IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

ArcelorMittal Case No. 33

And

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010, USW

OPINION AND AWARD

Introduction

This case from the East Chicago Harbor Works concerns the Union's claim that the Company committed a willful violation of the contracting out provisions of the 2008 Agreement, thus justifying a special remedy pursuant to Article 2-F-9-a-1. The case was tried in the Company's offices in East Chicago, Indiana. The parties submitted the case on final argument.

Background

As had other contracts before it, the September 1, 2008 Agreement says

> The Guiding Principle is that the Company will use Employees to perform any and all work which they are or could be capable (in terms of skill and ability) of performing (Bargaining Unit Work), unless the work meets one of the exceptions outlined in Paragraph 2 below.

The instant case concerns the Company's decision to contract out the repair of a mandrel from the 80 inch hot strip mill. The Company does not contest the capability of bargaining unit employees to do this work. Thus, the Company was not free to contract out the work unless it

could prove that it met one of the exceptions in Section 2. The Company acknowledges that it cannot meet any such exception. In fact, it has not ever claimed that the work was covered by an exception. Rather, from the outset the Company knew there was no exception covering the work, and, as a remedy for its contract violation, it offered to pay bargaining unit employees straight time wages for the hours worked by the contractor. Although remedies have taken different forms, as will be discussed below, there is not a significant claim by the Union that the Company has ever paid more than straight time wages to remedy contracting out violations.

In this case, however, the Union contends that the Company's contract violation was intentional, thus justifying the imposition of a special remedy, as provided for in Article 2-F-9-a-1 of the Agreement:

> Where it is found that the Company (a) engaged in conduct which constitutes willful or repeated violations of this Section or (b) violated a cease and desist order previously issued by an arbitrator, the arbitrator shall fashion a remedy or penalty specifically designed to deter the Company's behavior.

Subsection 9-a-2 includes similar language for violations of the Agreement's notice and information requirements. In initial settlement discussions with the Company concerning the violation, the Union asked that bargaining unit employees be paid time-and-one-half for all hours worked by the contractor, reasoning that bargaining unit employees would have done the work on overtime. By the time of the arbitration, however, that Union wanted double time for all hours worked by the contractor.

Thomas Mueller testified about the importance of the 80 inch mill to the Company's operations, particularly in difficult economic times. The mandrel fits inside the coiler that takes the strip from the finishing mill. There are 6 mandrels in total, with three mandrels in operation at one time. There are three spares, but that does not mean there are three mandrels ready to be installed; one or more of them is typically in the rebuild process. Mueller said he likes to have

two mandrels ready to be installed. If a mandrel breaks down and there is no spare, the hot strip mill will continue to operate, but at a slower pace, which results in fewer coils per hour. This is what happened in July 2009, when the Company was reduced to two usable mandrels. Mueller said this situation was "not acceptable." It was the first time in his two years in the hot strip that he had no spare mandrels, he said.

Mike Heaney, Senior Division Manager for Maintenance, testified that he learned of the mandrel situation on July 28, 2009. He called Shops Manager James Stahl and learned that two mandrels were being repaired, with one being machined and the other in strip and advise. Heaney told Stahl to expedite the process, and to make sure this did not happen again. Heaney also told Stahl to send one of the mandrels to a contractor. It was necessary to do this, Heaney said, because employees can only work on one mandrel at a time in the shop, and one mandrel was already in-process in the shop. Heaney testified that there are only 5 or 6 employees who work on mandrels and even if overtime were made available, there would still be only those 5 or 6 employees. Heaney said he told the contracting out committee to follow the proper protocol and send the mandrel out "under the rules." He did not think it was a contracting out violation, he said, given the exigencies. He also said that by July 29, employees were working overtime on the mandrel being repaired in house. They had not been working overtime prior to that.

On cross examination, Heaney said Stahl told him there was not enough room in the shop for two mandrels. Heaney also said it was very expensive to have the strip and advise work done by a contractor, and then have the mandrel returned to the Company for repair. He said the demands of the business influenced his decision, including an inability to meet customer needs with only two operating coilers.

James Stahl, Division Manager for the Shops System, testified that there are 6 MTMs on the fitting floor who can do strip and advise work, although he agreed that more could be trained. There are also about 12 machinists who can work on mandrels. On cross examination, he said employees can only work on one mandrel on the fitting floor at a time because there is no place for a second mandrel. He also said there were other employees with mandrel experience who could do the work, but that would mean taking them off other projects, which would jeopardize that work. But he agreed that employees presently doing mandrel work could do more work on overtime and that in the past, shops employees have worked as many as 72 hours a week. Stahl said if he moved things around in the shop, he could get a second mandrel in the shop, but that would mean taking space away from other projects.

Dave Vittetoe, Manager of Contractor Administration and Company Member of the Bargaining Unit Work Committee, said he learned of the need to contract out a mandrel on July 28 or 29, and then spoke with Union representatives on July 30. Vittetoe said he understood there were economic reasons to send the work out, but the Company did not rely on one of the exceptions. Vittetoe said he told the Union he proposed to settle the case, although he did not provide specifics at that time. Vittetoe met with Union Grievance Committee Chairman Dennis Shattuck on August 5 and Shattuck said the Union wanted time-and a-half for all hours worked by the contractor. Vittetoe said he could not agree to that, and said that was not how such cases were usually settled. He testified that to his knowledge the Company had never paid time-and-a-half. He also said Shattuck did not mention a willful violation during the meeting.

Dennis Shattuck testified Vittetoe approached him and said the Company was going to contract out a mandrel and did not have an exception that allowed it to do so. Shattuck said Vittetoe said he wanted to settle the case, but Shattuck replied that he wanted the bargaining unit

to do the work and he asked why it was being sent out. Vittetoe did not give a detailed reason, Shattuck said. Shattuck said he was unhappy, but told Vittetoe he would get back to him on a settlement. As noted above, the Union believed the bargaining unit could have done the work on overtime, so it asked for time-and-one half for the hours worked by the contractor. Shattuck said Vittetoe was "incredulous" and said he did not have the authority to approve such a settlement. Shortly after meeting with Vittetoe, Shattuck advised the committee members to file a grievance.

Shattuck testified that in contracting out cases the Local Union has consistently argued that bargaining unit employees should do the work and not just get paid for the hours contractors spent doing it. He agreed there had been settlements but he said the "huge majority" of settlements occurred when bargaining unit employees were already working all of the overtime they wanted. Shattuck also said the hours a contractor spends can be speculative and, even though the Company has claimed it was paying straight time as a settlement, often the settlement was just a pool of money. He also said some grievances were settled without money, like getting the Company to agree to add an employee to a crew or buy a piece of equipment so work could be done in-house. On cross examination, Shattuck said he decided to ask for double-time as a remedy after speaking with USW Staff Representative Mike Mezo. Shattuck said the requested remedy is intended to deter the Company from taking such action again. He said this was not the first time the Company had contracted out work without an exception, but the others were resolved. The uncommon aspect of this case, Shattuck said, was that the Company admitted up front there was no exception.

Mike Joseph, Machine Shop Customer Representative for the 80" mill, testified that there were other areas in the machine shop where the Company could have placed another mandrel, and that employees could have worked on it at the same time. Mandrels also come from other

areas in the mill, Joseph said, and he has seen as many as four in the shop at one time. There were three there on the day of the arbitration hearing, he said. He also testified that within the previous six months the Company had recalled a mandrel from a contractor after strip and advise was completed, and the repair work was done in-house. Joseph said employees were not working overtime when there were three operating mandrels, but overtime was available after the failure of one of those mandrels. He agreed that some MTMs had refused overtime on the mandrels, but he said the overtime was worked by another employee. All posted overtime was taken, he said. Machinist Cornell Smith testified that even though only 6 employees were assigned to mandrels, people move around the shop from time to time, so there are other employees in the shop who had worked on them. In fact, he said everyone in the shop had worked on mandrels and were still able to do so.

Positions of the Parties

The Company argues that this is a very narrow case. It has admitted that there was no exception, but it says there was a good business reason to justify its action. Heaney wanted to act quickly to get a spare mandrel, especially given the economic climate. The Company also claims the policy behind the willful violation provision does not apply here. There have been no allegations of willful violations in the past so there is no need to impose a special remedy in order to deter the Company from doing so again. This was, the Company says, "a one shot deal." The Company argues that the Union's demand for double time hours was "vindictive." The Company questions the Union's claim that employees could work on more than one mandrel in the shop at a time, and it also says it would not make sense to suspend other commitments to

work on a mandrel. Finally, the Company says a higher standard must apply to prove a willful violation, and it says its action was not capricious or malicious.

The Union says the Company's action was a deliberate flouting of the Agreement. The only business reason the Company advanced, the Union says, was to get the work done in a hurry. But it could have achieved that same end by having the work done in-house on overtime. And, to the extent money was a factor, this would have been cheaper than paying the contractor to do the work and also paying the bargaining unit employees, even if the remedy was only straight time pay. The Union discounts the Company's assertion that only one mandrel can be worked on at a time and it questions the Company's claim that the decision was compelled by circumstances. Prior to July 28 the Company seemed content to operate with no spares, the Union says; it only contracted out the mandrel after one of the three operating mandrels failed. But a rebuilt mandrel became available on August 7, which returned the mill to a three mandrel operation. The Union also questions whether there was a real emergency because the contractor was still stripping the mandrel a month after having received it. The Union concludes that the Company's action was serious enough to necessitate a special remedy.

Findings and Discussion

There is no real question that the Company committed a willful violation in this case. It is reasonable to conclude that Heaney did not realize there was no exception available when he told Vittetoe to handle the issue, but Vittetoe obviously understood the requirements. Vittetoe even indicated that there was no reason to discuss the issue because the decision had been made, there was no exception, and the only issue was a settlement. I have no reason to question the Company's assertion that it acted in good faith and that its action was neither malicious nor

capricious. But the contract does not say that malice is an element of a willful violation. Moreover, even though it seems likely the Company thought its action was compelled by business exigencies, that alone does not constitute an exception to the Guiding Principle, and arbitrators do not have the power to create exceptions under the basic steel language at issue in this case. The Guiding Principle – formerly called the Basic Prohibition – is quite broad; the Company "will use" bargaining unit employees to perform work they are capable of performing unless the Company establishes one of a limited number of exceptions listed in the contract. The word "capable" does not encompass such criteria as time or expense, but relates only to skill and ability. The bargaining unit was capable of performing the work at issue here and the Company contracted it out knowing that it had no contractual authority to do so. This is sufficient to establish a willful violation.

But the issue in the case is not simply whether there was a willful violation; in addition, I must determine the appropriate remedy for *this* willful violation. The Agreement says an arbitrator is to impose a special remedy – which is understood to mean something beyond the norm – in cases of willful violations. But it does not compel a specific remedy. The Union correctly asserts that the purpose of the special remedy for willful violations is to deter such behavior. The Company describes the decision at issue here as a "one shot deal" and says the Union has not previously charged it with a willful violation. Shattuck testified that there have been other cases where the Company did not have an exception, although it did not admit that fact in advance. I don't question that claim, although the record does not support an inference that there have been other cases where the Company decided to contract out work that it *knew* did not qualify under one of the contractual exceptions, which is what it did here.

The special remedies language has also been an issue at other steel companies. For example, the USS-USW Board of Arbitration has considered repeated violations, as opposed to willful violations, with the Board of Arbitration determining that a pattern of violations was necessary to invoke the special remedy provision. The Union does not rely on repeated violations in this case. Moreover, the language at issue says "willful **or** repeated," thus suggesting that a pattern of willful violations is not required. Nevertheless, the contract also says that the special remedy is intended to deter such actions. This would seem to require an appraisal of how likely it is that there could be future willful violations.

I credit testimony that the Company felt pressured to contract out the work because of the needs of the business. As noted above, the record would not support a finding that the Company has previously contracted out work knowing that it had no right to do so. This lends credibility to the Company's claim that this case was "a one shot deal." In these circumstances, it is not necessary to impose a financial penalty. Given the parties' history, it is enough to remind the Company that it can contract out work only when it meets one of the exceptions in the Agreement, and that in circumstances like these – where the Company knew from the outset that its action could not be justified under the contract – business exigency of itself is not a defense. This is not intended to mean that the Company cannot have a good faith dispute with the Union about the applicability of an exception and, after discussions with the Union, conclude that its action was in error. Willful means, at a minimum, knowing no exception exists when the decision to contract out is made. That was the case here. Although no special remedy is warranted in this case, future violations would make it more difficult for arbitrators to avoid imposing a monetary remedy. In addition, if it has not already done so, the Company is ordered

to remedy its contract violation by paying bargaining unit employees at straight time rates for the work performed by the contractor.

AWARD

The grievance is resolved as explained in the Findings.

Terry A. Bethel
December 21, 2009