IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR WEST

And

ArcelorMittal Case No. 43
Contracting Out, Roll Buggy

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1011, USW

OPINION AND AWARD

Introduction

This case from the Indiana Harbor Works West Plant concerns the Union's contention that the Company improperly contracted out the work of installing hand rails and platforms on the transfer buggy in the 84" hot strip mill. The work occurred on November 12, 13 and 14, 2010. The case was tried in the Company's offices on February 8, 2011. Tim Kinach represented the Company and Bill Carey presented the Union's case. The parties agreed that there were no procedural arbitrability issues. The issue on the merits is whether the parties agreed to allow the Company to contract out this work and, if not, what the remedy should be. The Union also contends the Company committed a notice violation, although it does not seek a penalty.

Background

The starting point in most contracting out cases between these parties is the Guiding Principle found in Article 2-F-1-a:

> 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 normal understanding under this and similar steel industry contracting out clauses is that the Company has the burden of establishing one of the exceptions, assuming the employees are capable of performing the work. In this case, the parties stipulated that the work at issue was bargaining unit work that bargaining unit employees were capable of performing. The Company, however, does not claim it satisfied any exception that would have allowed it to contract out the work. Rather, the Company says the parties agreed the Company could contract out the work, using a procedure they had used often, even before ArcelorMittal owned the plant.

The transfer buggy in the 84" mill is used to transport rolls between the mill and the roll shop. Prior to the work at issue in this case the transfer buggy did not have hand rails. Employees climbed on the transfer buggy to put chains around the rolls so they could be lifted by the overhead crane. In October 2010, employees began to complain about the lack of fall protection on the transfer buggy. The Company's initial response was to prohibit employees from getting on the running board of the transfer buggy, and having them manipulate the chains by using sheppard hooks, a pole 12 to 14 feet long with a curved hook at one end. On the night of February 11, 2010, there was a near miss with an employee using a sheppard hook, when a craneman moved the trolley and pulled him off the ground. The employee let go of the sheppard hook and apparently was not injured. Robert Smundin, Section Manager of Maintenance at the 84" Hot Strip Mill, said he learned a similar event involving another employee had occurred earlier. Smundin said he decided it was necessary to address the safety issue created by the lack of fall protection on the buggy.

Management had already scheduled an outage for the 84" mill for November 14 to 16. Smundin said he had planned to have bargaining unit employees install handrails in two previous downturns, but they ran out of time. However, Smundin had not planned any work on the transfer buggy in the November 14-16 outage. Smundin attended a meeting in the department at 6:30 a.m. on November 12. At 7:00 a.m., Smundin called the general foreman at The American Group of Constructors (TAG) and asked him to "take a look" at the buggy. TAG representatives were apparently on-site at about 7:00 a.m. that day to discuss another project, so Smundin was able to meet with them early. Smundin says he typically finds out if the contractor can do the work before he approaches the Union. There is no dispute that, notwithstanding the contracting out procedure outlined in the contract, the parties have a practice of meeting informally and agreeing (or not agreeing) that the Company can contract out certain work. The Company says – and the Union did not disagree – that the parties do not want a "legislative ruling" about the practice. I understood this to mean that neither party wants a ruling about whether their informal practice is consistent with the contract, or whether they can continue to use it. Rather, they ask only whether there was actually an agreement in this case.

Smundin left the meeting at about 8:00 a.m., he said, and encountered Terry Mikula, an MTM in the 84" hot strip and Union Co-Chairman of the Bargaining Unit Work Committee (previously called the contracting out committee). Smundin said he approached Mikula and said he would like to have a contractor install hand rails and lowered platforms (which the parties also call "grating") on the buggies during the upcoming outage. The grating was to be lower than the existing platform on the buggy. According to Smundin, Mikula commented that it was a safety issue and then "moved his head from side to side and said, 'Ok, go ahead and go outside.'" This was the entire conversation, Smundin said. He also testified that he and Mikula

had made agreements like this in the past. Smundin said he went to the roll shop about 2:00 or 2:30 p.m. the same day and saw the employee who had been involved in the near miss. Smundin had sought him out to tell him a contractor was going to do the work. A nearby employee commented that is was good that the Company was addressing the problem. That employee had sketches outlining what needed to be done. The employee gave them to Smundin, who gave them to the contractor.

Smundin said later the same day at about 6:00 p.m. he and Division Manager Dan Brown were in the shanty and told some employees the Company was going to have a contractor do the work. One of the MTMs became upset and Smundin told him Mikula had already agreed the Company could use a contractor. The employee then said, "that's our Union, they gave it away." By this time, Smundin said, the Company had already given the work to the contractor and the contractor had already started fabricating the hand rails. The next morning (Saturday), Mikula called Smundin and said he had not agreed to have the work contracted out. Smundin disagreed and told Mikula he couldn't pull the contractor off the job because the Company could not man the job with MTMs during the outage.

On cross examination Smundin said he didn't have the employee sketches when he spoke to Mikula on Friday morning. He had some of his own sketches, but he didn't show them to Mikula; rather, he described what the work would entail. He also agreed that he and the hot strip griever had discussed how they might keep the work in-house. Smundin said he had planned to have the work done by bargaining unit MTMs, but that was before he learned of the near miss. At that point, he thought the work needed to get done during the outage, but he did not have sufficient bargaining unit employees to do it. Smundin said he had been in the department for 16 months, and it was common to reach agreements like the one at issue here. He agreed that the

procedure after an agreement is reached is to notify the Planner, who prepares an emergency contracting out notice, usually on the same day. Smundin said he is not familiar with the procedure the Planner uses once an agreement is reached, but he thought the Planner gave the Union a contracting out notice.

The Union submitted an exhibit indicating that two TAG representatives were at the plant at 7:00 a.m. on November 12. There was some discussion of another project, but the time sheet shows that the two employees spent a total of 14 hours on the transfer car project. The Union points out that the 7:00 a.m. starting time was before Smundin met with Mikula about the work. Smundin said he typically meets with a contractor before approaching the Union, and that he was confident that if Mikula had not agreed to contract out the work, TAG would not have billed him for the time spent. Smundin said all MTMs were assigned to a project for the outage and he also offered overtime, Smundin said he called 22 employees, 11 of whom accepted the overtime work. He stopped then, he said, because he already had an agreement with the Union to contract out the transfer car work.

David Vittetoe was a manager involved in contracting out administration at the time the instant case arose. He described, generally, the system the parties used for contracting out notification on the West Side, which involved allowing bargaining unit employees to examine a computer system called Tab Ware that listed contracting out proposals from the Company. The parties had agreed this was proper notification, although the Union objected to it after an arbitration decision for the East Side that said Tab Ware did not satisfy the Company's notification obligation under the contract. Following the arbitration decision, the East Side parties agreed the Company could continue to use Tab Ware, but the Company would also send the Union a pdf e-mail as notification. The West Side parties adopted the same system, which

was implemented in October 2010. Prior to that, the parties had created a Contracting Out Subcommittee, which consisted of about 7 bargaining unit employees, including Mikula, who reviewed Tab Ware for contracting out projects in their departments. The Subcommittee members were authorized to make deals at the department level. If they did so, then the regular contracting out committee typically did not get involved. These agreements, Vittetoe said, were not always in writing.

Vittetoe testified that contracting out notices to Subcommittee members was often a verbal discussion. Once agreement was reached, a requisition had to be entered into the Tab Ware system. That document has a check box for "notification" that forwards a copy of the requisition to the Union. This is the pdf copy procedure the parties began in October 2010. It was common, Vittetoe said, for notices to be sent after the work had already begun, especially in rush or emergency jobs. On cross examination, Vittetoe agreed that the Union did not receive the pdf copy in this case.

Mikula said he met briefly with Smundin in front of the canteen on November 12, although it was in midday, not early in the morning. Smundin said he wanted to use contractors for the buggies, and Mikula replied he hadn't known Smundin planned to work on them during the outage. According to Mikula, Smundin said he wanted to install temporary handrails, and planned to do so by using temporary scaffolding alongside the buggy. Mikula said he told Smundin he didn't care if the work was to be temporary, but if it was to be permanent, then the Company would have to use bargaining unit employees. Mikula testified that he had been assigned to burn the stairs off the buggies about two weeks previously to keep employees off the buggies. The stairs would have to be reattached, he said, once the handrails were in place. But Smundin had not mentioned the stairs as part of the work the contractor would do, which Mikula

says supported his belief that the work to be contracted out was just a temporary solution. Mikula said bargaining unit employees could have installed permanent handrails and grating on overtime, or even when the mill was operating. On cross examination Mikula said he didn't know how the temporary handrails would work, and he didn't ask because it was to be a temporary fix. He also said he wasn't sure how the temporary scaffolding would work; all he heard, he said, was the word "temporary."

Mikula disagreed with the Company's contention that the handrails were temporary because they simply fit into pipe nipples, and could be taken out. He said there was a strap (a short piece of flat steel) welded between the rail sections. Mikula said he did not agree to installing the lowered platforms, although he acknowledged they would be necessary to install the handrails, unless the contractor used temporary scaffolding. Mikula said no employees complained to him about the agreement on Friday, November 12, but there were complaints on Saturday morning. Mikula said he asked the contractor what his employees were doing and learned that they were putting on lowered platforms. This exceeded the deal he and Smundin had made, Mikula said, so he called Smundin to complain. He said he had made deals like this one in the past, and this was the first time in 15 years there had been a problem.

Positions of the Parties

The only issue, the Union says, is whether the parties agreed the Company could contract out the installation of lowered platforms and permanent handrails. There was never a meeting of the minds, the Union says; the Company was talking about permanent handrails and grating, and the Union agreed to installing temporary handrails by using temporary scaffolding. The Union also points to Smundin's testimony that before he ever approached Mikula, Smundin had talked

to the hot strip mill griever about the work, and the griever said the Company had to have the work done by bargaining unit employees. The Union also says the Company did not provide proper notice, as required by the contract. The Company was supposed to provide notice before the work was started, but that did not happen. The contractor, in fact, began working on November 12 at 7:00 a.m., which was before Smundin even talked to Mikula. The Union says it is the Company's burden to demonstrate there was an agreement to contract out the work, which it could not do in this case. When the Company shortcuts the procedure, the Union says, the Company takes the risk of a failure to agree. The Union asks for make-whole relief for 577 hours of work performed by the contractor.

What is at issue in this case, the Company argues, is credibility. The parties have used a procedure that allows the Company and a contracting out subcommittee member – like Mikula – to agree to contract out work. The Union cannot insist that the contract procedures be followed without giving prior notice the Company says. And if the Union expects the Company to use the notification procedure in the contract, then it is bound by the contract provisions, too. But the Company points out that the Union did not file a grievance over the notice issue, as contemplated in such cases by Article 2-F-5-c. The Company says Mikula agreed to contract out the work, but now claims he did not know how the work would be done. Moreover, the Company asks how Mikula expected that handrails could be installed without first installing the lowered platforms. The Company says there are unanswered questions about how the temporary scaffolding would work.

In reply, the Union said the lowered platforms would not have been an issue because the handrails would have been installed by using temporary scaffolding. Mikula testified that he did

not understand how the temporary scaffolding would work, but he knew the contractor understood how to use it.

Findings and Discussion

Although the Union introduced evidence about the Company's failure to consider having bargaining unit employees perform the work on overtime, that is not an issue in the case. As noted above, the Guiding Principle (previously called the Basic Assumption) in contracting out cases is that bargaining unit members will perform work they are capable of performing. The word "capable" does not mean "available"; rather, it asks whether the work is of the kind bargaining unit employees have the skills and ability to do. The unavailability of manpower is a factor in one of the exceptions in Article 2-F-2, but the Company has not claimed that any exceptions apply in this case. The sole issue, then, is whether there was an agreement to allow the Company to contract out this work; if not, then the Guiding Principle controls.

I agree with the Union's contention – not really contested by the Company – that the Company has the burden of proof. Once the parties stipulated that bargaining unit employees were capable of performing the work, it became the Company's burden to escape application of the Guiding Principle, which it seeks to do by proving the parties reached an agreement to contract out the work. The Company says this case is simply a matter of credibility – either Smundin correctly described the conversation, or Mikula did. No one can know exactly what the two men said to each other and, as sometimes happens in cases like this, each may have misunderstood the other. It was obviously reasonable for Smundin to want the work done quickly, especially given the second near miss the previous day. But the need to act quickly would also be relevant to Mikula's understanding if he thought the Company wanted to remove

the hazard by installing a temporary fix. The point is that this case does not necessarily compel a finding that either Smundin or Mikula is lying.

Oral agreements are often hard to prove, which creates problems for the party that must establish the agreement. Compounding the problem in this case is the lack of any other witness to the conversation. Moreover, for some reason the Company's system did not send a copy of the requisition to the Union, which the parties treat as a contracting out notice. This means the parties lost another opportunity to clarify exactly what the contractor would do. It is also worth noting that Smundin had previously spoken with the griever about the permanent improvements, and the griever said the Company would have to use bargaining unit employees. That would not have prevented the parties from making an agreement to contract out the work during an emergency, but it provided incentive for Smundin to insure there was no ambiguity in what was agreed to.

Ultimately, I am not able to find that the Company proved there was an agreement that allowed the Company to contract out the installation of permanent platforms and handrails. Thus, the Company violated the Guiding Principle when it did so. The Company also violated the notice provisions of Article 2-F-5. This is not to suggest that the parties are precluded from giving oral notice, as has been done in the past. But the parties also agreed that the Company would provide the Union with a copy of the requisition, which did not happen here. There is no reason to believe this was intentional or the result of bad faith. Thus, no remedy is warranted for the lack of notice. However, the Union is entitled to a remedy for the work itself. The Union says the bargaining unit is entitled to be paid for 577 hours of work, which is the number of hours worked by contractor employees. But there was not enough evidence to allow me to frame a remedy. Thus, I will order make-whole relief and remand the case to the parties for

determination of the number of hours bargaining unit employees would have worked, and the amount of money to be awarded. I will retain jurisdiction over the remedy issue in the event the parties cannot agree to the amount due.

AWARD

The grievance is sustained. The Company will provide make-whole relief as explained in the last paragraph of the Findings. I will retain jurisdiction to resolve disputes over issues with respect to the remedy.

s/Terry A. Bethel
Terry A. Bethel
April 20, 2011