IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
STEELTON PLANT

And ArcelorMittal Case No. 80

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1688

OPINION AND AWARD

Background

This is a final offer arbitration from the Steelton Plant concerning the terms of a Layoff Minimization Plan (LMP). The proceeding arises under Article Eight – Earnings Security:

> Section A. Employment Security
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> 1. Objective
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> The parties agree that it is in their mutual interest to provide all Employees, with at least three (3) years of Continuous Service, with the opportunity for at least forty (40) hours of pay each week.
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> 2. Layoff Minimization Plan
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> The Company agrees that, prior to implementing any layoffs, it shall review and discuss with the Union
>
> a. documentation of a clear and compelling business need for the layoffs (Need).
>
> b. the impact of the layoffs on the bargaining unit, including the number of employees to be laid off and the duration (Impact); and
>
> c. a Layoff Minimization Plan which shall contain at least the following elements:

(1) a reduction in the use of Outside Entities;

(2) the elimination of the purchase or use of semi-finished and hot-rolled steel from outside vendors that can reasonably be produced by the Company;

(3) the minimization of the use of overtime;

(4) a program of voluntary layoffs;

(5) the use of productive alternate work assignments to reduce the number of layoffs; and

(6) a meaningful program of shared sacrifice, including senior management.

3. Employee protections

Reference to the elements of a Layoff Minimization Plan in Paragraph 2 above shall not be construed to impair in any way protection afforded to employees under other provisions of this Agreement.

4. Union Response

The Union shall be provided with sufficient information to reach its own judgment on whether there is a Need, the appropriate impact and to develop its own proposed Layoff Minimization Plan.

5. Dispute Resolution

a. In the event the parties cannot reach agreement on whether there is a Need, the appropriate Impact and the terms of a Layoff Minimization Plan, the Company may implement its plan and the Union may submit their dispute to an expedited final offer arbitration under procedures to be developed by the parties. If the Company lays off Employees or takes other actions in violation of this Article, such Employees shall be made whole.

b. The arbitrator's ruling shall address whether the Company demonstrated a Need and if it did, whose proposed Impact and Layoff Minimization Plan are more reasonable, given all the circumstances and the objectives of the parties.

Pursuant to the above procedures, the parties engaged in discussions concerning the need for an LMP, and exchanged proposed LMPs. On September 12, 2016, the Company proposed what it termed its "final LMP." On September 14, 2016, the Union rejected the Company's LMP and invoked the final offer arbitration process outlined in Article 8-A-5, above. The Company implemented its LMP on September 16, 2016.

The parties agree that there is "a Need for layoff," and they are in agreement with most of the terms of the Company's implemented LMP. At issue in this arbitration are whether the Company has implemented "a meaningful program of shared sacrifice..." *and* the Company's decision to impose a 32-hour work week on employees with more than three years of service. The 32-hour dispute was the principal focus at the hearing. Although the Company's LMP includes a voluntary 32-hour provision, no employees volunteered for the shortened work week. The plan also says that if voluntary layoffs and voluntary work week reductions are insufficient, the Company could (and now has) implement mandatory 32-hour scheduling. [1] There is no dispute between the parties that the Company can schedule employees with less than three years of continuous service for 32-hour weeks. However, the Union contests the Company's right to impose that schedule on employees with three or more years of service. That question must be addressed before any determination about whether the Company's LMP or the Union's LMP is more reasonable.

The Union points to Article 8-A-3, above, which says that the elements of an LMP "shall not be construed to impair in any way any protection afforded to Employees under other provisions of this Agreement." Article 5-C-4, headed "Full Week Guarantee" provides, in relevant part, "An Employee scheduled to work will receive, during a payroll week, an

[1] The Union's proposed LMP says that if voluntary layoffs and voluntary 32-hour schedules are not sufficient, then forced layoffs "will be made in accordance with the provisions of Article Five, Section (E).1(c) of the BLA and the Steelton Plant – Agreement on Seniority."

opportunity to earn at least forty (40) hours of pay...." This guarantee, the Union asserts, cannot be impaired under an LMP, absent agreement of the parties.

The Company argues that it secured the right to schedule employees with three or more years of service for 32 hours during the 2012 negotiations. The Company points to the December 15, 2002 Agreement between International Steel Group (ISG) – a predecessor of ArcelorMittal – and the USW, which ran to September 1, 2008. At the time of the 2002 Agreement, ISG had purchased – or was in the process of purchasing – assets of the Bethlehem Steel Company, including the Steelton Plant. The ISG-USW Agreement applied to those facilities beginning June 16, 2003. That Agreement had the same 40-hour guarantee language and LMP language found in the 2012 Agreement between ArcelorMittal and the Union. A December 15, 2002 Letter of Understanding from Thomas Woods, ISG's Corporate Manager of Labor Relations, to David McCall, the Union's District 1 Director, included the following provision:

> In the event of a "Need" for layoff under the provisions of Article Eight Section A, the local parties, by mutual agreement, may agree to utilize reduced work schedules of 32 hours as part of a layoff minimization plan.

This language, the Company contends, made it clear that the use of a 32-hour schedule under an LMP was subject to agreement by the parties, and could not be implemented unilaterally.

The mutual agreement language in the Letter of Understanding was carried forward into the 2008 Agreement. Patrick Parker, the Company's Corporate Vice President of Labor Relations, testified that one of the Company's goals in negotiations for the 2012 Agreement was to secure the right to impose a 32-hour work week as part of an LMP. That was effected, Parker asserted, when the parties agreed to remove the mutual agreement language, quoted above, from the Letter of Understanding. Parker testified that the Union's agreement to remove the language

was accompanied by two other agreements that worked to the benefit of employees on a 32-hour schedule. Under language agreed to in 2012, employees scheduled for 32 hours would receive 40 hours of credit for contributions to the Steelworker's Pension Trust. Also, profit sharing for 32-hour employees would be calculated as if the employees had worked 40 hours. Parker claimed it was clear in negotiations with Director McCall that the Company wanted to remove the mutual agreement language and that the Union did so in exchange for the pension trust and profit sharing provisions.

During the second day of hearing via telephone on December 9, 2016, McCall contested Parker's account of the negotiations. According to McCall, it was the Union that proposed removing the mutual agreement language. Also, McCall said the Union proposed treating employees who had been scheduled for 32 hours as if they had worked 40 hours for purposes of the pension trust and profit sharing. The Union's impetus for the changes, McCall testified, was a 2009 experience at the Burns Harbor plant when local officials agreed to a 32-hour schedule for some employees with three or more years of service. Employees who had been laid off at the same time were given 40 hours of credit for profit sharing and the pension trust for up to two years, while employees working on a 32-hour schedule received only 32 hours of credit. McCall said the Local Union leaders were not aware of the disparity when they agreed to a 32-hour schedule.

McCall testified that the Union's proposals in 2012 were intended to "repair" the result at Burns Harbor. Moreover, McCall contended that the mutual agreement language was taken out so the same thing would not happen again. As I understood McCall's testimony, he did not say the removal of the mutual agreement language would eliminate the right of Local Union officials to agree to 32-hour schedules in LMPs. In fact, McCall testified that the language was inserted

in 2002 in response to an ISG request, so local officials would understand they had the right to agree to a 32-hour schedule. But, the Union wanted to remove the language to discourage Local Unions from agreeing to a 32-hour schedule. There was, McCall insisted, no bargain to remove the mutual agreement language in exchange for the Company's concession for 40 hours of pension and profit sharing credit for employees on a 32-hour schedule.

The Union also offered a Company proposal from the 2012 negotiations, which indicated that at one point in the negotiations, the Company proposed amending Article 8-A-2-b by adding the words "or a reduction to a 32-hour workweek" immediately after the words "the impact of the layoffs." Under this proposal, the LMP language itself would have recognized that such plans could include a mandatory 32-hour work week. The Company withdrew a separate proposal for a 32-hour work week side letter when it made this proposal. The Union did not accept the proposal and the language is not part of the 2012 Agreement. Thus, the Union argues that in the instant case, the Company is trying to get through arbitration what it was unable to achieve in bargaining. The Union also notes that at the same time the Company made the proposal to add the 32-hour language to the LMP provisions, the Company accepted the Union's proposals to give 40 hours of pension trust and profit sharing credit to those employees on a 32-hour schedule. This means, the Union contends, that there was no quid pro quo involving an exchange of the 40-hour credit provisions for a right to schedule 32 hours under an LMP; the 32-hour proposal was still pending when the Company accepted the other provisions.

The Company responded by arguing that the removal of the mutual agreement language from the Letter of Understanding accomplished its goal to schedule mandatory 32-hour work weeks under an LMP. Thus, the Company argues, it did not need the proposed language amendments to the LMP provision itself. The Company insists that it withdrew that proposal

because it was no longer necessary after the Union agreed to strike the mutual agreement language from the Letter of Understanding.

Findings and Discussion

The parties obviously have different recollections of the negotiations. They do not even agree about who made the proposal to remove the mutual agreement language from the Letter of Understanding. The Company says it made the proposal so it would be clear that 32-hour work weeks were no longer solely a matter of agreement, and that the Company could unilaterally include the shortened work week in an LMP. The Union, on the other hand, said it made the proposal to prevent local Union officials from viewing the language as encouragement to agree to 32-hour work weeks. It is not clear from the record when the parties agreed to remove the mutual agreement language. The Union says it was not tied to the 40-hours-credit-for-32-hours-worked provisions because the Union's exhibit shows the Company agreed to those proposals at the same time it proposed adding the 32-hour language to the LMP itself. But paper proposals themselves do not always tell the whole story. The Company could have agreed to the Union's 40-for-32-hours proposals in an effort to get Union agreement to its 32-hour proposal, which is how Parker characterized what he called a "package deal." The point is that each side has a different view of the bargaining history – both of which are plausible – and the written proposal the Union submitted does not necessarily favor either side.

Both of the principal witnesses – Parker and McCall – were credible; that is, both offered an honest account of their view about what happened in negotiations, even though their versions of what the parties agreed to are not compatible. This is not uncommon; complex contract negotiations often produce differing accounts of what happened in bargaining. In such

cases, bargaining history is of limited value – especially when there are no credibility issues – and all an arbitrator can do is interpret the language of the Agreement.

The principal change was the removal of the mutual agreement language from the side letter. The parties clearly understood, however, that at least prior to 2012, mandatory 32-hour work weeks under an LMP were barred. The only LMP arbitration case cited by the parties was Rolf Valtin's 2010 decision concerning an LMP for the Cleveland Plant. Arbitrator Valtin noted that the Company had proposed a 32-hour work week as part of its LMP, but that implementation required the Union's consent. The Company ultimately withdrew the proposal because the Union would not agree. And, in the instant case, the Company acknowledged that it entered negotiations in 2012 determined to win the right to include a mandatory 32-hour schedule in an LMP.

The Company claims that the removal of the mutual agreement language, coupled with its concessions on profit sharing and pension contributions, signaled the parties' acknowledgement that the Company had the right to include mandatory 32-hour work weeks in an LMP. There is no contention that removing the mutual agreement language ended the parties' right to agree to reduced work weeks in an LMP. The Company, in fact, included a 32-hour work week in its proposed LMP in the instant case, presumably hoping – even if not believing – the Union would accept it. But, on its face, it is hard to understand how removing language that permitted agreement to a 32-hour work week removed the bar on imposing a 32-hour schedule without agreement. According to the Union, the language was included merely to emphasize that the local parties could modify the Agreement as needed to allow a 32-hour work week in an LMP. But, even if the parties could not have agreed to a shortened work week in an LMP absent the mutual agreement language, it does not necessarily follow that removing the language

empowered the Company to make those modifications unilaterally. Nothing in the stricken language indicated that it was included in the Letter of Understanding to prevent the Company from imposing a shortened work week unilaterally.

The Company argues, however, that the mutual agreement language meant the inclusion of a 32-hour work week could be accomplished *only* by agreement. Once it was removed, the Company says it was free to include a 32-hour work week in its LMP as long as doing so did not "impair…any protection afforded to employees." And, the Company argues, a shortened work week under an LMP does not limit any right to a 40-hour guarantee. The Full Week Guarantee in Article 5-C-4 says, in relevant part, "An employee scheduled to work will receive, during a payroll week, an opportunity to earn at least forty (40) hours of pay…." The Company traced the history of employment security provisions, beginning with language under the 1999 Bethlehem and Ispat Inland contracts, two ArcelorMittal predecessor companies. Under those contracts, the employers could lay off employees only in very limited circumstances. The Employment Security Plan (ESP) language in both agreements said, "employment security is defined as the opportunity to earn forty (40) hours of pay…during any payroll week." However, in the 2002 ISG contract, the 40-hour language was taken out of the ESP and moved to the workplace procedures section of the Agreement, a change that was maintained in subsequent ArcelorMittal contracts. This change, the Company says, reduced the protection of the 40-hour guarantee. It was no longer an absolute right under the ESP but, rather, was part of the workplace procedures. However, the Company argues that a workplace procedure is "the standard way of doing something," which does not inhibit the Company's right to schedule employees for less than 40 hours under the circumstances confronted by an LMP, where there is "a Need for layoff."

I am not persuaded that the heading "Workplace Procedures" supports the Company's cause. That section covers not only working hours, but also a plethora of other subjects, including local working conditions, seniority, job postings, and the grievance procedure. These provisions do not merely outline a standard way of doing things subject to unilateral change in unusual circumstances, like "a Need for layoff." Moreover, it does not seem surprising that the 40-hour language would have been moved out of the ESP. Prior to 2002, the ESP was essentially a prohibition against layoffs. But, beginning in 2002, the Employment Security language was revised to acknowledge that layoffs could occur and to establish procedures for their implementation. The 40-hour guarantee language was moved to the hours-of-work provision and, of particular significance to this case, the language was changed to say that the employees subject to the 40-hour guarantee were those who were "scheduled to work." Unlike the previous Employment Security Plans, then, this change recognized that not everyone had to be scheduled to work.[2] Some might be laid off, but those who were not were to receive an opportunity to earn 40 hours of pay. Given this language, I cannot find that the Company has the right to schedule employees on 32-hour work weeks under an LMP, absent agreement from the Union.

I agree with some of Arbitrator Valtin's observations in his Cleveland Plant LMP case, including his view that using a 32-hour work week would have required a uniform sacrifice throughout the bargaining unit. Moreover, in the instant case, a 32-hour schedule may have given the Company a better chance to overcome its financial difficulties, not all of which are

[2] The 1999 Ispat Inland ESP language said "all full-time active employees as of the week beginning May 30 1993, are eligible for employment security under the provisions of this plan." Employees hired after July 31, 2009, were eligible for employment security "upon attaining three (3) years of service." See, Appendix A, Section C. There was similar language in the 1999 Bethlehem Agreement, see Appendix 16, Section C: "All current Employees with at least one (1) year of continuous service as of August 1, 1999 at their respective Business Divisions, are eligible for employment security."

attributable to the same factors that have affected the rest of the steel industry. I believed the Company witnesses who said consistent operation under a 32-hour schedule would have made the Company more responsive to customer demand than imposing periodic down weeks, which will be necessary under a 40-hour schedule. Nevertheless, my responsibility under Article 8-A-5-b is to determine which of the two LMPs is more reasonable. I am not free to make modifications. Because the Company's plan includes a mandatory 32-hour work week, which the Company has no right to impose, I must find that the Union's LMP is more reasonable. Pursuant to Article 8-A-5-a, employees with three or more years of service who were scheduled for involuntary 32-hour work weeks shall be made whole.[3]

AWARD

Pursuant to Article 8-A-5-b, I find that the Union's Layoff Minimization Plan is the more reasonable one, given the circumstances addressed in the Findings. I will retain jurisdiction for a period of 60 days to resolve any disputes concerning the remedy provided for in Article 8-A-5-a.

Terry A. Bethel

Terry A. Bethel, Arbitrator
January 4, 2017

[3] As noted in the text, the parties had agreed to all of the LMP except the 32-hour provision and the shared sacrifice provision, which were the only issues covered by these proceedings. Presumably, then, the parties understood that the agreements concerning the other terms would stand regardless of the result in this case.