

IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

ArcelorMittal Case No. 54

And

UNITED STEELWORKERS  
INTERNATIONAL UNION AND  
LOCAL UNION 1010, USW

OPINION AND AWARD

Introduction

This case from Indiana Harbor Works East concerns the Union's claim that the Company failed to post permanent vacancies in the warehouse person occupation box in the No. 3 Cold Strip LOP. The case was tried in the Company's offices on March 5, 2012. Tim Kinach represented the Company and Bill Carey presented the Union's case. There were no arbitrability issues and the parties agreed that the case is properly in arbitration. They also agreed that the issue on the merits is whether the vacancies at issue were permanent or temporary. In the event I decide the case for the Union, the Union asks that I order the Company to post permanent vacancies; the Company denies that such an order would be appropriate. The parties submitted the case on final argument.

Background

The No. 3 Cold Strip LOP includes a one-box branch for Service Technician, Labor Grade 2. Although the parties have abolished traditional job classification titles in favor of six

classifications (of which Service Technician is one), they often refer to job assignments by traditional classification names. I will do so in this case while recognizing that the classification of warehouseman no longer exists, but simply represents an assignment within the box. The Union filed the grievance in this case on November 19, 2010, protesting the Company's decision to assign two laborers to work as warehouse persons in the No. 76 warehouse. The Company contends that the two employees are working in temporary vacancies. The parties stipulated that the two employees have worked continuously in the warehouse since their initial assignment.

The Company called Robert Dicianni, a Manager in the Marketing Department with 33 year of experience. He gave a detailed review of the state of the steel industry following the sudden downturn beginning in October 2008. Prior to that time steel companies were running at full capacity, and shipping as much as 1.2 million tons a month. But in October, November and December 2008, they shipped about 650,000 tons a month. By December 2008, Dicianni said, utilization had fallen to 33%, the fastest drop in American history. In 2009, the industry production was only 563 million tons. ArcelorMittal shipped 13.6 million tons in 2008, and fell to 7.2 million tons in 2009. The picture was equally bleak for steel companies in developed countries worldwide. Dicianni said Indiana Harbor Works was affected by the decline in demand for appliances and cars, two of the Company's principal sources of business. He also presented a brief overview of several industries that use significant amounts of steel. I need not recite that presentation in detail. In general, the car market has improved since the depth of the recession, but is still a long way from its pre-recession production. The same is true of appliances and freight cars. Indiana Harbor Works West has benefited from a good recovery in the energy market. On the whole, Dicianni said, the picture has improved, but the economy is

still fragile and could be put back into recession, especially in the event of a war in the Persian Gulf.

Charles Mauder, Division Manager of Services and Spares, said there are about 300 employees in the No. 3 Cold Strip LOP. The warehouse employees manage the spare parts inventory, which includes ordering, receiving, stocking and distribution. The number of employees in the warehouse has declined in recent years from 19 to 9, which is the current number. All of the reductions were from attrition, Mauder said. The two temporary employees began work in the warehouse in November 2010, but are not filling permanent vacancies. The Company has not posted permanent vacancies, Mauder said, because there aren't any. Mauder said if the two temporary positions were posted as permanent, then in the event of a reduction, employees who bid into the vacancies might displace experienced warehouse workers who have less seniority. This helped influence the Company's decision that the vacancies were temporary, Mauder said. In addition, he said filling the vacancies could cause a ripple effect throughout the LOP and could even result in hiring new employees. Given the current economic climate, Mauder said, it does not make sense to consider the vacancies to be permanent.

On cross examination Mauder said the two employees have worked five days a week for over a year because they are working on the managed inventory project, which involves identifying common spares and moving them to the warehouse. The project has been underway for three or four years. Mauder said he planned to keep the temporary employees until the project is completed. He said he did not know how long that would take, and that some projects take years to finish. The Union directed Mauder to the second step minutes, which say Mauder submitted a request to fill the vacancies, which had been denied. Mauder testified that the decision not to post for permanent vacancies was made at a higher level and conveyed to him by

his supervisor, Mike Haney. He also agreed that the Company had posted for permanent vacancies in 2009, and had added two employees to the warehouse in the spring of 2010.

The Union called Rick Fisher, a Warehouseman in Central Spares East 76 Warehouse. All of the employees in the warehouse do the same work, Fisher said, including the two temporary employees. According to Fisher, the temporary employees were not working on a project but, like everyone else, were simply managing the spares. On cross examination, Fisher said he did not know anything about the managed inventory project Mauder referred to in his testimony. He said for the last couple of years he had been involved in moving spares to 76 warehouse from outlying areas and satellite warehouses. But that is a continuous process, he said, and he had never heard it called a “project.” Dennis Shattuck, Chairman of the Grievance Committee, said the Company had filled temporary vacancies without objection from the Union when there was a temporary spike, as happened in the 12” mill some years ago. In addition, Shattuck said a couple of years ago the Company temporarily increased the amount of production in annealing and it used temporary employees to do that work. He agreed that the Company had appropriately used temporary employees on some special projects. He also said a permanent vacancy is one that is “going to last.”

On rebuttal, Mauder responded to Fisher’s testimony that there are no projects in the warehouse. He said the managed inventory project started in the 2007-08 time frame, and was intended to identify common spares and move them to a managed warehouse. There had been plans for a central receiving location, meaning that all shipments coming to the plant would go to one point. Ultimately the Company abandoned the central-point-receiving part of the project, but it is still moving spares into the warehouse. Since 2008, the number of warehousemen has reduced from 19 to 9 because of the efficiencies gained by the management system. There are

now fewer parts to move, he said, because many of them have been taken into the warehouse. The two temporary employees work on the project, Mauder said, and can be assisted by the other employees on the shift. The temporary employees also unload trucks and put parts away, which is part of the project. He agreed on cross examination that it was fair to say all of the work performed at the 76 warehouse was part of the managed inventory project. He said he could not predict an ending date for the project. Mauder also acknowledged that there is no mention of using the temporary employees on a project in either the second step or third step minutes.

### Position of the Parties

The Company says the recession that began in 2008 created the worst economic conditions since the great depression. The Company does not claim it can call any vacancy temporary; however, whether a vacancy is permanent or temporary depends on the circumstances, including the possible effect on the LOP. The effect here, the Company says, is that in uncertain economic times it is reasonable to believe another recession could cause a falloff in production, leading to a reduction in the number of employees in the warehouse. This could mean that experienced employees would leave the warehouse in favor of employees with more seniority but very little warehouse experience. The Company says when economic conditions improve, if it needs more employees in the warehouse it will post permanent vacancies. But in the current climate it makes no sense to do that.

The Union says the two temporary employees have worked in the warehouse without interruption since November 2010. There is no definite ending date for the work and there are no special circumstances. The Union notes that in the grievance procedure the Company claimed it did not have to post vacancies because it had modified the work; but it abandoned that

argument in arbitration, and for the first time claimed the temporary employees were working on a special project. The project, the Union says, has been going on for five years, and is the work all of the employees perform on a daily basis. The two temporary who are allegedly working on a project are, in fact, doing the same work as the other employees in the department. The Union also points out that the Company did not introduce any documentary evidence about the project. The real reason the Company has not posted the job, the Union argues, is that the Company did not want to hire other employees, and did not want to risk the domino effect that bidding can create. But, the Union says, those possibilities do not change the seniority sections of the Agreement. Finally, the Union cites several steel industry cases in which arbitrators have distinguished between temporary and permanent vacancies.

### Findings and Discussion

Although some of the arbitration cases the Union cites define temporary positions, in part, as being of short duration, it is conceivable that a temporary vacancy might extend more than a few weeks or months, as when an employee replaces an injured coworker who is expected to return. Moreover, it could be, as the Company says, that an employee working on a special project filled only a temporary vacancy. But neither of those scenarios is present in this case. The two temporary employees began work after other employees retired and as of the time of the arbitration hearing, they had worked in the same positions on a daily basis for about sixteen months. Mauder acknowledged that even though he expected the managed inventory project to end, he could not say when that would happen. However, the fact that a project will end at some point does not mean the employees who work on it are filling temporary vacancies.

Steel industry arbitrators have recognized that an assignment of indefinite duration can be a permanent vacancy. Thus, in *Republic Steel Decision No. 25*, the arbitrator noted that “indefinite vacancies have generally been viewed as permanent.” The rationale, the arbitrator said, was that “relatively few jobs are assuredly permanent in the ordinary sense of the word.” And in *Youngstown Sheet and Tube Decision No. RM-296*, Arbitrator Richard Mittenthal said a vacancy is permanent “where it is intended to continue for an indefinite period.” This, he said, is the “common sense industrial relations meaning” of the word.<sup>1</sup>

I understand the Company’s concern about the economy and the slow rate of recovery from the recession. But I agree with Arbitrator Ralph Seward’s observation in a Bethlehem Steel case (cited in *Republic Steel Corp. Decision No. 304*) that whether vacancies are temporary or permanent is not merely a matter of management discretion. Rather, it is a question of fact. The harsh realities of the industry beginning in late 2008 have understandably caused concern about what appears to be a fragile recovery. But the good faith concern expressed by the Company in this case does not mean it can suspend its obligations under the Agreement. The economic uncertainty no doubt influences the way the Company makes decisions about both day-to-day and long term issues. However, collective bargaining agreements sometimes impose requirements that cannot be avoided simply because the Company believes another course of action would be more prudent. In the instant case, permanent vacancies cannot be considered temporary because of the possibility of another recession, or because of the Company’s concern that seniority rights might affect the LOP.

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<sup>1</sup> The Company dismissed the cases the Union submitted because all of them were decided before the effective date of the current Agreement and, in fact, before the structure of the Agreement changed significantly in 2003. But the current Agreement preserves a distinction between permanent and temporary vacancies, and prior decisions are relevant to how the parties have used those terms, especially in the absence of evidence that the parties intended to change the meaning of the terms in the current Agreement.

The facts in this case convince me that the temporary employees are working in permanent vacancies. The employees have worked on the same jobs for sixteen months and are expected to continue in those positions indefinitely. Equally important, the Company did not rebut Union testimony that the two employees do the same work as everyone else. This is not to suggest that the managed inventory system did not change the way work is performed and spares are maintained. But the fact that the system has changed or is changing does not mean that everyone who spends his day looking for spares, unloading trucks, and managing the inventory is working on a special project. Mauder said on cross examination that any of the work performed in the warehouse could be considered working on the project. However, in the absence of a temporary spike in the amount of work available – and there is no evidence of that here – there is no way to differentiate between temporary and permanent jobs when all of the employees do the same work. They may be working in a new way or under a new methodology, but “new” does not mean “temporary.”

The facts convince me that the two temporary employees were improperly assigned to permanent vacancies that the Company was required to post. Moreover, Murdock said he planned to keep employees working in those positions for an indefinite period. These are permanent vacancies that the Company must post. The Union also asked for make-whole relief. As is typically the case, there is no evidence about which employees are entitled to a remedy, or whether employees who may have bid on the jobs suffered any financial loss, especially since the warehouse person assignment is a Labor Grade 2 job. Thus, I will remand the case to the parties for discussion of the remedy. If they cannot resolve the issue, then they can resubmit it for decision.



AWARD

The grievance is sustained. The Company is directed to take the actions specified in the last paragraph of the Findings.

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Terry A. Bethel  
May 3, 2012