IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

And

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ArcelorMittal Case No. ~~32~~
Grievance 1151
Lackawanna Side Letter

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 2604, USW

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company has misapplied Option A of the Lackawanna Side Letter. The case was tried in Cleveland, Ohio on April 21, 2009. Arthur Smith represented the Company and Bruce Fickman presented the Union's case. There are no procedural arbitrability issues. The parties did not agree to a statement of the issue on the merits, although it is fair to say that the issue is whether the Company's administration of Option A of the Lackawanna Side Letter deprived employees of other rights they claim under both the collective bargaining agreement and the Side Letter. Both parties filed post-hearing briefs by e-mail. I received the briefs on May 21, 2009.

Background

The parties' current collective bargaining agreement was effective on September 1, 2008. During negotiations, the demand for steel was high and the Company sold all it could make.

Nevertheless, the Company entered the 2008 negotiations with a desire to close or shrink some of its American plants. In April 2008, the Company had shared its "footprint" document, which discussed plans for expansion and capital investment in certain areas. This led to discussion of capital investment in the negotiations and the Company's commitment to invest substantial amounts of money in various projects. The Lackawanna Plant was not included in the list of facilities that would see capital improvement. The Company said it anticipated closing the Lackawanna Plant.

Carl Pfeifer was Plant Manager at the time of the negotiations. He described the manufacturing capacities of the plant, which were duplicated at other Company facilities. He also said the Lackawanna Plant no longer had a hot mill, which meant that it had to ship in hot band from the Cleveland and Burns Harbor (Indiana) plants. Another disadvantage was that the nature of the Lackawanna operations led to a higher conversion cost and a greater yield loss than other plants incurred. The plant's best chance for survival, Pfeifer thought, was to focus on niche products produced at Lackawanna that could not easily be made in other facilities. Pfeifer described the efforts of the Union and Company to explore options to keep the plant in operation, including the creation of the Lackawanna Plant Viability Team. In May 2008 Pfeifer made a presentation to a group that included ArcelorMittal's CFO and the CEO for the Americas. Pfeifer said he stressed the importance of the facility for production of niche products. However, the Company executives asked him to reevaluate those products, and Pfeifer said his research revealed that only about 5% of Lackawanna's production was devoted to niche products. Pfeifer said this finding "shot a big hole" in his argument and that it hurt the chance the plant could survive.

The parties addressed the future of the Lackawanna Plant during negotiations, as well as the future of some other facilities. The Union took a "no-casualties" position in negotiations, meaning that no plant would be closed. The Company, however, was not willing to make that commitment. In late August 2008, the parties negotiated what became known as the Lackawanna Side Letter (LSL). That document reads, in full:

> [Nonprecedential Sideletter]
>
> This confirms our understandings regarding the Lackawanna facility.
>
> The parties will continue to explore options to improve the viability of the Lackawanna facility. If, notwithstanding such efforts, the Company elects to close or substantially reduce the level of operations at the Lackawanna plant, affected Employees shall opt for one of the following:
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> A. Severance Package: (i) $3,000 per year of service, with a minimum of $25,000, (ii) continued healthcare coverage for one additional year beyond current coverage eligibility for each affected employee; or
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> B. Interplant Opportunity: In accordance with the BLA, except that the right shall be extended to all Employees, not just those with more than two (2) years of Continuous Service and the relocation allowance will be $15,000; or
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> C. Dofasco Employment:
>
> 1. an opportunity to work at ArcelorMittal's Dofasco facility in Hamilton, Ontario.
> 2. Employees electing this option shall remain as Employees of the Company and covered by the Agreement. Therefore they shall be compensated in all respects as they would have in the event their facility had continued to operate. They shall also continue to enjoy all the rights to which they are entitled under the Agreement and shall be expected to perform work of which they are capable and to which their Continuous Service entitles them. In addition, Employees shall be expected to observe reasonable local plant rules.
> 3. These Employees shall maintain the local union structure that they maintained as of September 1, 2008, to the maximum extent permitted under all applicable laws.

4. Any Employee choosing this option shall be entitled to either a daily travel voucher of $50 or a relocation allowance of $15,000.

5. The Company shall be responsible for and shall make its best effort to secure all necessary governmental and other approval(s) necessary for this Option C to occur.

6. The Company shall continue to provide employment at the Lackawanna facility as if the facility were operating at current capacity until the earlier of (i) its securing of all such approvals or (ii) January 1, 2010, provided that the Company has made its best efforts to secure the approvals..

D. Employment at other ArcelorMittal operations not covered by the BLA:

The Company shall make its best efforts to provide a similar opportunity to that described in "C" above at other ArcelorMittal operations not covered by the BLA.

E. The economic provisions described above shall not be in addition to the provisions described in Article Eight Section C of the BLA.

The plant was still operating as of September 1, 2008, the effective date of the new contract, and the demand for steel remained high. All of that changed, however, later in September. The demand for steel dropped precipitously as if, the Company's advocate said, someone had turned off a switch. This phenomenon affected the entire industry, not just ArcelorMittal. Plants were shuttered, production decreased and employees were laid off. On December 9, 2008, the Company served notice on the Union that it planned to close the Lackawanna and Hennepin Plants. In addition, the Company informed Lackawanna employees of the options available under the Side Letter, which included accepting a severance benefit and terminating their employment, see Option A, above.

David McCall, District Director, was chairman of the Union's negotiating committee. McCall detailed the negotiation of the Side Letter, which occurred mostly between him and Company Vice-President of Labor Relations Dennis Arouca. He said the need for the letter arose when the Company refused to make any capital commitments for the Lackawanna Plant.

The Union asked what the Company intended to do for the Lackawanna employees, McCall said. The Company's initial proposal would have delayed any closure to no earlier than September 1, 2009, and would have guaranteed employees 40 hours of work a week until that date. The Company also proposed offering employment at other locations, a proposal that seemed more feasible then because the industry was still robust.

The Union's counter offer adopted the form that appears in the final letter. Option A asked for a severance package that included $3,000 per year of service, with a minimum of $25,000, continued health insurance coverage as if the employee had remained active for 5 years, and continued accrual of seniority "for the purpose of determining eligibility for retiree benefits for five years." In an August 27 counter proposal, the Company struck the language "as if the Employee remained an active Employee for five years" as well as the continued accrual of seniority for five years. The parties continued to negotiate about other provisions of the Side Letter, but the Union accepted the Company's modification to Option A and that language appears in the Side Letter. McCall testified that Arouca approached him on August 28 saying he was concerned that employees would accept Option A, and also claim a severance benefit under Article 8-C of the BLA. McCall responded that this was not the Union's intent, and he proposed Paragraph E of the Side Letter to make that clear. This language was included in the agreed-to draft of the Side Letter.

McCall explained that employees who were laid off because of a plant closure could continue to receive health insurance coverage for a period of up to 30 months. However, pursuant to Article 8-E-7, "An employee who requests and accepts a Severance Allowance shall permanently terminate employment with the Company." This means, McCall said, that the employee would no longer be eligible for Company-paid health insurance. However, the

Union's contention in this case is that pursuant to Article 8, employees affected by a permanent closure had the right to be laid off and to collect the benefits provided in the BLA for laid-off employees.

During the layoff, employees would have been eligible for SUB benefits, and could have continued receiving health insurance coverage for a period of up to 30 months, depending on length of service. They would also have continued to accrue service for purposes of retirement for two years, pursuant to Article 5-E-1-b.

Local Union President Tony Fortunato said the December 9 closing letter was the first time the Union had heard the Company interpreted the side letter to mean that employees who selected one of the options were not eligible to be laid off with the benefits available to laid off employees. The Company made presentations to employees in February 2009 indicating that employees who accepted Option A would terminate their service with the Company. It did not say the employees could be laid off and obtain the benefits available to a laid off employee before accepting the enhanced severance package. The Company submitted election forms to employees and told them they had to elect an option by March 14. The Option A form included the following language: "Article Eight, Section C (severance allowance) of the Basic Labor Agreement shall not be in addition to the severance package in the Lackawanna Side Letter. The Side Letter shall govern an employee's eligibility for severance from ArcelorMittal."

Although at one point the Company had said Lackawanna employees were not eligible to be laid off as provided for in the BLA no matter which option they chose, on March 19, 2009 it announced that employees who selected one of the transfer options would be placed on layoff with the benefits available to laid off employees until they were able to transfer. It also said employees who elected no option by the deadline would be placed on layoff and given the layoff benefits under the BLA, but would not be eligible for any options under the side letter. Following these announcements, the Union held a meeting with employees and recommended that employees sign their option forms "under protest." About 35 to 40 employees attended the meeting. Thirty-one employees signed under protest for Option A and 45 employees signed under protest for Option C.

The target date for the Lackawanna closing was April 30, 2009. However, the Company said its order volume was "drastically reduced" so it advanced the first round of layoffs to March 21, 2009. On March 19, 2009, the Company posted a notice informing employees that they were required to select one of the four options in the Side Letter not later than their last day of work. Employees who worked until March 21, 2009, were given an additional seven days to decide. The notice closed by saying:

> If you do not choose one of the options within the time periods, you will be laid off and afforded all of the layoff benefits provided under the Basic Labor Agreement and shall have no further rights to any of the options under the side letter.

Although the parties apparently had some disagreement about the manner in which the Company would administer options B, C and D, those disagreements were resolved or, in any event, are not part of this dispute. The issue in this case is the treatment of employees who selected Option A.

The Company says Option A was intended to give employees a final severance payment which would immediately terminate their employment with the Company, and any other rights they may have had under the collective bargaining agreement. However, the Union argues that the terms of Option A simply amended certain provisions already found in the Agreement. Thus, the 2008 contract contained a severance benefit in the event of a plant closure with language that was unchanged from the 2005-2008 contract. Article 8, Section C reads, in pertinent part:

Section C. Severance Allowance

1. Right to Severance Allowance

   Employees meeting the conditions outlined below shall, upon request, receive a Severance Allowance as described below.

2. Eligibility

   In order to be eligible for a Severance Allowance an Employee must:

   a. at the time s/he requests such Allowance, have accumulated three (3) or more years of continuous Service; and

   b. be on layoff (other than voluntary layoff):

   (1) for six (6) consecutive months, or in any twelve (12) month period be offered, under the terms of the Agreement, less than 520 hours of straight time work, or

   (2) due to a Permanent Closure as defined in this Section.

* * *

5. Amount and Form

a. In the case of Paragraph 2(b)(1) a single lump sum payment equal to one (1) week of pay at the Employee's Vacation Rate of Pay for each year of Continuous Service or portion thereof.

b. In the case of Paragraph 2(b)(2) above:

   (1) One (1) week of pay at the Employee's Vacation Rate of Pay for each year of Continuous Service or portion thereof; plus

   (2) Two (2) weeks of pay at the Employee's Vacation Rate of Pay for each year of service over 15 years of Continuous Service or portion thereof.

   c. The total of (1) plus (2) above may not exceed seventy thousand dollars ($70,000).

6. Definitions

   For purposes of this Section,
   * * *

> c. Permanent Closure means the permanent closure of a plant or permanent discontinuance of a department of a plant or substantial portion thereof. In addition to an announced Company decision providing, therefore, a Permanent Closure shall be deemed to have occurred wherever the Company is not operating the subject plant, department, or substantial portion thereof and cannot clearly demonstrate reasonable plans or expectations for a re-start in the immediate future.
> * * *

7. Consequence of Acceptance

> Any employee who requests and accepts a Severance Allowance shall permanently terminate employment with the Company.

In brief, the Union argues that Option A of the Side Letter did not supplant Article 8-C, but that the option simply enhanced the amount of the severance allowance available under Article 8-C, and the duration of paid medical insurance for those employees affected by the closure. Moreover, the Union says that Option A did not terminate other rights employees had under the collective bargaining agreement in the event of a plant closure, like the right to be laid off and receive benefits available to laid off employees.

In order to be eligible for a severance benefit under the BLA, an employee has to be laid off "due to a permanent closure."[1] Article 5-G defines a plant closure to mean, among other things, the permanent closure of a plant. Article 5, Section G-4 says "Any employee affected by a closure shall, after exercising any rights to which s/he may be entitled, may [sic] be placed on layoff in accordance with this Agreement." Article 5, Section E-1-b says that continuous service is to be used for all purposes under labor and benefit agreements, "provided, however, that accumulation in excess of two (2) years during a period of layoff shall be counted only for purposes of this Section, including local agreements thereunder." Article 5, Section E-3-5 provides that an employee's continuous service shall be broken if the employee "is absent

[1] The benefit is also available for employees with at least three years of service who have been laid off for six consecutive months.

because of layoff (including layoff due to a plant closure) ... for a period longer than the lesser of his/her length of Continuous Service at the commencement of such absence or five years...." (Parenthesis in original).

Option A, the Union argues, simply increased certain economic benefits already contained in the BLA. Thus, rather than allowing a laid off employee one or two weeks of pay per year of service with a maximum of $70,000, Option A provided employees with a payment of $3,000 per year of service, with no maximum and with a minimum of $25,000. In addition, employees who elected severance would get an additional year of health insurance coverage. But, the Union argues, nothing else was to change; the affected employees could elect to be laid off and receive the benefits available to laid off employees. This would have been possible had the parties not agreed to Option A, the Union argues, and nothing in the negotiations indicated that the layoff/severance process would change. The only effect of the Option A language, the Union says, was to increase severance benefit amounts and offer an additional year of health insurance. The Union did not mention the right to a layoff accompanied by layoff benefits while negotiating Option A, it says, because those matters were not "enhancements"; employees were already entitled to those benefits under the BLA. McCall testified that the Company did not tell the Union that it understood option A to eliminate the employee's right to be laid off because of the closure, and to collect the benefits available to laid off employees. Nor did the Company say that Option A was a stand-alone provision that was cut off from – and replaced – the severance and layoff benefits available under the BLA.

Vice President of Labor Relations Arouca basically agreed with McCall's testimony about the negotiations over the Side Letter. There was no discussion from either side about whether Option A was to replace the severance or layoff provisions in the BLA. Arouca testified that because of the high demand for steel, the Company thought it could relocate Lackawanna employees to other plants, which was the subject of Options B, C, and D of the Side Letter. Option A was intended for employees who did not want to transfer. Arouca said unlike the typical severance benefit – like the one in Article 8 of the BLA – employees who elected Option A were able to receive the severance payment even before the plant closed. This would allow them, Arouca said, to "get on with their lives." About 20 employees elected Option A "right away" and before any layoff, he said.

Arouca said Option A was more generous than the BLA, where the severance payments were only available to employees with more than 3 years of service. Also, the BLA severance payments were only available to employees who had been laid off. It was not possible to apply for and receive a severance payment under the BLA before the plant had closed. Arouca also noted that Options B, C, and D expressly referenced the BLA, and he said the intent was to "feather" those options into the rights available under the contract. But there is no reference to the BLA in Option A. Arouca said the Union did not have the right to pick and choose the parts of the BLA severance article it wanted. He also said the Company understands Paragraph E of the Side Letter to mean that Option A replaces Article 8-C. He agreed that Option A prevented two severance payments, but he noted the use of the word "provisions," which the Company says means Option A replaces the contractual language.

The Company argues that the structure and language of the side letter "conclusively demonstrates" that accepting a severance benefit under Option A terminates an employee's employment and does not entitle the employee to be laid off. The Company notes, first, that the Union's first two proposals for the Side Letter asked for health care as if the employee remained an active employee for 5 years, and for continued accrual of seniority for determining an employee's eligibility for health care for 5 years. The Company struck that language in a counter offer, and the Union abandoned those proposals. This demonstrates, the Company says, that an employee who selected Option A would not continue to accrue service but, instead, would be terminated immediately upon making the election. The Union, the Company argues, is trying to get in arbitration what it could not obtain in negotiations. Moreover, the Union did not even propose the right to elect layoff as part of its Option A proposal.

The Company also parses the language of the Side Letter, which contained four options with the direction that employees "shall opt for one of the following." Those were the only options available, the Company says, and Option A includes no reference to the BLA. In contrast, Option B says expressly that it operates "in accordance with the BLA," except that interplant rights will apply to all employees and not just those with 2 or more years of service. In addition, the Company points out that Option C says expressly that employees will continue to be covered by the BLA and enjoy rights under the contract.

The Company argues that the Union's position effectively adds a fifth option to the Side Letter. Under the Union's interpretation, the Company says, employees could elect to remain on layoff and receive the layoff benefits, including SUB, pension creep for up to two years, pension contributions for up to two years, and medical coverage for up to 30 months. Once those benefits were exhausted, the employee could then elect Option A and receive a larger pay out than provided for in the BLA. But nothing in Option A refers to layoff or to any provision of the BLA, the Company says. The Company notes that the parties have agreed that employees who have elected Option C and then been laid off will be entitled to elect severance under the terms of Article 8 of the BLA, and it says that result applies logically to options B and D as well. But unlike those provisions, Option A is not tied to the BLA. The Company also says the Union's interpretation of Paragraph E requires the addition of the word "economic," so that the language would say that "The economic provisions described above shall not be in addition to the [**economic**] provisions described in Article Eight Section C of the BLA." The parties knew how to include this language, had that been their intent, the Company says.

The Company also points out that if the Union's interpretation is correct, employees with under three years of service were not entitled to Option A, even though sixteen short service employees accepted it. In addition, under the Union's interpretation an employee would have to be laid off before claiming a severance benefit under Option A. But twenty employees elected Option A and were paid severance before the plant closed. The Union's interpretation would harm these employees, the Company says, because – if the Union's interpretation is adopted – they will have received payments to which they were not entitled, and will have to refund them.

The Company also argues that it was appropriate to require selection of an Option by March 21, 2009 (or March 28 for employees who worked until March 21). Nothing in Option A mandates a certain time frame, and, the Company argues, the management rights clause gives the Company the right to establish rules about how the Side letter will be administered.

Findings and Discussion

The issue in the case is what effect, if any, Option A of the Side Letter had on the availability of certain layoff benefits, like SUB and continued insurance coverage. There seems to be no dispute that, absent the Side Letter, an employee affected by a plant closing could be laid off and, prior to claiming the severance allowance pursuant to Article 8-C-7, could collect and even exhaust layoff benefits. The Company's claim in this case is that Option A eliminated the requirement to place employees on layoff when the plant closed. Instead, an employee electing Option A would not be laid off and, by accepting the severance allowance, would make a clean break from the Company. This would eliminate the right to benefits available to laid off employees, including SUB and continued health insurance. The Union, however argues that Option A was not intended to prevent employees from being laid off. Rather, it says the Option A severance formula was simply intended to replace the formula contained in Article 8-C-7.

At the same time they agreed to Option A, the parties were negotiating the BLA, in which the Company agreed to make significant capital investments during the contract term, including investments aimed at specific plants. There were no such commitments made for the Lackawanna Plant. Thus, McCall said he asked the Company what it would do for the Lackawanna employees. Given the robust market for steel at the time the parties agreed to the Side Letter, it is reasonable to believe that the Option A benefits were a way of sweetening the pot for employees who would lose their employment as a result of the plant closure. The Company recognized that some employees would not want to move their residence to other locations, which was the principal motivation for Option C. It is not clear whether the parties considered employment in the Canadian plant to provide a real option since they apparently did not investigate the logistical problems involved until after the closing was announced. But the point is that the parties knew the Company planned to close the Lackawanna Plant, they understood that some employees would likely not be able or willing to transfer, and they had already agreed to contract provisions that provided SUB and other benefits to employees laid off as a result of a closing. I cannot infer that the parties intended to waive those rights merely because they did not mention them in Option A. To the contrary, if such a waiver had been intended, one would have expected an unambiguous statement to that effect.

I disagree with the Company's claim that Paragraph E of the Side Letter expressly waived the rights available to employees under the layoff provisions of the Agreement. It is true, as the Company points out, that Paragraph E says the "economic provisions" of the Side Letter are not to be in addition to the "provisions" of Article 8-C of the BLA. The Company says this made it clear that the economic benefits in the Side Letter were to be offered in place of the provisions of Article 8-C. Stated differently, the Company argues that Paragraph E demonstrated that the quid pro quo granted to the Company for the enhanced severance benefits of Option A was the surrender of any layoff benefits and any rights under Section 8-C. But both McCall and Arouca testified that the language stemmed from the Company's concern that employees would try to pyramid severance payments by accepting Option A, and then seek the severance payments outlined in Section 8-C-5-b. McCall said the purpose of the paragraph was to make it clear that employees who elected Option A had only one severance benefit, which was to be calculated by using the formula in Option A. The Union did not tell the Company that its proposal was intended to supplant all of Article 8-C, and the parties did not discuss it as such. Moreover, the Company did not say during the negotiations of Option A that it understood the proposal to encompass a waiver of Article 8-C and layoff benefits. The parties had already negotiated layoff benefits and other protections for employees affected by a plant closing which were not even mentioned in Article 8-C. Thus, the language of Paragraph E – which says nothing about a waiver of layoff benefits – does not convince me that the parties fashioned it as a quid pro quo for the waiver of those provisions.

Most of the Company's arguments are based on its contention that Option A is a "stand alone" provision that is divorced from the severance benefits and layoff benefits available under the BLA. For example, there is a "fifth option" only if one assumes that Option A and Article 8-

C are not related. The Company's principal argument for Option A's independence is that Option A makes no reference to the BLA, which the Company interprets to mean that the parties bargained it as an alternative to BLA layoff benefits. It is true that Option B specifically references the BLA and extends its interplant transfer provisions to all employees. Options C and D do not increase the amount of benefits spelled out in the BLA, but they extend those rights to workplaces that are not covered by the BLA.

The fact that Option A does not make explicit reference to the BLA, however, does not convince me that the option was intended to supplant the severance provisions of the BLA and the rights available to employees who would be laid off as a result of a plant closure. Option A does not mention the BLA, but it also does not say that it was intended to waive or supplant rights granted under the BLA. Moreover, Option A implicates the BLA, even if it does not say so expressly. The Company argues that selecting Option A resulted in a termination of employment with no further rights under the Agreement. But Option A does not say that; rather, the Company's argument about the effect of receiving a severance payment must be based on Article 8-C-7, which says that accepting a severance allowance terminates employment with the Company.

Nor can the Company claim that the Union should have understood that accepting a severance allowance of itself constituted a termination of employment, even without Article 8-C-7. Article 8-C-5 contained a severance formula, but the parties still found it necessary to bargain Article 8-C-7 to specify the effect of taking the severance payment. That provision would have been unnecessary if the parties believed a severance allowance automatically ended the employment relationship. Thus, even without an express incorporation of Article 8-C, the Company's interpretation of the effect of Option A is based on Article 8-C-7 of the BLA. This fact supports the conclusion that Option A was intended to increase the severance formula found in Article 8-C-5, and was not intended to supplant Article 8-C.

The Company also argues that Options B, C, and D are tied to the BLA because the severance benefits of Article 8-C are available to employees who selected one of those options and later found no job was available. Thus, employees who wanted to transfer to the Canadian plant but could not, could fall back on the severance provisions of the BLA. The Company says the same treatment should be available for employees selecting options B or D, but not to those accepting Option A, which makes no reference to the BLA. Of course, this argument depends on the Company's claim that Option A is independent of the BLA, an argument I have already rejected. Moreover, the Company's argument is irrelevant to determining the meaning of Option A. Nothing in the Side Letter suggests that employees who elected Options B, C, or D did so at the risk of losing all severance benefits. Those options were intended as an opportunity to continue working, which would have made severance payments unnecessary. But employees were not expected to accept the risk of getting nothing if there were no transfer opportunities available. Option A is different. Unlike Options B, C and D, Option A is not tied to job availability elsewhere or to events beyond the parties' control. Rather, it simply increases the economic benefits available under Article 8-C-5. Employees who selected Option A cannot have that choice frustrated by other circumstances. Thus, there would have been no reason to contemplate the possibility that Option A selectees might have to revert to the severance allowance measured by Article 8-C-5.

The Company says, however, that Option A was intended to provide employees with immediate termination of their employment, allowing them to receive a severance benefit and "get on with their lives." But employees did not need Option A to supplant Article 8-C in order to effect a quick separation from the Company. The desire to terminate employment with the Company quickly is not inconsistent with the severance provisions of the BLA. Under those procedures, the employee must be on layoff as a result of a plant closure, but nothing in the Agreement requires that the layoff be for a minimum term. Presumably, the employee would be laid off as of the last day he was scheduled to work, or on the day the plant actually closed. I find nothing in the Agreement that would prevent an employee who is otherwise qualified from requesting his severance allowance shortly after the layoff, and thus terminating his relationship with the Company.

The Company also says Option A is different from Article 8-C because a layoff is not an essential requirement under Option A, but that argument seeks to prove a proposition by restating it. Thus, in order to prove that Option A is independent of the plant closure and layoff benefits of the BLA, the Company says Option A is available regardless of whether an employee was laid off, something Option A does not say expressly. But the question is whether Option A *is* independent of and supplanted Article 8-C, at least for employees who selected Option A. The Company also argues that the management rights clause allows it to impose rules for the administration of Option A. This is correct as far as it goes. The Company can determine how Option A is administered but it cannot use that power to affect the substantive benefits available from the BLA and the Side Letter. The issue here is substantive, not procedural and it cannot be answered by citing the Company's authority to make rules. In this case the Company decided unilaterally that it could pay a severance benefit to employees who had not been laid off. That action stemmed from the Company's belief that Option A was independent from the BLA, particularly the layoff benefits and Article 8-C. As already explained, neither the Side Letter nor the BLA supports that interpretation.

I find no merit in the Company's argument that the Union seeks to gain in arbitration what is was unable to obtain in negotiations. This familiar principle played a significant role in my decision in ArcelorMittal Case No. 31, in which I found that the Company had the right to close the Hennepin, Illinois plant. But in that case, the Union had proposed expressly that the Company agree to keep the Hennepin facility in operation, a commitment the Company refused to make during negotiations. The subsequent arbitration involved a claim by the Union that the Company had impliedly agreed to keep the plant in operation because it made investment commitments for the Hennepin Plant in a side letter. My decision was premised, in part, on the fact that the Company had refused to guarantee continued operation even while the parties negotiated about investment commitments. Thus, I found that the investment commitments were not, of themselves, an agreement to keep the plant in operation.

In the instant case, the Union's initial proposal for Option A was of a different ilk. The Union proposed continued healthcare coverage as if an employee were active for five years, and continued seniority accrual for purposes of gaining retiree benefit eligibility for 5 years. These proposals merely sought to increase benefits already available under the BLA, as did the proposal to increase the severance payment to $3,000 per year of service. Under the BLA, a laid off employee could continue to receive health insurance for up to 30 months, and could continue to accrue continuous service for two years. The Company refused to agree to these improvements and the Union dropped the proposals. But the Union is not trying to regain the withdrawn proposals in this arbitration; rather, it merely seeks to enforce the layoff benefits already contained in the BLA.

Moreover, the language of Option A lends support to the Union's interpretation. The Union was able to obtain an additional year of health care coverage "beyond current coverage eligibility for each affected employee." This had the effect of granting a year of paid medical insurance to employees who accepted the severance payment and terminated their employment with the Company. But if the intent was to limit its application to those circumstances, then there would have been no need to reference "additional" coverage "beyond current coverage eligibility." As Article 8-C-7 makes clear, there *was* no "current coverage" eligibility for employees who accepted severance, so there was no reason to refer to it. If the medical coverage provision of Option A was limited to employees electing severance, all the parties would have needed to say was that employees who selected Option A would receive a year of health insurance coverage. The reference to an additional year beyond "current coverage" seems to apply to employees who already had some coverage eligibility, like laid off employees who could be covered for up to 30 months. Option A added a year to that time period.

I find that Option A of the Side Letter did not replace Article 8-C of the BLA or the layoff benefits available to employees in the event of a layoff due to plant closure. I also find that the Company violated the contract and the Side Letter when it required employees to elect Option A without permitting them to take advantage of their layoff benefits before they claimed severance, with the amounts in Option A replacing the economic provisions of Article 8-C.

The Remedy

As noted in the Background section of this opinion, some employees acted on the Union's advice by electing Option A under protest. Local Union President Fortunato said he gave that advice at a Union meeting attended by 35 to 40 of the 211 bargaining unit employees. He also apparently told other employees the same thing informally. The Company's brief says that only 31 of the 134 employees who selected Option A did so under protest, and that 44 of the

47 employees who selected Option C acted under protest. The Company concludes, then, that the 106 employees who did not write "under protest" on their selection forms rejected the Union's advice and wanted – and still want – the option they selected. Any "reselection remedy", the Company argues, should be limited to those employees who accepted an option under protest. The Company also says that any money already received by employees under the original selection must be returned to the Company, including money received by employees who elected Option A and did not have the required 3 years of seniority needed to receive a severance allowance under Article 8-C-2-a. The Company says the same thing applies to employees who received an Option A payment but had not yet been laid off by a permanent closure, as required by Article 8-C-2-b-2.

The Union argues that it filed the grievance on behalf of "all affected employees." Although some employees did not make their selection under protest, as recommended by the Union, some of them may not have received that advice. In any event, the Union says that anyone who selected an Option would have understood that the Union would seek to protect them if the selection process was improper. The Union also notes that employees made the selections because the Company imposed a deadline not contemplated by the Side Letter, and it required a selection without giving employees accurate information about their actual entitlements under the BLA. All employees are entitled to a make-whole remedy, the Union argues, which includes the ability to apply for layoff benefits under the BLA and the right to select a different option.

I reject the Company's claim that employees waived their right to any remedy when they did not personally protest their selection of an Option. In the first place, they made the selection on the basis of incorrect information. The Company's position was that employees were not entitled to any layoff benefits in the BLA, and it required employees to make elections on that misinterpretation of the Side Letter and the BLA. The Company cannot misinform employees about their options, require that they select an option by a unilaterally imposed deadline, and then claim employees waived the rights the Company improperly denied them. Moreover, one might wonder whether individual employees even had the right to waive BLA provisions. Like the collective bargaining agreement, the Side Letter was negotiated by the Union and the Company, and they are the parties to it. Individual employees benefit from the agreements, but they are not party to them, and it is unlikely that they could change their terms individually, especially when the Side Letter said employees "shall opt for one of the following." But the deal the Company and Union made did not include an option that removed an employee's right to layoff benefits. Any attempt to impose those terms would amount to a modification of the Side Letter's terms, something the Union did not agree to and which employees could not bargain on their own.

I find that the appropriate remedy is make-whole relief for bargaining unit employees, which includes furnishing them with accurate financial information about the effect of the options available under the Side Letter. In addition, bargaining unit employees must be given an opportunity to reselect an option. The make-whole remedy, however, does not apply to employees who selected Option A (or other options) and then retired. Retirement fundamentally changes the employer-employee relationship. Absent fraud – which requires an intention to deceive not present here – I am not willing to undo the fact of retirement.

I will remand the case to the parties for discussions about the appropriate amount of the make-whole remedy, including the layoff benefits available to employees and the treatment of employees who have already received benefits that may have exceeded their entitlement. As the

Company's brief stresses, there may be financial consequences for some employees who have received money for which they did not qualify. Some employees received severance payments even though they had not been laid off. On the surface that would not appear to be a problem because the employees seemingly would have been laid off anyway when the plant closed. But there may be consequences that are not apparent from the record. In addition, Option A apparently did not eliminate the three year service requirement of Article 8-C-2-a. Given the number of employees and the different circumstances, I will retain jurisdiction for a period of 90 days solely for the purposes of resolving disputes about the remedy.

AWARD

The grievance is sustained and a remedy is ordered as explained in the Findings.

Terry A. Bethel
July 1, 2009