IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
GEORGETOWN, S.C. PLANT

And ArcelorMittal Case No. 62

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 7898, USW

OPINION AND AWARD

Introduction

This case from the Georgetown Plant concerns the Union's claim that it secured the right to grieve the production aspect of the Gain Sharing Plan agreed to during negotiations to reopen the plant. The case was tried in Georgetown, South Carolina on June 4, 2013. Eric Schweitzer represented the Company and Mark Shaw presented the Union's case. There are no procedural arbitrability issues. I will discuss the issue on the merits in the body of the opinion. The parties submitted the case on final argument.

Background

The Company closed the Georgetown Plant in mid-2009 following the economic meltdown in late 2008, which had dire effects on the steel industry. The parties negotiated about reopening the plant and, on August 23, 2010, signed a Memorandum of Agreement (MOA) modifying certain terms of the 2008 Basic Labor Agreement (BLA) as they applied to the

Georgetown facility, including a $3 per hour wage reduction. The parties also agreed to terms outlining a new gain sharing plan in Section II B of the MOA, which says, in relevant part:

> Beginning January 1, 2011, or 6 months after restart, whichever occurs last, a Monthly Gain Sharing Plan for a 20% opportunity at target (Bonus) will be established for the Georgetown Facility consisting of:
>
> a. One-third of the Bonus to be comprised of the Production Incentive Plan at Attachment A.
>
> b. One-third of the Bonus to be comprised of the Transformation Costs/ton compared to an agreed upon Key Performance target (KPT) regarding the following:
> ...
>
> c. One-third of the Bonus to be comprised of a quality measurement compared to an agreed upon KPT.
>
> d. The parties will develop a KPT for b. and c., using the following factors: (1) base time period should be a representative time period; (2) reflect equipment capability, repair and maintenance and capital expenditures; (3) provide for continuous improvement; (4) be fair and reasonable to both the Employees and the company. If the parties have not agreed upon the KPTs by December 15, 2010, or six months after re-start, the Company may promptly implement a plan, and the Employees shall give the plan a fair trial. If, after 90 days, the union believes the implemented Plan does not allow for the attainment of the stated goals of this section in a fair and representative manner, a grievance may be filed.

The parties agree that the grievance language in Section II-B-d of the MOA applies only when the Company implements a plan unilaterally after the parties were unable to agree to KPTs for the transformation costs and quality elements of the plan. The language does not apply to disputes over the productivity element in subparagraph a.

Dino Spiridis, the Company's Manager of Labor Economics, testified that he developed the gain sharing plan draft after the parties signed the MOA. The parties discussed the draft and reached agreement on its terms, as reflected in a document signed on June 16, 2011. The

agreement said, among other things, that the production target for the first 6 months (ending December 31, 2011) was 22 heats-per-day, and that the number would rise to 24 heats-per-day beginning January 1, 2012. This is an attainable number, Spiridis said. One purpose of the gain sharing plan is to foster a "culture of continuous improvement," he said, so that employees have to strive to meet their targets.

The Union's complaint in this case is that 24 heats-per-day is unattainable on a consistent basis, which denies the employees a fair opportunity for a 20% payout. The Union acknowledges that it agreed to 24 heats-per-day in the discussions that followed the MOA, but it says it did so only after the Company agreed to a letter dated June 16, 2011, and signed by Dennis Arouca, then-Vice President Labor Relations for ArcelorMittal, and James Sanderson, President of Local Union 7898. In relevant part the letter says:

> This will confirm our understandings in connection with Section II B. of the August 23, 2010 Memorandum of Agreement and the Gain Sharing program agreed to by the parties on this date. The union supports the Gain Sharing program. If, beginning in January 2012, the union believes the productivity element of the Steelmaking aspect of the program does not allow for attainment of the stated goals of the Part II B. of the MOA, the union may file a grievance. (underlining added)

The Union says it would not have agreed to the gain sharing program without the underscored language, and it says the grievances at issue in this case are intended to compel an order to the Company to meet and bargain an appropriate number of heats per day.

In its cross examination of Local Union President James Sanderson – who identified the June 16 letter – the Company pointed to Article 5-I-4-c of the BLA, which says:

> At each step of the grievance procedure the parties shall provide a full and detailed statement of the facts and provisions of the Agreement relied upon and the grieving party shall provide the remedy sought. Facts, provisions or remedies not disclosed at or prior to Step 3 of the grievance procedure may not be presented in arbitration.

Sanderson agreed that the letter had not been presented in the grievance procedure prior to the arbitration hearing.

Union witness Sam Thomas, a Technician from the Union's International Headquarters in Pittsburgh, said the Union made it clear in negotiations that it did not agree with the 24 heat target. The June 16, 2011 letter was part of an agreement that the parties would go through a transition period and then review data on the number of heats to determine whether the target was attainable. The parties understood, he said, that the Union could challenge the 24 heat target if it believed the data showed the target was unrealistic. They even set a December date for a meeting to review the data, although the parties did not meet. There was another meeting scheduled in January, but only the Union attended; the Company did not show up and did not inform the Union that it did not plan to attend the meeting. However, the parties did meet during contract negotiations in August 2012, and discussed problems the Union raised. This resulted in a modification to the way energy consumption was measured, but did not change the 24 heat requirement. On cross examination, Thomas acknowledged that he had met with Spiridis in December 2011.

The Union agrees that there are days when it meets the 24 heat target, but those are fairly rare – a Union witness called them a "perfect storm" – in part because of the age and condition of the equipment; meeting the target puts a strain on the equipment, the witness said, making it more likely it will break down in the next day or so. The same witness said there are other problems that impeded achieving the 24 heat target, including the quality of the scrap, which can slow the process, and scheduling issues. In 2012, the employees averaged 21.42 heats per day and managed 24 heats on only 53 of 266 operating days. The average in 2013 as of the time of the hearing was 22.20 heats-per-day. The Union also voiced concern about missed heats, as they

call heats that don't meet Company specifications. These do not count as one of the 24 heats per day, even if the Company is able to sell them to a customer at prime.

Spiridis said the goal of the plan is to allow a 20% opportunity at target, although employees still receive a payout even if they miss the 20% goal, i.e., if they are at 17%, the payout is 17%. Overall, Spiridis said, there is an upward trend and the plan has been working well, but he said the plan was not designed to insure that employees would meet the 20% opportunity every month. He said his figures showed the employees had met the 24 heat per day target more than 53 times in 2012. The plan paid 14% in 2012, and the levels were about 17% in 2013. The levels would also have been about 17% in 2012, had there not been production problems that summer.

Matt Matthew, Operations Manager, discussed the summer 2012 operations problems in detail, all of which, he said, were caused by employee error and could have been avoided. Thus, the Company says scrap quality and other issues are not the sole cause for missing the target. The Company says the 24 heats-per-day target provides incentive for employees to avoid errors as a way of increasing their payout. The Company also points to Section II-B-d-(2), quoted above, that says the parties took the condition of the equipment into account when they agreed to 24 heats. Danie Devapiriam, General Manager, said the plant has been losing money and that 24 heats per day are essential to its survival. The Company would not have agreed to restart the plant if the Union had not agreed to 24 heats.

The Union says the facts show that it was skeptical of the 24 heat target during negotiations and that it agreed to that number only with a written assurance that it could grieve the requirement if a fair trial did not establish that the goal was attainable. The Union says the evidence shows that its skepticism was well-placed; the employees have seldom met the target,

which can be attained only rarely. The Union was also unaware in bargaining that the Company would count a heat as a missed heat even if it sold the product at prime. The 24 heats-per-day target is unrealistic, the Union says, and the remedy should be to require the parties to meet and agree on a reasonable target. The Union also says employees should be paid at the 20% rate retroactively and prospectively until an agreement is made.

The Company says it has not made money since reopening the plant and that it continues to lose "huge amounts" of money. The 24 heats-per-day target is essential to the Company's survival. The Company also argues that the gain sharing plan is working; employees have been getting payouts in the 17% range, which is close to the 20% target. Moreover, poor workmanship and inattention have hampered production on numerous occasions. The 20% opportunity is not guaranteed; it is intended to be a challenge and demands a higher level of performance than employees have managed in the past. The plant can be turned around only if there is a team effort, the Company says, and lowering production goals will not serve that purpose.

Findings and Discussion

As noted above, the parties agree that the grievance language in Section II-B-d does not apply to production criteria. The Company also says the BLA allows modification of contract terms (here, the 24 heats-per-day provision in the Gain Share Agreement) only in the event of unilateral action; but the parties agreed to the heat-per-turn number, meaning there was no unilateral action in this case. At base, this is a substantive arbitrability issue: the grievance clause in Section II-B-d excludes the production factor, which reflects the parties' understanding that the heat-per-day agreement could not be challenged under that language. If the Union pointed to Section II-B-d as its justification for filing the grievance, the Company's position would prevail; the language (as interpreted by both parties) does not apply to the kind of

grievance at issue in this case. But the Union did not grieve under Section II-B-d; rather, it relied on the June 16, 2011 letter, quoted above on page 3, which says the Union could grieve if by January 2012 it believed the productivity standard did not allow employees a 20% payout opportunity.

In its cross examination of Union President Sanderson, the Company pointed out that Article 5-I-4-c of the BLA requires the parties to disclose the "facts and provisions" relied on in the grievance procedure, and that a failure to do so precludes their use in arbitration. The Union agreed that it did not give the Company a copy of the June 16 letter in the grievance procedure. The letter was executed the same day as the MOA, and says specifically that it confirms the parties' understanding of the gain sharing portion of that document. It is fair, then, to consider the letter to be part of, or an addendum to, the MOA, which amended the BLA. This means the June 16 letter that allows the Union to grieve the production criteria in the gain sharing agreement is part of the contract that covers Georgetown bargaining unit employees. The parties are bound by the contract terms they agreed to. The Company did not claim that plant management was unaware of the letter or its provisions; nor did the Company contend that the 24 heat-per-day standard was not discussed in the grievance procedure. In these circumstances, I find it was appropriate for the Union to ground its position in arbitration on the June 16 letter.

The June 16 letter says clearly that the Union retained the right to grieve the production standards. What is does not address, however, is the scope of the grievance or the kind of relief the Union can seek. No guidance about the parties' intent can be gleaned from the grievance language in II-B-d because, like the June 16 letter, it simply says the Union can grieve the standards (albeit not ones the parties agreed to) if it believes they unfairly impede attainment of the standard. The parties submitted evidence about the difficulty of achieving 24 heats-per-day,

as well as divergent explanations about the cause, such as old equipment and employee error. But despite that evidence, the Union said at the beginning of the hearing and again in its final argument that its purpose in arbitrating the case was to force the Company to bargain about the productivity standard, and not to have it determined by the arbitrator. The Company did not argue that the Union's objective in the case was inappropriate, although it is fair to observe that the Company's focus was defending the 24 heats-per-day target.

I am reluctant to expand the moving party's purpose in a case, especially in situations like this, where the issue submitted is narrow and does not require a resolution of the standard. The Union's approach to the case is not inconsistent with the arbitration language which, as already noted, does not explain what could be challenged by the grievance. The fact that the grievance language might embrace a grievance (and subsequent arbitration) over the reasonableness of the 24 heats-per-day standard does not mean it cannot also include more modest aims. An arbitration seeking an order to resume bargaining over the standard fits within the ambit of the letter's grievance language. There was no dispute that the Union expressed reservations about the 24 heat target in negotiations over the June 16 gain sharing agreement, which led to the June 16 letter. Nothing in the letter precludes a grievance seeking further negotiations about the standard.

This is not to suggest that the June 16 letter allowed the Union to file a grievance simply to obtain a lower standard. The letter says expressly that a grievance is permitted only if the Union believes the heats-per-day standard "does not allow for the attainment of the stated goals" of the MOA. The Union's evidence was sufficient to prove its good faith belief that the production standard is unattainable. This is not intended to say that the Union's belief is correct; however, it does satisfy the criterion the parties agreed to for filing a grievance. In these

circumstances I find that the Union's grievance has merit and I will order the parties to meet and bargain in good faith about the number of heats per day in the productivity element of the gain sharing program. This decision should not be understood to reflect an opinion about what the number should be.

The Union asks that I order the Company to pay at the 20% rate retroactively to January 2012, and prospectively during the parties' negotiations. The Union's original grievance was filed on January 31, 2012, which is the point from which a new standard could be applied if the parties agree to change the number. But requiring back pay to that date at this point deprives the parties of the opportunity to use that time period as leverage in structuring a settlement. The same can be said of an order covering the negotiation period. Finally, it is important for the parties to minimize the delay that sometimes accompanies negotiations. Thus, I will order the parties to meet and begin bargaining within 15 days of the date of this decision, unless the parties jointly agree to a longer period. I will also retain jurisdiction for 60 days to resolve issues about this remedy.

AWARD

The grievance is sustained as explained in the Findings.

s/*Terry A. Bethel*
Terry A. Bethel
August 1, 2013.