IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
CONSHOHOCKEN PLANT

And

ArcelorMittal Case No. 72

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 9462, USW

OPINION AND AWARD

Introduction

This case from the Conshohocken Plant concerns the Union's claim that the Company failed to implement changes to the Rolling Mill Incentive Plan that the Union says the parties agreed to on May 1, 2013. The case was tried in the Company's offices in Conshohocken, Pennsylvania on February 12, 2015. Robert Casey represented the Company and Lew Dopson presented the Union's case. The Company raised a procedural arbitrability issue, arguing that the Union's grievance was untimely. The Union countered, in part, that the Company cannot raise the timeliness objection because it was not disclosed to the Union prior to or at the third step meeting. The parties agreed that the issue on the merits is whether the parties agreed to incentive plan changes on May 1, 2013 and, if so, what the appropriate remedy should be. The parties agreed not to bifurcate the hearing. The parties submitted the case on final arguments.[1]

[1] As explained in detail in the Opinion, this case began with an agreement from the 2012 negotiations titled Union Issue #2, in which the parties agreed to establish a new incentive plan for the Rolling Mill. The parties also negotiated Union Issue #3, which concerned a new incentive plan for Heat Treat and Finishing employees. The grievance over Union Issue #3 was settled on October 29, 2013. It includes the following language: "The settlement of the Local Issue and [this grievance] are not to be used or discussed in any other incentive grievances." For the most part, I have excluded mention of the Heat Treat and Finishing settlement in the instant case. The Company referred to the settlement at one point to

Background

During the 2012 negotiations, the parties agreed to Union Issue #2, which resulted in a September 1, 2012 Memorandum of Agreement. It says, in relevant part:

> The Company and the Union agree to develop a new incentive plan replacing the existing Rolling Mill Incentive Plan. The parties agree that the new plan baseline will be representative of recent performance and will reference the simple model intended with the original incentive plans....
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> The parties agree to make a commitment that the incentive issues will be worked on and completed within 60 days of the expiration of the current contract (September 1 2012). Any payment or credit due the parties related to the comparison of weekly payouts for the current and new plan will be retroactive to September 2, 2012.

The parties' first meeting concerning the new incentive plan was on November 14, 2012. The Company submitted a proposal to the Union covering the terms outlined in the Memorandum of Agreement. However, the proposal also contained an equalizing factor intended to operate when there was a negative bonus. The Union said the Company had tried to do this once before, and that it did not agree to it then and would not agree to it in the new plan.

The parties met again on April 17, 2013, and the Company presented a new proposal. The proposal listed nine numbered items, including a provision for single furnace operation, which was listed in the Memorandum of Agreement, but had not been included in the Company's initial proposal. The Union was in agreement with the first eight listed items, but not the ninth item, which involved what the incentive would be if the mill did not operate for an entire week. The proposal said the incentive for that week would be zero. The parties met again

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show that the grievance was settled by a signed memorandum. The Union did not object to using the settlement for that purpose. The Heat Treat and Finishing agreement and the grievance are also mentioned in some exhibits referred to in this opinion.

on May 1, 2013. Either at that meeting or shortly before, the parties agreed they would handle weeks when the mill did not operate (Item 9 on the April 17 proposal) on a case-by-case basis, which was consistent with how the parties had treated the issue in the past. Union Grievance Chairman Ron Davis said once that issue was resolved, he told the Company there was an agreement.

There is no question that Union and Company representatives agreed to the first eight items on the Company's April 17 proposal, and resolved the ninth item by a compromise. Even so, the Company argues that the parties had reached only a tentative agreement that would not bind the parties until it was approved by corporate management. Paul Waterman, Senior Division Manager of the Conshohocken Plant, testified that he considered the May 1 document to be a jointly developed proposal to the corporate office for the terms of a new incentive plan. Waterman said he did not have the authority to reach final agreement on a plan, and that he never told the Union he was "the final decision-maker." According to Waterman, incentive plans are part of the total cost of employment, and he said he has no authority to increase that cost. He said he was not aware of any incentive plan changes implemented since 2011 that did not have corporate approval. Waterman also asserted that the Union knew the corporate office had to approve the new plan.

The Company submitted a series of mostly internal documents intended to show that Waterman did not have final authority to implement changes to an incentive plan without approval. The documents included an April 9, 2013 memo to Conshohocken managers telling them the Local Union and Local Management had "come to a tentative agreement on the mill plan," and asking them to compile information "so that we can finalize the package with the Union." A memo the same day to Joanne Babaian, Human Resources-Labor Relations Manager,

said, "Before sending to Dino, we should have a proposal on the table for handling weeks with zero production." Dino is Dino Spiridis, Corporate Manager of Labor Economics and Productivity Programs. The "weeks with zero production" referenced in the email to Babaian, was the ninth issue on the Company's proposal of April 17. The April 9, 2013 memo suggests that the parties had agreed to all of the items on the April 17 proposal except the zero weeks issue prior to the April 17 meeting.

The Company introduced an email chain beginning June 17, 2013. The first message was from Grievance Chairman Ron Davis and was sent to Local Union President Lloyd Turpin. The message asked if Turpin had spoken to Waterman about the incentive plan, and said, "Last discussion was it was with corporate." Davis also said, "We should get this done and out soon," and that "Only thing left was retro and get plans live." Later that day, Turpin sent a message to Davis and Waterman saying he understood the incentive plan "was in corporate status." He also referenced a need to discuss a concern Waterman had about the percentage from one year to the next. And, Turpin told Davis that "retroactive and live is where we left off," an apparent reference to where they stood in meetings with Waterman. The other two messages in the chain were related to a different incentive plan.

A June 19 message from Turpin to Waterman asked for an incentive committee meeting, saying "I understand you have concerns after the agreed plans." He also said that the plan "could be revisited." Davis also sent a message on June 19 saying that he understood the plan "was being reviewed by corporate. Can you give us a status and what are the time frame[s] for the next steps." Davis testified that following the agreement on May 1, he thought the Company was busy calculating the retroactive payments to employees covered by the plan, which is time-consuming. He said in mid-June he approached someone in payroll about the calculations, who

said he did not know anything about retroactive payments. Davis contacted Turpin that same day.

The Company introduced an email and attached documents Waterman sent to Dino Spiridis on June 21, 2013, for his review and approval. The message said Waterman and the Union had been developing proposals and that the Union thought the proposals were "essentially done, with the understanding that nothing is done until it is approved." A power point document was included, with the last page saying that the next step was negotiating open items. The Union was not copied on this document. On June 25, Spiridis wrote back asking questions about the plan and requesting more information. Waterman replied that same day and gave Spiridis the information he had requested. Waterman and Spiridis also exchanged information on August 6, including a message from Waterman to Spiridis that said Waterman was meeting with the Union incentive committee the next day, and they had asked where things stood on the incentive plan. Waterman said he told the Union "I think we're close on the mill plan but need to work on the finishing plan. They don't like it, but they all know it doesn't go anywhere unless it's approved."

On July 31, 2013, Turpin wrote to Waterman telling him that employees were becoming restless about the delay. Turpin asked Waterman when the plans would be ready to implement, saying that all the Union ever heard was "that it's in corporate's hands." Waterman responded the same day saying, in part, "All along, I have stated that anything we develop would be submitted to and must be approved by corporate management." He also said it took some time to compile the information corporate needed for its review. Turpin wrote back saying, "If in good faith you're truly waiting on the response from corporate. Then so be it."

On August 6, Davis wrote to Waterman asking, "Are we not ok on all plans from a corp perspective." Waterman responded, "I'd say we're close on the mill plan...." On August 8, 2013, Waterman wrote to Spiridis concerning the meeting with the incentive committee on August 7. He said the Union officials were "disappointed that we are not approved at this time." He also told the Union that the rolling mill plan was "still under review." In an August 12 email, Waterman answered a query from Turpin by saying the Company was concerned about the calculation of the retroactive payment. Davis wrote back and asked if this meant the Company "is not accepting agreed to local issues # 1 and 2?", an apparent reference to Union Issues #2 and #3 from the 2012 negotiations. Waterman responded that the proposals were still under review.

On August 22, 2013, Waterman wrote to Spiridis about another meeting with the incentive committee. He said they focused on the "the work to be done to address the issues with the two plans.'' He said the Union was "very anxious to get it done." And, he mentioned two issues with the mill plan, including how to address "the zeros." On August 30, Waterman sent Spiridis a report on a meeting with the incentive committee on August 29. He said the Union had not made any "concessions on the zeros." Spiridis wrote back on September 2, with a summary of his review, and asking questions about retroactivity. Waterman replied with the information and said he thought the plan met the language of the September 1, 2012 Memorandum of Agreement.

Waterman sent the Union an e-mail on September 8 saying, "Corporate has completed their review. We are ready to discuss the incentive" The parties set a meeting for the following day. On September 9, 2012, the Company made the Union two offers about the equalization component of the plan. Waterman told the Union the corporation would approve the package if

the Union accepted the equalization component. The Union rejected the offer and said it would file a grievance, which it did the next day, September 10, 2013.

The Company submitted additional exhibits leading up to the grievance which, it says, show the Union understood corporate approval was needed for the new plan. At some point in late August, Turpin asked Waterman about writing a letter explaining the situation to employees. On August 26, Waterman sent Turpin a draft of the letter. It said meetings had continued and that in a recent meeting they had "put a plan together" that would be finalized "in the coming weeks." The letter also said, "We believe that we are very close to completing incentive plans that are fair and equitable to all parties...." Turpin responded that, "The letter looks to be fitting for its purpose." The letter does not mention the need for corporate approval.

HR Director Babaian testified about previous instances in which the Union knew that corporate approval was needed for changes to the incentive plan, as well as other changes that increased compensation. During the 2008 negotiations, Babaian prepared a spreadsheet tracking all issues. Included were three Union incentive proposals. In each case, Babaian mentioned the need for review or approval by John Perham, who was Dino Spiridis' predecessor. She also identified the final spreadsheet from those negotiations, which continued to note the need for Perham's approval for incentive increases. Another exhibit was a 2008 memorandum advising the Union that she had sent a local agreement to increase pay for two classifications to Perham for approval. Babaian's notes from an incentive committee meeting on January 9, 2013, cover discussions about the incentive plan at issue in the instant case. At one point, Davis said the Union's biggest issue was negatives in the baseline. Babaian's notes then show Waterman saying, "what is my advantage? How can I get this approved."

Babaian's notes from a June 25, 2013 incentive committee meeting open with Waterman telling the committee he had submitted the plan to corporate the previous week. The notes say Turpin expressed concern that the plans had not been implemented, and that he said

> Agreed in the last meeting. We agreed in the last meeting. My understanding was we were going to get retro numbers. What is your position? We need to know it has been submitted, We can't go live until you get feedback. How long does it take to get a retro?

Babaian then said no one should talk about what the retro payments would be "until we sign off," which she testified was a reference to approval by corporate. On cross examination, Babaian said she understood Turpin's "agreed in the last meeting" comment to mean they had agreed to submit the plan to corporate. She did not know then that the Union thought there was an agreement as of May 1, 2013.

Babaian discussed a memorandum she sent to Waterman on January 28, 2015, following a meeting with Davis concerning the Company's supplement to the third step minutes claiming the Union's grievance was untimely. According to Babaian, Davis said they did not know "the incentive plan wasn't a go until the July 31, 2013 email from" Waterman, and they had 30 days from then to file a grievance.

The Union argues that it did not know the corporation would not approve the plan until September 9, 2013, when it met with Waterman. The Union also claims the parties entered into a binding agreement on May 1, 2013. Prior to the May 1 meeting, the parties had already agreed to everything except one issue – the effect of the mill not operating for a week. Davis testified that on May 1, the parties decided to handle non-operating weeks on a case-by-case basis, and he said to the Company representative, "We have an agreement." The Company did not say anything about needing corporate approval on May 1, or at any time before May 1. Moreover, Davis testified that he had negotiated incentive changes with Gary Sarpen, the Plant Manager

before Waterman, and Sarpen said he had full authority to negotiate incentive plan changes and did not need corporate approval.

Spiridis testified that local managers do not have authority to change an incentive plan without corporate approval, which comes from Spiridis and Neil Kohlberg, Director of Strategic Planning and Analysis. There are 120 incentive plans corporate-wide, Spiridis said, and he has to insure that there is a consistent approach from plant to plant. Babaian testified that she sometimes had to remind Sarpen to call Perham (Spiridis' predecessor) to get approval for changes to the incentive plan.

Even if there was an agreement on May 1, the Company says, it would not be enforceable because it was not in writing and signed by the appropriate parties. The Company points to Article 5-A-6, which says:

> As of the Effective Date, all future Local Working Conditions must be reduced to writing and signed by the Plant Manager and the Local Union President/Unit Chair.

The Union agrees that there is no writing signed by Waterman and Turpin, but it says the May 1 agreement *is* written, pointing to the Company's April 17 proposal, which the parties adopted on May 1, after they agreed that non-operating weeks would be handled on a case-by-case basis. Also, the Union contends that an incentive plan is not a local working condition, and agreements concerning them need not be by signed writing. But the Company responds by citing Article 5-A-1, which says, in relevant part,

> The term Local Working Conditions as used in this Section means specific practices or customs which reflect detailed applications of matters within the scope of wages, hours of work or other conditions of employment, including local agreements, written or oral, on such matters....

The Company argues that the incentive plan reflects "detailed applications of matters within the scope of wages...." The Union countered by arguing that a local working condition cannot exist

for matters covered by the Agreement, and the subject of incentive plans is covered in detail in Article 9-B

The Union also says incentive plans have been changed in the past without using a signed writing. Davis identified an e-mail exchange from December 2005, which he said adopted a "kicker" that amended the incentive plan in effect at the time. Another modification to the incentive plan concerning treatment of training hours was agreed to and went into effect on April 16, 2006. The agreement is memorialized in an unsigned document and, Davis said, is still in effect. Davis also pointed to two incentive plan revisions in 2007, which were not explained in a writing and, obviously, were not signed. Finally, Davis identified what appears to be a meeting agenda from February 3, 2005, which he said noted changes that were made to the plan. The document is not signed. There was also no signed writing for the incentive plans themselves, Davis said, which were installed in 2004 when ISG owned the plant. Davis testified that to his knowledge, none of the changes made from 2004 onward required corporate approval. The Union understood and believed they were all done locally.

The Company contends that the grievance was not timely. The September 10, 2013 grievance was initially set for arbitration on June 19, 2014. The hearing was canceled after the parties reached a tentative settlement. However, the parties were not able to resolve the case and, on August 24, 2014, the Company implemented a new incentive plan for the rolling mill. The Company acted pursuant to Article 9-B, the details of which need not be explained, except for Article 9-B-3-d. That provision says if the Company implements a new plan, the Union can file a grievance "at any time from ninety (90) to 180 days from the date of installation of a new plan."

On December 8, 2014, I received an email informing me that the Union wanted to set its September 10, 2013 grievance for hearing. The Company contended that the case was no longer arbitrable because "events have overtaken the original grievance...." The Company asserted that the grievance had been rendered moot because the parties had continued to negotiate about the terms of a new plan after the Union filed its September 10 grievance, and because the Company had implemented a new plan pursuant to Article 9-B-3. The Union's recourse was to file a grievance in the window of not less than 90 days and not more than 180 days from August 24, 2014, which was the date the plan was implemented. The Union disagreed, arguing that the December 10, 2013 grievance protested the Company's "failure to comply with a Local Issue agreed to by the parties in 2012 negotiations."

The parties set a conference call with me to discuss the issue on December 17, 2014. The Company says prior to the conference call, it had not realized the Union believed the parties had reached agreement on a new plan on May 1, 2013. The December 10 grievance alleged that "The Company failed to comply with issue #2 mill incentive." The remedy it sought was for the Company to "comply with issue #2" and make employees whole. The Company said it believed the grievance protested an alleged failure to comply with the 2012 Memorandum of Agreement, which was appended to the grievance. However, the Union asserted that the parties had reached agreement on a new plan on May 1, 2013, and it said the grievance protested the Company's failure to implement that plan.

The Company argues that if the grievance relates to the alleged May 1, 2013 agreement, then the grievance was not timely. Pursuant to Article 5-I-4-e,

> Any grievance filed directly in Step 2 or higher shall be initiated within thirty (30) days of the event upon which the grievance was based, or the date on which such event should reasonably have become known.

The Company says the Union knew or should have known several months before its September 10, 2013 grievance that the alleged May 1, 2013 agreement was not going to be implemented. Thus, the Company insists the September 10 grievance was filed too late.

The Union counters that it did not realize the Company would not implement the May 1, 2013 agreement until September 9, 2013, and it filed the grievance the next day. Also, if, as the Company contends, the Union should have realized on July 31, 2013 that the Company would not implement the May 1 agreement, it still filed the grievance within 30 days of that date. Pursuant to Article 5-I-2-b, "Day, as used in this Section shall mean a calendar day, excluding Saturdays, Sundays and holidays." Using that definition, the grievance was filed on the twenty-eighth day. The Union also asserts that the Company is precluded from raising the timeliness objection because it did not raise the issue in either Step 2 or Step 3. Article 5-I-4-c, says "Facts, provisions or remedies not disclosed at or prior to Step 3 of the grievance procedure may not be presented in arbitration." The Company did not mention the timeliness issue in either Step 2 or Step 3.

The Company says it did not raise the timeliness issue until after the December 17 conference call because it was not aware until then that the Union was relying on an alleged May 1, 2013 agreement. On January 21, 2015, the Company tendered a document titled "Supplement to Step 3 Minutes," which asserts, among other things, that the grievance was not filed within thirty days. The supplement also says the Company was not aware of the Union's claim that the May 1 plan was an agreement until December 17, and that there was no such allegation in the Step 2 or Step 3 minutes. However, the Union points to its response to the Step 2 minutes, which says, in part, that during the Step 2 meeting, "The Union stated that the Company had already agreed to the plan and the baseline to be used." This, the Union says, was a reference to the May

1 agreement. The Company says it understood that statement to refer to the Memorandum of Agreement, which is what was appended to the grievance.

Findings and Discussion

Timeliness Issue

The Union correctly points out that Article 5-I-4-c prevents a party from advancing "facts, provisions or remedies" that were not disclosed in the grievance procedure. And, the Company did not raise the timeliness issue in Steps 2 and 3. However, Company witnesses testified credibly that they did not understand prior to the December 17, 2014 conference call that the Union was claiming there was an agreement on May 1, 2013. It is true that the Union's response to the Step 2 Minutes says, "The union stated that the company already agreed to the plan and the baseline to be used." The Union claims this was a reference to the May 1, 2013 agreement. But Waterman testified credibly that he understood the reference to an agreement to mean the September 1, 2012 Memorandum of Agreement, which, among other things, included language about the "baseline to be used." Moreover, the Union attached the 2012 Memorandum to its grievance, which did not mention or otherwise identify a May 1, 2013 agreement.

I find the Company reasonably understood the grievance and the Union's response to the Step 2 minutes to claim that the Company had violated the terms of the Memorandum of Agreement. I also find that the Company in good faith did not realize the Union was relying on a May 1 agreement until the December 17, 2014 conference call. There was, then, no reason the Company would have raised a timeliness issue prior to the conference call. Once it understood the basis of the Union's claim, it was appropriate for the Company to question the timeliness of the grievance. This is not intended to suggest that the Union acted inappropriately. The

grievance is broad enough to include other agreements entered into pursuant to Union Issue #2, and the Union's response to the grievance minutes alleges that the parties had agreed to a new plan. But the Company's good faith interpretation of the grievance was plausible. In these circumstances, it would be inequitable to prevent the Company from raising the timeliness issue in arbitration. Article 5-I-4-c should not be understood to prohibit the Company from raising a defense that it reasonably did not realize was even an issue in the case until more than a year after the grievance was filed.

The fact that the Company properly contested the timeliness of the grievance, however, does not mean its contention was correct. Waterman testified credibly that he knew the proposal agreed to by the parties would have to be approved by corporate. The Company's paper trail of interactions between Waterman and Spiridis supports that claim. Thus, the Company argues that there was no agreement on May 1, 2013; from its perspective the parties had simply agreed to a proposal that had to be approved by Spiridis. But Davis' testimony was also credible. Davis testified that the Union had made incentive plan revisions with the former plant manager, who said he had the authority to do so without corporate approval. Moreover, it was reasonable to believe that the plant manager had authority to negotiate a new plan, especially when Waterman was the one who signed the Memorandum of Agreement, which set forth some of the terms the parties had agreed to. From the Union's perspective, then, it was reasonable to believe that on May 1, the parties had entered into an agreement that filled in the details of the commitment the parties made in the Memorandum of Agreement.

The question then becomes when the Union was required to file a grievance in support of its claim that the Company had breached its alleged May 1, 2013 agreement. For this purpose, it does not matter whether there *was* a May 1 agreement, which is one of the issues on the merits.

For procedural arbitrability purposes, what matters is the Union's claim that the Company breached an agreement made on May 1, 2013. If the grievance was timely, then the Union has an opportunity to try and prove there was an agreement on May 1, and that the Company breached the terms of that agreement. The contract requires a grieving party to file the grievance within 30 calendar days. That clock would start running when the Union learned of a breach, meaning when it first knew the Company did not intend to implement the terms the Union says were agreed to on May 1.

It is clear that the Union knew at least by June 17, 2013, that the new plan was being reviewed by corporate. An email of that date from Davis to Turpin says, "Last discussion was it was with corporate." Turpin responded to Davis – with a copy to Waterman – later that day, saying "yes I understood that it was in corporate status." But knowing the plan was under review by someone in corporate is not the same thing as knowing the Company did not intended to comply with the agreement the Union claimed the parties reached on May 1. There is even some hint in the messages that in June 2013, the Union thought the hang-up was the calculation of retroactive pay. Davis' June 17 message to Turpin says, "We last left it as we were in agreement on all. Only thing left was retro and get plans live." It is not clear when the parties met for the last time prior to June 17, although the record suggests it was on May 1. If so, then Davis' message can be interpreted to mean that all of the terms had been agreed to in the May 1 meeting, except for the calculation of retroactivity.

This is also reflected in a June 19 email from Davis to Turpin, with a copy to Waterman and Babaian. Davis said employees were making inquiries and he told them "we were waiting for final paperwork from company and new plans implementation." A message from Turpin to Waterman later that day said he understood that Waterman had "concerns about the agreed

plans...." Turpin's comment that the plans could be revisited does not mean he understood the Company was not going to implement the plans; it seems to mean only that the Union was willing to talk about concerns. Agreements, especially agreements that have not been implemented, can always be revisited with the consent of the parties. The Union's expectation on June 19, then, was that the Company intended to implement the May 1 agreement; nothing in the exchange suggests the Company did not plan to implement the May 1 terms.

The same is true of the incentive committee meeting on June 25, as reflected in Babaian's notes. Again, the meeting notes demonstrate that the Union knew the plan was being reviewed by corporate, although there is nothing in the notes indicating that corporate was backing away from the May 1 terms; rather, the Union's concerns seemed focused on retroactivity. Turpin said employee morale was down because the plan had not been implemented, and "we agreed in the last meeting." Again, the comment is ambiguous, but the Union says it refers to the agreement made on May 1. Turpin then said he understood the Union would get "retro numbers" and he asked "how long does it take to get a retro?" I cannot read this to mean the Union should have understood the Company would refuse some of the May 1 terms. The Memorandum of Agreement does not calculate the retroactive payments due, and it was reasonable for the Union to believe that the Company was still working on those calculations.

But the Union's understanding changed on July 31. On that day, Turpin wrote to Waterman expressing frustration that the plan had not been implemented. In response, Waterman said, in part, "All along, I have stated that anything we develop would be submitted to and must be approved by corporate management." He also referred to when "the proposed plans were developed." Although not identified as such, the "proposed plans" reference clearly refers to the terms the parties agreed to on or before May 1, 2013. Certainly, by July 31, the Union

understood that the Company was doing more than calculating retroactivity, and that the Company would not implement any plan until it had corporate approval. Even so, one might question whether the Union was required to grieve within thirty days of this exchange of messages. Although the Union knew the Company thought approval was necessary before the plan was binding, the Union still did not know that corporate would refuse to implement the terms agreed to on May 1. Nevertheless, even if the Union was required to file a grievance within 30 calendar days of July 31, its September 10 filing was timely; as noted in the Background, the term "calendar days" excludes Saturdays, Sundays, and holidays.

The Merits

Meeting of the Minds

The principal issue on the merits is whether the parties had an enforceable agreement on May 1. The Company argues, in part, that there was no agreement to the May 1 terms because there was no meeting of the minds, one of the classical requirements of the common law of contracts. As described by the Company, Waterman negotiated with the Union knowing that any agreements he reached were tentative, and had to be approved by corporate; in contrast, the Union did not (or says it did not) understand that approval was required. Thus, the Union thought there was a binding commitment, but the Company did not believe it was bound absent approval. If the Company did not believe there was a final deal, the Company says, then there was no deal.

The words "meeting of the minds" are used often in connection with contract formation, but they cannot be understood to require actual subjective assent. As the eminent jurist Learned

Hand once observed, "A contract has, strictly speaking, nothing to do with the personal, or individual intent of the parties." See, *Hotchkiss v. National City Bank of New York*, 200 F. 287, 293 (S.D.N.Y. 1911). Although this statement is overbroad, as Hand himself recognized in the same opinion, it is frequently cited as descriptive of the objective theory of contracts, which prevails in American common law. At base, the law is that mutual assent (what the Company calls a meeting of the minds) is determined not by reference to one party's subjective intentions, but, instead, by the reasonable meaning of what parties say and do. This does not mean that subjective mutual assent is irrelevant; indeed, it is fair to assume that a party's objective manifestations of assent (or non-assent) will often mirror his subjective intentions. But even if subjective intent and objective manifestations do not agree, a party can be held to a contract by what he said and did.[2]

There is no question that the parties agreed to the terms first proposed by the Company on April 17, albeit with one modification. Davis testified that on or before April 17, the parties had already agreed to terms 1 through 8. In fact, on April 9, Waterman wrote to some managers internally, indicating that the Company and Union had a tentative agreement. The terms he described in the memo were identical to numbers 1- 7 of the Company's April 17 proposal. A message Waterman sent to Babaian the same day said the parties had tentatively agreed to terms identical to numbers 1-8 of the April 17 proposal.[3] And, Waterman acknowledged Davis'

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[2] *CVS Pharmacy and IBT Local 727*, CCH-LAA P 13-1 ARB P 5766 (Elliott Goldstein 2012), cited by the Company, is not inconsistent with this description of mutual assent. Goldstein did say there had been no meeting of the minds. But this was not because the parties lacked a shared subjective intent; rather, there was no contract because the parties' objective manifestations – what they said to each other – showed that they had never reached agreement on terms. In the instant case, however, the parties did agree to the terms of the new plan.

[3] Waterman's April 9 memo was not sent to the Union, so it was not aware that Waterman called the agreement "tentative." But even if it had been sent to the Union, on April 9 the parties had not yet settled the zero weeks issue (number 9), and that issue is not even included in the memo. Thus, there was still

testimony that on May 1, the parties agreed to treat zero weeks – item number 9 of the April 17 proposal – on a case-by-case basis.

The Company contends, however, that it was a tentative agreement; Waterman did not have the authority to bind the Company on incentive plan issues, and the Union knew – or should have known – that any agreement reached locally would need corporate approval. The Union's burden, then, is to show that the May 1 agreement was binding when negotiated, and was not merely, as Waterman described it, a jointly developed proposal to corporate. A principal component of the Union's case, and of the Company's defense, is what the Union knew about Waterman's authority on May 1, 2013. The date is significant because most of the Company's evidence about the need for approval concerns events that occurred after May 1, when the Company was compiling information to send to Spiridis. Davis testified credibly that the Union did not know what the Company was doing until mid-June, when he asked someone in payroll about the retroactivity calculations, and learned there were none. There were discussions between the parties beginning in June about the plan being "with corporate," and on July 31, Waterman told the Union that nothing could be implemented until it was approved by corporate. But, as discussed in the Timeliness section, above, those interactions were relevant to when the Union had to file its grievance; however, they do not show that on May 1 the Union knew that Waterman had no authority to bind the Company to the terms of a new incentive plan.[4]

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work to be done before the negotiations were completed, so any agreement to terms would necessarily have been tentative. The memo to Babaian, in fact, said "they" should have a proposal on the table concerning zero production before they sent the plan to Spiridis. Presumably, the proposal would be one agreed to by the parties, which is how Waterman characterized what the parties agreed to on May 1. During the May 1 meeting, the parties agreed to treat zero weeks on a case-by-case basis.

[4] The fact that the Union continued to discuss provisions of the May 1 agreement from mid-June to September 9 does not mean that it knew the May 1 agreement was tentative. In the first place, in some of the discussions the Union seemed focused on retroactivity due under the May 1 agreement. Babaian's notes from the June 25, 2013 negotiating session, for example, show Turpin saying that the parties had

I believed Waterman's assertion that he understood corporate approval was required, and that he thought the Union knew that, too. But I am not convinced that there was any discussion of that requirement during negotiations for Union Issue #2 or in the subsequent negotiations leading to the May 1 agreement. There were no meeting minutes for the April and May negotiations showing that Waterman told the Union about the need for approval in those meetings. Babaian identified a set of notes she took in January 2013 concerning incentive issues, which quotes Waterman as saying, "How can I get this approved?" But this does not necessarily mean the approval had to come after the parties had reached agreement. In November 2012, the Union had balked at the Company's equalization proposal, and it would have been reasonable to believe that in January 2013, Waterman was concerned about how he could get the authority to make a proposal more favorable to the Union's position. The Union certainly understood that Waterman took direction from people higher in the corporate hierarchy. But that does not mean they should have understood agreements made with Waterman had to be approved after-the-fact, or that Waterman came to the local negotiations without the authority to bind the Company within parameters specified by his superiors.

In fact, the recent bargaining history suggested the opposite conclusion. Even though it came out of the national negotiations, the terms of Union Issue #2 were negotiated and signed by the local parties. There are no signatures representing approval at a higher level, and there is nothing in the Memorandum of Agreement indicating that such approval would be needed for the

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"agreed in the last meeting" and asking "how long does it take to get a retro?" Also, see text supra at p. 15. The Company's evidence does indicate that the parties continued to discuss the zero weeks issue into September. However, that does not mean there was no agreement on May 1 to treat zero weeks on a case-by-case basis. By mid to late June, and certainly by July 31, the Union knew the Company wanted to change the case-by-case agreement. The Union was free to discuss changes in the interest of resolving any delays that would ensue in implementation. But the Union's willingness to discuss alternatives did not somehow suspend the May 1 agreement or waive the Union's right to insist on compliance with those terms.

subsequent negotiations. Nor was there any testimony from Waterman or Babaian, who signed the agreement for the Company, that they sought corporate approval for the terms agreed to or that such approval was required. This is significant because Union Issue #2 does not say merely that the local parties would negotiate a new incentive plan; rather, it specifies some terms that the new plan would contain and establishes some limits on what the plan would do. Thus, "the baseline for the new plan will be the performance demonstrated in 2010 and 2011." It also says the plan "will be comprised of a single component, weekly productivity measured in tons per hour." The Memorandum of Agreement says the plan "will still contain the rejection component" and that it "will pay 20% for weekly productivity equivalent to the average performance over the 2010 and 2011 period." If Waterman had the authority to negotiate these terms, then it was reasonable for the Union to believe he was authorized to agree to the terms of the May 1 agreement. (all underlining added)

Waterman testified that he had been in a position to know about incentive plan changes since 2011, and he was not aware of any changes that had not had corporate approval. But there is no evidence the Union knew that. Babaian introduced spreadsheets she prepared from the 2008 negotiations that said two incentive plan proposals would have to be approved by John Perham, Spiridis' predecessor. But the Company did not introduce anything from the 2012 negotiations that said changes agreed to as a result of Union Issue #2 had to be approved. Moreover, the Union said Gary Sarpen, Waterman's predecessor, had said he had authority to modify the incentive plan and that corporate approval was not needed. On rebuttal, Babaian said she sometimes had to remind Sarpen to obtain approval, but she did not rebut Davis' testimony about what Sarpen told the Union, and she did not say the Union knew about Sarpen's belated calls for changes he had already agreed to.

This record does not convince me the Union should have known that any changes Waterman agreed to on May 1 would have to be approved after-the-fact. As far as the Union knew, there was no consistent practice of corporate approval for incentive plan changes. There were some instances when that occurred, but other times when it did not. It would also have been reasonable for the Union to believe that if any approval was needed, Waterman would have secured it as negotiations proceeded. And, it is significant that Waterman negotiated Union Issue #2, which says nothing about the need for corporate approval, and it was reasonable for the Union to believe that he had the authority to agree to terms implementing that agreement. In these circumstances, I find that Waterman had apparent authority to bind the Company and that given the objective evidence, it was reasonable for the Union to believe the parties had reached an agreement on the terms of the new incentive plan on May 1, 2013. I find that the parties reached agreement on the terms of the new incentive plan authorized by Union Issue #2 on May 1, 2013, and that the Company breached the agreement on September 9, 2013 when it informed the Union it would not implement the agreed-to plan.

Local Working Condition

The Company says the May 1 agreement is not enforceable because it was not in writing and signed by the appropriate parties. The Company points to Article 5-A-6, which says:

> As of the Effective Date, all future Local Working Conditions must be reduced to writing and signed by the Plant Manager and the Local Union President/Unit Chair.

The Union agrees there is no writing signed by Waterman and Turpin, but it says the May 1 agreement *is* written, pointing to the Company's April 17 proposal that the parties adopted on May 1, after they agreed that non-operating weeks would be handled on a case-by-case basis.

Also, the Union contends that an incentive plan is not a local working condition, and agreements concerning them need not be memorialized in a signed writing. But the Company responds by citing Article 5-A-1, which says, in relevant part,

> The term Local Working Conditions as used in this Section means specific practices or customs which reflect detailed applications of matters within the scope of wages, hours of work or other conditions of employment, including local agreements, written or oral, on such matters....

The Union countered by arguing that a local working condition cannot exist for matters covered by the Agreement, and the subject of incentive plans is covered in detail in Article 9-B.

There is some question about the interplay between Union Issue #2 from the 2012 negotiations and Article 9-B. Section B-2 says, "The Company shall establish new incentive plans to cover newly created jobs" and that it can "modify existing incentive plans" only in the event of certain new or changed conditions resulting from various factors. It also says, "In all other circumstances, existing incentive plans shall remain unchanged." Section B-2 says nothing about creating and implementing a new incentive plan to replace an existing plan. Nor does the language concerning changes to an existing plan apply here; no one has alleged that any of the factors mandating a modification were present in this case. Rather, these parties simply agreed that there would be a new plan for the rolling mill, and they outlined some of the more important terms. Neither party has argued that Union Issue #2 is ineffective under Article 5-A-5 because it is a local working condition "which conflicts with [a] provision of this Agreement." The better interpretation, then, is that Union Issue #2 was part of the bargain reached in the 2012 Agreement, and that it is not a local working condition, as that term is used in Article 5-A-1.

The same conclusion follows for the terms of the incentive plan negotiated pursuant to the Memorandum of Agreement. As I understand Union Issue #2, its contents are not merely hortatory; rather, the parties agreed that they would negotiate a new incentive plan and,

moreover, that it would include certain items. Some subjects in Union Issue #2 appear to impose specific criteria – e.g., "The baseline for the new plan will be the performance demonstrated in 2010 and 2011"; other subjects were more general, like the agreement that the new plan "will reflect the simple model intended with the original incentive plans." Obviously, the parties understood that more negotiations were needed, and they made a commitment to work on incentive issues and complete them.

At the meeting on May 1, the parties agreed to the terms the Company first proposed on April 17, 2013, except for number 9, dealing with zero weeks. However, both parties offered testimony that on May 1, they agreed orally to handle zero weeks on a case-by-case basis. Thus, most of the agreement is written, but there is no signed document. Nevertheless, the May 1 terms were negotiated pursuant to the September 1, 2012 Memorandum of Agreement, and were intended to effectuate that agreement. As such, the May 1 agreement was not merely a confirmation of local customs or practices; it was part of the commitment the parties made in the Memorandum of Agreement. Other than the local working condition language in Article 5-A-6 – which does not apply to the May 1 agreement – the Company has not pointed to anything that requires the terms negotiated pursuant to the Memorandum of Agreement to be in a signed writing. That is not to suggest that the parties would not reduce the terms to writing at a later date, and have them signed by their representatives. But the items agreed to on May 1 were sufficiently definite for the parties to understand how they would be applied, and no signed writing was required to bind the parties to those terms.

Conclusion

In sum, I find that the parties agreed to binding terms implementing the commitments made in Union Issue #2. The agreement was complete on May 1, 2013, and the Company could not mandate a change by arguing that the agreement was not binding until approved. The Company is directed to implement the terms agreed to on May 1, 2013, and provide retroactive payouts, if any, from September 2, 2012 until the terms are implemented. The retroactive payments will be reduced by payments made during that same period from the plan the Company installed in August 2014. I recognize that the existence of another incentive plan could cause some issues concerning how the new plan is implemented. Thus, I will maintain jurisdiction for a period of 90 days to resolve issues concerning implementation of the remedy.

AWARD

The grievance is sustained. The Company is directed to take the action explained in the Conclusion, above. I will maintain jurisdiction for a period of 90 days to resolve issues concerning implementation of the remedy.

Terry A. Bethel

Terry A. Bethel
May 11, 2015