. He also said when he found a chain with a bad link, the Company had him replace the entire chain. Similarly, if there were two or three chains on one ring that was attached to the bull ring, he was instructed to replace the other legs as well. The importance of this from the Union's perspective is that new, pre-certified chains did not have to be proof-tested. Kurtz testified that he didn't know if this same replacement procedure was used by the contractor who repairs the chains now.

Warner said a backlog developed after the Company assigned another chain repair employee to other work. At some point the Company proposed having the contractor perform the on-site periodic inspections, thus freeing Warner for more repair work. But Warner said he – and presumably the Union – agreed to this only temporarily. Warner said when they made the temporary agreement, he was aware that in the past the Company had been found out-of-compliance with OSHA regulations because of untimely inspections. Warner said no one ever told him he was working too slowly, and that there was no backlog until the Company reassigned the other chain repair employee. Warner said he knows the bargaining unit employees who accompany the contractor-inspector are not doing any inspection work because they aren't qualified. Warner said he and another employee had attended chain repair training.

Positions of the Parties

The Company argues that there is both an economic advantage and a bona fide business purpose for having chains repaired and tested off-site. The Company does not have a testing machine and it would be prohibitively expense to buy one. In addition, OSHA regulations

require that proof-testing be performed by the "sling manufacturer or equivalent entity." The Company is not an equivalent entity, the Company argues. The Union's challenge to having the contractor perform periodic inspections is, the Company argues, "much ado about nothing." Previously a bargaining unit employee – Warner – inspected the chains by himself. Now one or two bargaining unit employees accompany the contractor. The bargaining unit has not lost any work, the Company says, and the amount of man-hours has actually increased. In addition, the Company contends that it has not contracted out the periodic inspection work because the contractor does not charge the Company for inspections.

The Union questions the Company's claim that the contractor performs the periodic inspection without charge. The contractor is a profit-making enterprise and does not work for free, the Union argues. But even if the inspections were free, the Union says, that does not defeat the bargaining unit's right to the work, which it is capable of performing and, indeed, has performed. The Union also dismisses the disparity between the contractor's claim that it can repair a chain in an average of 1.25 hours per chain, while it took bargaining unit employees 14.44 hours. The Union says nothing in the record shows a lack of productivity in the bargaining unit when it did the work, and there is no evidence of an OHSA violation in inspections. The contractor cannot come onto plant property to do inspections without mutual agreement, the Union says, and there is no such agreement.

The Union acknowledges that the Company would have to purchase and install a proof testing machine at a total cost of $184,000, but it says this is not a significant cost over a 12 year period. In addition, if the number of units tested were to rise, then the cost per unit would decrease. Finally, the Union argues that the contracting out notice was defective because it did not include all of the cost of contracting out the work. The notice said the vendor would inspect,

repair and test all chains for an estimated $26,555 per year. This is inaccurate, the Union says, and probably does not even cover the cost of inspection. The Union also says it asked for bids from contractors, but the Company never furnished that information.

Findings and Discussion

Periodic Inspection

Different standards apply to the work being performed by the contractor. The periodic inspection work is performed on-site, which means the Company has to establish an exception under Article 2-F-2-a. The only two exceptions provided in that section are (1) New Construction Work, and (2) Surge Maintenance Work. The Company agrees that neither of these exceptions applies in this case. The Company's principal defense is that it has not contracted out the work at all because the vendor does not charge for the inspections. There is some merit to the Union's claim that the extent of services provided factors into overall cost. As an economic matter, at least, it is fair to assume that a vendor calculates all time and materials expended in pricing its product, even if it does not state each element separately, and even if it advertises part of the service as "free."

However, even if the contractor does not charge for its services, the Company is still having an outsider perform work the bargaining unit is capable of doing and has done in the past. The Guiding Principle preserves work for the bargaining unit that it is capable of performing, subject only to clearly defined exceptions. It doesn't matter whether the Company gets the work for free or pays for it; the effect on the bargaining unit is the same – work bargaining unit employees are performing and that is of value to the Company is being performed by an "outside

entity."[1] The Company argues, however, that bargaining unit man-hours have increased because at least one and sometimes two employees accompany the contractor's inspector. But the work at issue is inspection work and the Union offered credible evidence that the employees the Company assigned to the inspector are not qualified to inspect chains and are not, in fact, inspecting them. Even if they were qualified and were inspecting chains, the contractor would also be inspecting chains, which is work the bargaining unit is capable of performing. The Company cannot contract out part of the work just because it has also given some to bargaining unit employees. The Company says it needs the contractor's representative on-site because of his subject matter expertise. But the Company cannot obtain that benefit by supplanting the inspection function performed by the bargaining unit.

Neither of the exceptions for on-site work applies in this case. Thus, the only way a contractor can come onto Company property and perform bargaining unit work is by agreement. At one time there apparently was such an agreement. The record does not include a copy of the agreement or even indicate whether it was in writing. Moreover, the Company did not argue that there was an existing agreement that permitted it to use a contractor for periodic inspections. In these circumstances, the Company's use of a contractor on-site for periodic inspections violates the Guiding Principle of Article 2-F-1-a

The Company argues that an inability to meet the required schedule for periodic inspections gives it a bona fide business purpose for contracting out the inspection work. But that work is performed on-site, and is not subject to the off-site inspection tests of Article 2-F-2-b-1. That test applies, instead, to the repair and proof-testing work.

[1] This conclusion is consistent with Article 2-F-1-b which says an outside entity is "Any individual or entity other than an Employee who performs bargaining unit work...."

Repair and Proof-Testing

The repair and proof-testing work is performed off-site, calling into play the exceptions in Article 2-F-2-b-1, quoted above. The first paragraph creates two hurdles for the Company, each of which must be cleared. First, it has to show a bona fide business purpose, and second, a meaningful sustainable economic advantage. The Company argues that the bona fide business purpose can include demonstrating that the contractor can perform the work at less cost. That would seem to reduce the two tests to one; if the Company could demonstrate a meaningful sustainable economic advantage, then it would necessarily have a bona fide business purpose for contracting out the work. But economic considerations cannot be excluded entirely the bona fide business purpose test; an economic value can be ascribed to almost every decision a business enterprise makes. To the extent that a bona fide business purpose depends, in part, on economic considerations, the language seems to say that those considerations have to produce a meaningful and sustainable economic advantage.

It is appropriate to view the repair and proof-testing functions as separate items of work. There is an obvious relationship between the two, because repaired chains have to be proof-tested. But for some period of time the Company divided the work, with the repair work done by bargaining unit employees and the proof-testing performed by contractors. There is no evidence that bargaining unit employees have ever done proof-testing. Nor is there is any evidence that the Union protested having the contractor proof-test the machines before the Company transferred the repair and periodic inspection work to the contractor. The parties, then, have treated repair and proof-testing as discreet parts of the process, and it is fair to apply the Article 2-F-2-1-b exception separately.

Repair Work

There is no evidence that the off-site contractor performs superior repair work or offers something that cannot be done in-house, either of which might constitute a bona fide business purpose for having the contractor do the work. Company witnesses testified that using the contractor eliminated the backlog of chain repair work, but on cross examination Kurtz agreed that the backlog developed after the Company assigned one of the chain repair employees to other duties. This was clearly a decision the Company was free to make. But it indicates a business choice that the other duties were more important to the Company than avoiding a chain repair backlog – otherwise it would not have made the assignment. Moreover, even with the backlog, MTM Warner testified credibly that no one had complained he was not providing adequate repair service. Nor did the Company submit evidence about how the backlog might have affected operations.

There are also questions about the relative efficiency of the contractor over the bargaining unit. The Company calculated that it took the bargaining unit – meaning Warner – an average of 14.44 hours to repair a chain. In contrast, the contractor's figures said its employees spent only 1.75 hours per chain[2]. But Warner said his time included looking for the chain and transporting it to and from the repair area. This work had to be performed for the contractor as well, but is not part of the 1.75 hour figure because the work was performed in-house by bargaining unit employees. There is nothing in the record about the average time the bargaining unit actually spent repairing a chain. But there is no reason to assume that there is a great disparity, especially when the bargaining unit employees are experienced repairmen. The record

[2] There is some ambiguity in the record about the contractor's repair time and inspection time, with the 1.25 hour figure sometimes applied to both inspection and repair in the Company's cost estimates. This was carried forward in the testimony. The differences, however, do not affect the analysis, given the large disparity between contractor time (whichever it is) and estimated bargaining unit time.

will not support a finding that time disparity or the quality of repair work constitutes a bona fide business purpose for using a contractor.

The Company also said moving the repair work off-site allowed it to reduce the amount of inventory, and the costs of maintaining it. It is fair to assume there is some cost in maintaining an inventory of spare parts, which means the Company has money invested in material it is not using. In addition, the Company said the contractor had faster access to repair parts, which could lessen the time a chain is out of service. Freeing space for other endeavors and allocating less manpower to maintain an inventory would seem to be a bona fide business purpose, although the fact that it frees up the assets invested in inventory could also be an economic advantage.

But even if the Company can establish that it has a bona fide business purpose for contracting out the repair work, it cannot demonstrate a sustainable meaningful economic advantage. Presumably the word "sustainable" is intended to require that cost savings in chain repair would endure, and not merely be short-lived. The word "meaningful" is not defined, but at the very least, it means more than trivial. The Company cannot carry its burden of showing a meaningful sustainable economic advantage for contracting out the repair work because the comparative data raises as many questions as it answers. As the Union points out, most of the disparity in cost stems from the Company's estimate that it would take bargaining unit employees an average of 14.44 hours to repair a chain, but that it would take the contractor only 1.25 hours per unit. As explained above, the contractor versus bargaining unit repair time is not an apples-to-apples comparison. The bargaining unit's average time includes more work than the actual repair time, and the contractor's does not. It may be that the contractor can do the

work at a lower cost, but the data in the record is not sufficient to establish a meaningful sustainable economic advantage.

Proof Testing

Although the Company cannot demonstrate a meaningful sustainable economic advantage for contracting out the repair work, there is sufficient evidence for having the proof-testing performed by a contractor. As was true with the repair work, the time advantage claimed by the Company is not reliable. For the 118 chains proof-tested in 2006, the Company estimates it would have taken the bargaining unit 1165 hours, or 10.75 hours per unit. In contrast, it estimates that the contractor performed the work in about 140 hours, comprised of inspecting the chain before testing (which it did even though the chain was repaired and inspected by the bargaining unit) and an additional 84.75 doing the actual proof-testing. This adds up to about 1.75 hours per chain for inspection and proof testing. There is no reason to question the hours estimated for the contractor, although it is worth noting that the time does not include some pre and post-testing activity, like identification, loading and transportation of the chains. Some of this is mentioned in the Company's exhibit, but is lumped into other contractor activity and is not stated separately.

The obvious problem is the 10.75 hour average testing time for the bargaining unit. Although the contractor's employees might work faster given the limited scope of their work, it does not make sense to assume that they can work 6 or 8 times faster than a competent Company MTM. The Company did not explain the disparity except to say that because repair time was 6 times faster for a contractor than a bargaining unit employee, it thought the same ratio would apply to proof-testing. But as already explained, the 14.44 hour repair time is not a reliable

estimate, and, even if it were, there was no explanation about how the same correlation should apply to proof-testing.

The Company is on firmer ground when it cites the expense of purchasing and installing a testing machine. Article 2-F-2-b-1 says that the Company's proof of a meaningful sustainable economic advantage cannot include the cost of equipment, "unless the purchase, lease or use of such equipment would not be economically feasible." The Union argues correctly that the purchase would have to be viewed over a period of time, and not merely evaluated as a onetime expense. The Company does not claim that it cannot afford a testing machine. But having the resources to buy is not the test; rather, the contract uses the words "economically feasible." Dictionary.com defines "feasible" as capable of being done. The Cambridge On-line dictionary adds that it can mean "reasonable." The American Heritage Dictionary says one alternative is "used or dealt with successfully." When combined with the word "economically," the feasibility standard seems to mean that the purchase of equipment is not economically feasible when it is unreasonable, or impracticable.

This does not mean merely that it is cheaper to have the work performed outside or that it is not economically efficient to purchase equipment. A loose interpretation of "feasible" could undermine the Guiding Principle, which presumably was not the parties' intent. The Company cannot contract out work simply because it is cheaper to have contractors perform it. But the language of Article 2-F-2-b-1 suggests there are circumstances where it does not make sense to have the Company purchase the equipment. Here, for example, the contractor tested about 118 chains in 2006 and reported that the testing took about 141 hours, about 56 hours of which was devoted to inspecting the chain. The Company's data show the contractor reporting that actual proof-testing took about 85 hours. This means the Company would make a significant

investment – even if spread over 12 years – for minimal usage. In terms of man-hours, the machine would be used for somewhere between 2 and 6 weeks per year. Moreover, this estimate was based on 2006 data, where the contractor tested an estimated 118 chains. But from April 2007 until April 2008 the contractor tested only 77 of the Company's chains, which presumably lowered the hours of use. In these circumstances, the Company has shown a meaningful sustainable economic advantage to having the work performed off-site by a contractor.

The Company must still establish that that decision to subcontract was for a bona fide business purpose. The Company says, in part, that there is a bona fine business purpose for contracting out the proof-testing work because OSHA regulations require that the chains be tested "by the sling manufacturer or equivalent entity, in accordance with paragraph 5.2 of the American Society of Testing and Materials Specification A391-65...." The Company says it is not an "equivalent entity" as required by the regulation. There is no definition of that term in the OSHA regulations submitted at the hearing. There may be a definition in Specification A391-65, but that is not part of the record. It is not clear, then, whether the Company could become an "equivalent entity" by purchasing a proof-testing machine and training bargaining unit employees to operate it. The requirement that proof-testing be done by the manufacturer or "equivalent entity" might suggest that the tester is expected to be someone other than the user. Presumably this would lead to more objective findings.

But more important is the small amount of work involved in testing, which could be 85 hours or less. The Company would have to allocate space for a function it seldom performed and perform maintenance on a machine that was rarely used. Moreover, because the testing employees would not perform the work on a regular basis, the Company would have to find ways of keeping them adept at the work, a matter of significant importance given the potential

consequences of failing to properly proof-test a chain. In these circumstances, there is a bona fide business purpose for having the work performed off-site.

Remedy

Because the Company violated the contracting out provisions by giving the periodic inspection work and repair work to a contractor, the bargaining unit is entitled to a remedy. It is not clear whether there were employees remaining in the bargaining unit other than Warner who were capable of performing the work. Moreover, there is no information in the record about the extent to which Warner or other qualified employees, if any, worked overtime during the period of the violation. The volume of overtime, including opportunities refused, would affect the amount of back pay. In addition, no bargaining unit employee can recover for the time period when the contractor performed periodic inspections by agreement with the Union. I will return the case to the parties for discussion of the appropriate remedy, taking these factors into account. If they cannot resolve it, they can resubmit the case for a decision on the remedy.

Notice

The Union argues that the Company violated the notice provisions of Article 2-F-5-a-4 because it failed to provide the Union with copies of bids received from contractors. All it received, the Union says, was an Access Agreement entered into between the Company and the contractor. The contracting out notice estimated that the work – periodic inspections, repair, and proof-testing – would cost $26,555. As the Union argues, this amount seems too low, given the volume of work performed. It is not clear from the record whether there were bids or internal estimates, or how the Company allocated time and expense to the various functions in the notice.

The Company did not produce testimony that there were no bids or internal estimates. The Union was entitled to this information in a timely fashion. The failure to furnish it violates Article 2-F-5. Because I have provided a monetary remedy for the substantive violation, no monetary remedy is warranted for this notice violation.

AWARD

The grievance is sustained, in part. The Company violated the Agreement when it had periodic inspection work performed in-house by a contractor employee, and when it contracted the chain repair work off-site. That work must be returned to the bargaining unit. The Company has satisfied the appropriate exception for contracting out proof-testing work. The Company has also violated the notice provisions of the Agreement. The case is remanded to the parties for discussion of the appropriate remedy, as explained in the Findings.

Terry A. Bethel
August 27, 2008