DAVID A. PETERSEN, ARBITRATOR

In the Matter of Arbitration between	)	Arbitrator's Opinion and Award
ArcelorMittal Indiana Harbor West	)	Grievances TR-13-272-275
and	)	Award Issued: December 12, 2015
United Steelworkers Local Union 1011	)	**Case 76**

Subject: Article 2-F-6 Mutual Agreement Concerning Trucking – Remedy for Utilizing Contractors to Perform Intraplant Trucking Work on the November 28 and 29, 2013 Holidays

Appearances of Representatives:

Robert P. Casey, Esquire
On behalf of the Company

Rick Bucher, Staff Representative / Sub-5 Director
On behalf of the Union

BACKGROUND

At issue in this case, as stipulated by the parties, is the appropriate remedy due for Steel Shop Management's use of a trucking contractor (Phoenix Trucking) to perform scrap hauling work within Indiana Harbor West on the November 28, 2013 Thanksgiving Day contractual holiday and on the November 29, 2013 Day after Thanksgiving Day contractual holiday. It is the Union's basic position that pursuant to the express terms of Paragraph 4 of an Article 2-F-6 Mutual Agreement Concerning Trucking,[1] signed in September 2010 by Company and Union officials including the Local Union President and the Local Union Grievance Committee Chair and an International Staff Representative[2], all Internal Logistics CDL-A Motor Pool Truck Drivers who had volunteered and were available to work on these holidays and who were not offered employee option overtime on those days are entitled to a make whole monetary remedy regardless of the number of hours worked by the contractor. It is the Company's basic position that the Mutual Agreement provides for no special remedy for this contracting out case and that the total monetary remedy here should therefore be limited to the hours worked by the contractor on November 28 and 29, 2013. Both parties represented that no need existed in the context of the present proceeding for the arbitrator to do more than decide which of these remedies is appropriate on the facts and circumstances of this case.

In arbitration the Union and the Company submitted the following written factual stipulations:

1. In September 2010, the parties entered into a Mutual Agreement regarding Trucking work at Indiana Harbor West ("IHW") in resolution of certain contracting out grievances that were scheduled for arbitration. That Trucking Mutual Agreement ("Mutual") is a Joint Exhibit in this case.
2. The Mutual, among other things, established a base force of Internal Logistics CDL-A Motor Pool drivers to perform trucking work, both Interplant (meaning between IHW and Indiana Harbor East), and Intraplant (meaning within the confines of IHW).
3. Interplant driving requires driving on public roads and is subject to USDOT regulations; but Intraplant driving is not DOT regulated work because the work is performed completely on the property of IHW.
4. Paragraph 4 of the Mutual is entitled "Offers of Overtime" and states as follows: In addition to paragraph #1, above [dealing with base force], before the Company

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[1] Paragraph 4 of the Mutual Agreement Concerning Trucking reads in relevant part: "Before contractors are utilized to perform work within the confines of IH/W, the Company will offer employee option overtime beyond the maximum DOT hourly constraints to all Internal Logistics CDL-A motor pool truck drivers performing non-DOT regulated trucking and up to DOT maximums for those who are performing DOT regulated trucking."

[2] In accordance with Article 2-F-6-c the signatures of these officials were required in order for this Mutual Agreement relating to the use of outside entities on an on-going basis to be valid or enforceable beyond the termination date of the Collective Bargaining Agreement in effect at the time such an agreement was reached.

utilizes contractors to perform trucking work from IH/W to IH/E, the Company will offer overtime to all active Internal Logistics CDL-A motor pool truck drivers in the Transportation Department to the maximum hours permitted by the DOT. Before contractors are utilized to perform work within the confines of IH/W, the Company will offer employee option overtime beyond the maximum DOT hourly constraints to all Internal Logistics CDL-A motor pool truck drivers performing non-DOT regulated trucking and up to DOT maximums for those who are performing DOT regulated trucking.

5. In November 2013 the base force was comprised of 34 truck drivers, one of whom was inactive (on S&A leave).
6. All base force motor pool drivers perform both DOT regulated (interplant over the road driving) and non-DOT regulated (IHW internal driving) work.
7. Based on information received from the operating units regarding their anticipated needs for drivers over the [Thanksgiving] Holiday, Trucking Management scheduled some but not all base force drivers who had volunteered to work on the November 28th and 29th [2013] Holidays.
8. On November 28th [2013] and again on November 29th [2013] an outside contractor (Phoenix Trucking) was called out by the Steel Shop to haul scrap on the West Side during the Day Shift – the work was non-DOT regulated work because it was internal (IHW) work.
9. The work performed by Phoenix on November 28th and 29th [2013] was not assigned or offered to any Internal Logistics motor pool driver who had volunteered and was available for work on either day.

The Union offered testimony from the Local Union Grievance Committee Chair and from a retired International Staff Representative.

The Grievance Committee Chair stated that to his knowledge the Mutual Agreement Concerning Trucking has never previously been interpreted and applied as providing motor pool truck drivers with less than unlimited overtime whenever a trucking contractor was used within the confines of Indiana Harbor West, except that motor pool truck drivers performing DOT regulated trucking were limited to DOT maximums. The Chair said contractors have performed non-DOT work at the mill on a regular basis since September 2010 and that the amount of overtime offered to motor pool truck drivers on those occasions has never been limited by the number of hours contractors worked in the mill. The witness expressed the opinion that, pursuant to Paragraph 4 of this Mutual Agreement, all available motor pool drivers were entitled to have been offered employee option overtime before the Company could properly contract out intraplant work, and since the Company did not offer such overtime to the drivers who had volunteered and were available to work on the November 28 and 29, 2013 holidays before utilizing contractors it is appropriate that each of these drivers be paid for the hours worked by the contractors on those dates as a make whole monetary remedy for this violation. The Chair acknowledged, on cross-examination, that this is the first case to be arbitrated which advances the theory that if contractors

are utilized to perform work within the confines of Indiana Harbor West without the Company having offered employee option overtime to all available Internal Logistics CDL-A motor pool truck drivers then all such drivers are entitled to be paid for the hours worked by the contractors.

The Staff Representative stated that the Mutual Agreement Concerning Trucking, which he signed in September 2010, was negotiated in the context of on-going violations of the contractual contracting out provisions with regard to trucking service work. The Representative related that Management did not want to buy additional trucks at the time, that the Union was seeking to have the motor pool truck drivers protected and be able to work all the overtime they wanted before contractors were utilized, and that both parties wanted to resolve this issue with a lasting agreement which would not expire at the conclusion of the then-current Collective Bargaining Agreement. The witness said the parties considered different versions of the Mutual Agreement, but he insisted the final version clearly conditions the use of contractors to perform intraplant work on the Company offering "employee option overtime beyond the maximum DOT hourly constraints to all Internal Logistics CDL-A motor pool truck drivers performing non-DOT regulated trucking and up to DOT maximums for those who are performing DOT regulated trucking", which he asserted was mutually intended to convey that when trucking contractors were used in the plant motor pool truck drivers could work unlimited overtime subject only to DOT maximums for those performing DOT regulated trucking.

The Company offered testimony from a Manager of Mobile Equipment and Trucking, from a Process Manager at the Motor Pool, and from a retired Labor Relations Representative.

The Manager of Mobile Equipment and Trucking stated that he has been responsible for the Motor Pool since late 2009 and that in his experience contractors have been utilized on a regular basis to perform intraplant hauling work as was performed on the November 28 and 29, 2013 holidays if such work needs to be performed and there are not enough motor pool truck drivers available and willing to perform the work. The Manager said Trucking Management contacted the operating departments to determine their needs for these holidays and then scheduled the number of employees required to cover all identified work to be performed at premium time plus one or two extra employees for flexibility. The Manager recalled that Steel Shop Management failed to alert Trucking Management it would require intraplant hauling work on the November 28 and 29, 2013 holidays and yet Steel Shop Management called-out contractors to work on those days. The Manager reported the contractors performed 8 hours of work per day, for a total of 16 hours of work in this case.

The Process Manager stated that he believed there were sufficient motor pool truck drivers scheduled on the November 28 and 29, 2013 holidays to have performed this intraplant hauling work if the need for such work had been brought to his attention before Steel Shop Management called-out contractors on those days. The Manager said he could have easily reassigned available truck drivers already in the mill and would not have needed to call-out any additional drivers on either November 28 or 29, 2013. On cross-examination the Process Manager freely agreed that,

under Paragraph 4 of the Mutual Agreement Concerning Trucking, motor pool truck drivers are to be offered overtime before trucking contractors are utilized to perform intraplant work.

The Labor Relations Representative stated that he was present at each of the negotiating sessions for this Mutual Agreement Concerning Trucking, which he signed in September 2010. The Representative said the intent of the Mutual Agreement was to prevent the use of contractors when motor pool truck drivers were available and willing to perform the work. The witness maintained he could recall no discussions having occurred between the negotiating parties regarding the measure of remedy to be provided for a violation of Paragraph 4 of the Mutual Agreement, although he readily acknowledged the parties had agreed any such violation would constitute an improper contracting out of trucking work. The witness noted that subsequent to September 2010 alleged violations of the Mutual Agreement have been arbitrated and have been settled, with the typical measure of damages for proven or acknowledged improper contracting out of trucking work being based on the number of hours worked by the contractors consistent with prior arbitration precedent and historic practice at the mill. He urged that Paragraph 4 of the Mutual Agreement should be viewed as extending to motor pool truck driver service work the type of Surge Maintenance Work overtime opportunities and/or protections provided for maintenance and repair work under Article 2-F-2-a-(2).[3] The witness agreed during cross-examination that Paragraph 4 of the Mutual Agreement does not contain the words "contracting out", "surge maintenance", or "holiday", and that the arbitration precedent he cited regarding the normal/appropriate measure of remedy in contracting out cases had not involved violations of a separate mutual agreement.

On this record the Union contends Paragraph 4 of the Mutual Agreement Concerning Trucking is clear and unambiguous in providing that before the Company utilizes a trucking contractor to perform work within the confines of Indiana Harbor West the Company must "offer employee option overtime beyond the maximum DOT hourly constraints to all Internal Logistics CDL-A motor pool truck drivers performing non-DOT regulated trucking and up to DOT maximums for those who are performing DOT regulated trucking." The Union insists this commitment, made in the context of a written mutual agreement signed by the Local Union President and the Local Union Grievance Committee Chair and an International Staff Representative in accordance with Article 2-F-6-c, stands alone and is not restricted in its application to the use of contractors during non-holiday periods and does not limit the remedy for violations to one which may be typically available and utilized for violations of contracting out provisions contained in the Collective Bargaining Agreement. The Union urges that to ignore the parties' express agreement in Paragraph 4 of this Mutual Agreement to offer employee option overtime "to all Internal Logistics CDL-A motor pool truck drivers" in this situation, and to deny a make whole monetary remedy to all the truck drivers who volunteered and were available to

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[3] Article 2-F-2-a-(2) provides in part: "The Company may use Outside Entities to perform Surge Maintenance Work provided that the Company has offered all reasonable and appropriate requested overtime to all qualified Employees who, by working such overtime, could reduce the amount of Surge Maintenance Work performed by Outside Entities in an efficient manner.

work on the November 28 and 29, 2013 holidays and yet were not offered overtime before the trucking contractor was utilized, would constitute an improper alteration of the parties' Mutual Agreement by the arbitrator and would effectively render this Mutual Agreement meaningless. The Union requests a finding that all the affected motor pool truck drivers are entitled to a make whole monetary remedy regardless of the number of hours worked by the trucking contractor on November 28 and 29, 2013.

The Company acknowledges that Paragraph 4 of the Mutual Agreement Concerning Trucking was violated on November 28 and 29, 2013 when a trucking contractor was called-out by the Steel Shop to haul scrap on day shift within Indiana Harbor West. The Company does not dispute that a monetary remedy is due for what it considers to have been an avoidable violation of its obligations under Paragraph 4 of the Mutual Agreement, but the Company strenuously disputes that the remedy required in these circumstances is to make all motor pool truck drivers whole as if they had worked while the contractor was in the plant on November 28 and 29, 2013. The Company insists that even though the references in Paragraph 4 to "employee option overtime" and "all Internal Logistics CDL-A motor pool truck drivers" accorded its available truck drivers the right to have been asked to work before the contractor was utilized for this intraplant hauling, nothing in Paragraph 4 changed the measure of the make whole remedy traditionally awarded in cases of improper contracting, which is typically limited to the hours worked by the contractor unless a special remedy is found to be applicable.[4] The Company asserts the evidence fails to establish that the negotiators of this Mutual Agreement discussed and jointly intended, let alone expressed in writing, that Paragraph 4 constituted a special remedy, and the Company insists the facts of this case do not otherwise satisfy the special remedy preconditions set forth in Article 2-F-9-a. The Company requests a finding that the appropriate remedy due for its non-willful violation of Paragraph 4 is a make whole monetary remedy for the affected motor pool truck driver(s) limited to the number of hours actually worked by the contractor on November 28 and 29, 2013.

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[4] Article 2-F-9-a (Special Remedies) provides: "(1) Where it is found that the Company (a) engaged in conduct which constitutes willful or repeated violations of this Section or (b) violated a cease and desist order previously issued by an arbitrator, the arbitrator shall fashion a remedy or penalty specifically designed to deter the Company's behavior. (2) With respect to any instance of the use of an Outside Entity, where it is found that notice or information was not provided as required under Paragraph 5 above, and that such failure was willful or repeated and deprived the Union of a reasonable opportunity to suggest and discuss practicable alternatives to the use of an Outside Entity, the arbitrator shall fashion a remedy which includes earnings and benefits to Employees who otherwise may have performed the work."

FINDINGS

The Article 2-F-6 Mutual Agreement signed by the parties in September 2010 reads in part as follows:

MUTUAL AGREEMENT
between
ARCELORMITTAL USA, INC., INDIANA HARBOR
and
UNITED STEEL WORKERS, LOCAL 1011
TRANSPORTATION DEPARTMENT
Concerning
Trucking

In accordance with the provisions of Article 2, Section F.6. of the BLA, the Company and the Union agree to the following in full and final settlement of BUWC contracting out Notices dated 10/14/09 and 2/23/09 regarding slag and coil hauling respectively. The parties recognize that trucking between IHW and IHE is bargaining unit work.

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4. Offers of overtime:

In addition to paragraph #1. above [dealing with base force], before the Company utilizes contractors to perform trucking work from IH/W to IH/E, the Company will offer overtime to all active Internal Logistics CDL-A motor pool truck drivers in the Transportation Department to the maximum hours permitted by the DOT.

Before contractors are utilized to perform work within the confines of IH/W, the Company will offer employee option overtime beyond the maximum DOT hourly constraints to all Internal Logistics CDL-A motor pool truck drivers performing non-DOT regulated trucking and up to DOT maximums for those who are performing DOT regulated trucking.

It is undisputed that the Company utilized a trucking contractor to perform scrap hauling work within the confines of Indiana Harbor West on the November 28, 2013 Thanksgiving Day contractual holiday and on the November 29, 2013 Day after Thanksgiving Day contractual holiday, and that on neither occasion did the Company offer employee option overtime to all Internal Logistics CDL-A motor pool truck drivers who had volunteered and were available to

work on these holidays. While it was persuasively established that this failure to have offered employee option overtime before utilizing a contractor to perform intraplant work was not attributable to an intentional violation of Paragraph 4 of the Mutual Agreement Concerning Trucking, but rather resulted from Steel Shop Management calling-out the contractor without having previously alerted Trucking Management of the need for this work to be performed on these holidays, the Company did not comply with the agreed procedure in Paragraph 4 for utilizing contractors for intraplant work and thus this work was improperly contracted out on November 28 and 29, 2013 and a make whole monetary remedy is due. At issue is whether every one of the affected Internal Logistics CDL-A motor pool truck drivers is entitled to a make whole monetary remedy regardless of the number of hours worked by the contractor or whether the make whole monetary remedy here should be limited to the total number of hours worked by the contractor on November 28 and 29, 2013.

The Union asserts that proper resolution of this case requires a focus on the express terms of Paragraph 4 of the Mutual Agreement Concerning Trucking and not on the limited make whole monetary remedies typically ordered for improper contracting out in grievances arising under Article 2-F of the Collective Bargaining Agreement. The Union insists the Mutual Agreement stands alone, and the Union stresses that in Paragraph 4 of the Mutual Agreement the negotiating parties specifically provided the Company was to offer employee option overtime beyond the maximum DOT hourly constraints to all Internal Logistics CDL-A motor pool truck drivers performing non-DOT regulated trucking and up to DOT maximums for those who are performing DOT regulated trucking before contractors could be used to perform intraplant trucking work. The Union reasons that since overtime had to be offered to "all Internal Logistics CDL-A motor pool truck drivers", then "all … the motor pool truck drivers" who had volunteered and were available to work on November 28 and 29, 2013 were adversely impacted by the Company's failure to have offered overtime before utilizing a contractor and therefore they are each entitled to a make whole monetary remedy. The Union insists Paragraph 4 would be rendered meaningless if a monetary remedy is not extended to all of these truck drivers.

Improper contracting out of intraplant trucking work occurred in this case and there is certainly no question that a make whole monetary remedy is due. That said, there is a distinction between an appropriate make whole monetary remedy and a penalty. Monetary remedies awarded by arbitrators in cases of improper contracting out are normally limited to the total number of hours worked by the contractor, and the only cited reference in the Collective Bargaining Agreement to arbitrators having more expansive authority to fashion a remedy or penalty was the Article 2-F-9 Special Remedies provision which was not shown to be applicable in the present circumstances. The negotiating parties were not proven to have jointly intended that a violation of Paragraph 4 of the Mutual Agreement Concerning Trucking would authorize a special remedy or penalty in the form of a monetary payment to every available motor pool truck driver for all hours of intraplant trucking work improperly assigned to a contractor, and the language of Paragraph 4 is not interpreted as providing for such a special remedy or penalty. Nor is the failure to have offered employee option overtime before utilizing contractors on the November 28 and 29, 2013

holidays to perform this intraplant scrap hauling found to have constituted a willful or repeated violation of Paragraph 4.

The Company's utilization of a trucking contractor to perform this intraplant work constituted improper contracting out, justifying a make whole monetary remedy, but it is determined that in the absence of authority for the arbitrator to fashion a special remedy or penalty on these particular facts and circumstances the total monetary remedy due in this case is appropriately limited to the number of hours worked by the contractor on the November 28 and 29, 2013 holidays.

AWARD

The Company is directed to provide a make whole monetary remedy limited to the number of hours worked by the contractor on the November 28 and 29, 2013 holidays.

David A. Petersen, Arbitrator