IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR EAST

And ArcelorMittal Case No. 92

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010, USW

OPINION AND AWARD

Background

This case from Indiana Harbor East concerns the Union's claim that the Company is improperly paying hostage pay to employees who have been held in their old job for more than 60 days after a successful bid to another job. The case was tried in the Company's offices on March 15, 2019. Chris Melnyczenko represented the Company and Mike Millsap presented the Union's case. There are no arbitrability issues. The parties did not stipulate to a statement of the issue, but agreed that I could formulate the issue based on the record. The parties submitted the case on final argument.

Article 5 of the parties' Agreement concerns Workplace Procedures, and Section E covers Seniority. Section E-7 concerns Posting of Job Openings, Section E-10 concerns Permanent Vacancies and Transfer Rights, and Section E-10-e is devoted to what the parties call hostage pay:

> Should the Company deem it necessary to retain an Employee on his/her former job in order to continue efficient operations, it may do so for a maximum of sixty (60) days, on the basis of establishing such Employee on the new job and temporarily assigning him/her to his/her former job until a suitable replacement

> can be trained for the job or its performance is no longer required. In such event, after two (2) weeks of being delayed the Employee shall be entitled to earnings not less than what s/he would have made had s/he been working on the new job on which s/he has been established and, where applicable, shall be paid as though such hours were credited to any trainee program. In addition, should the Company not assign the Employee to the new job on the sixty-first (61st) day, all subsequent hours worked will be calculated at overtime rates until the employee is assigned to the new job.

This case involves the last sentence of Section E-10-e, which establishes what the parties acknowledge is a penalty for failing to assign an employee to his or her new job after 60 days.

A version of the language appeared in the 1999 Agreement between Ispat Inland and Local 1010, although without the 60-day limitation and the time-and-a-half penalty in the last sentence. The language assumed its current form – albeit still absent the last sentence – in the ISG-USW December 15, 2002 Agreement, although that document did not cover what is now ArcelorMittal Indiana Harbor East, the entity affected by this arbitration. Ispat Inland and ISG merged in 2004, forming Mittal Steel USA. The parties' 2005 Agreement continued the ISG version of what is now Article 5, Section E-10-e. The 60-day penalty covered by the last sentence was added during negotiations for the 2008 Agreement because, the Union says, the Company continued to hold employees in their old jobs for more than 60 days despite the limitation of Section E-10-e. However, in the same contract, the parties also agreed "to delay the effectiveness date of the overtime penalty provisions associated with Article Five Section E(10)(e) until September 1, 2010." Apparently, the delay was intended to allow the Company time to deal with employees who had already been held in their old jobs for more than 60 days, and to plan how to reduce the number of employees who were kept into the penalty period.

There is no dispute that once the penalty pay provision was implemented in September 2010, eligible employees were paid time-and-a-half in current payrolls, meaning they received

the penalty pay during the same pay periods they worked the hours. This case arose following a letter dated October 30, 2017, from Javier Sanchez, Division Manager of Labor Relations, to Tom Hargrove, President of Local 1010. The letter said:

> Effective November 1, 2017 and in accordance with Article Five, Section E(10) of the 2015 Basic Labor Agreement, an employee who is a successful bidder but who is retained on his/her former job for more than 60 days, will be paid at overtime rates for the subsequent hours worked after she/he begins work on the new job and has remained on the new job for more than 30 days (working turns).[1]

Sanchez testified that the reason for the change was that employees were "playing games" by submitting what he called fake bids. The employees, he said, submitted bids for jobs they did not really want hoping to be held in their old jobs for more than 60 days and receive the time-and-one-half penalty. This also had the effect of keeping employees who wanted the jobs from getting them. The Company could not simply have moved all of the bidders within 60 days, Sanchez said, without having an adverse effect on the area they were moved from.

Sanchez said the Company believes it has the authority to make rules, citing Article 5, Section E-7-b: "Employees in the seniority unit who wish to apply for the vacancy... may do so in writing in accordance with reasonable rules developed by the Company." He also cited a similar rule that the Union has not challenged. Pursuant to Section E-10-e, an employee who is delayed from taking his new job for more than two weeks is entitled to the earnings the employee would have made working on the new job. This differential is not paid until after the transfer to the new job has been completed, that is, until after the employee has moved to the new job and worked for 30 days. On cross examination, Sanchez acknowledged that these

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[1] Similar letters were received at Indiana Harbor West, where the Company implemented the rule, and Burns Harbor, where the rule has not been implemented, despite a scheduled start date of January 7, 2019. Both the Steelton Plant and Coatesville pay the penalty only after an employee has been on the new job for 30 days. The Company has not announced the change at the Cleveland Plant.

make-up earnings are dependent on what other employees have made or worked, and are not simply a mandatory overtime payment. He also agreed that in the 2015 negotiations, the Company proposed that employees would "receive hostage pay upon becoming transfer complete on a bid." The Company's proposal noted that some employees simply reverted back to their home department after they had collected hostage pay. The parties did not adopt the Company's proposal. Sanchez said it is not uncommon for the Company to reach out to the Union about an issue, even though it already has the right to take action.

Matt Beckman, Vice Chairman of the Union's Grievance Committee, said the Union does not question the Company's right to make rules concerning the bidding process. But Section E-7-b applies to the bidding process, he said, not to the hostage situation. Beckman said the bid forms have language that says the bids can be submitted by written form or fax up until 11:59 of the day the bids close. This, he said, was the kind of rule the Company has the right to impose pursuant to Section E-7-b.

Jennifer Spiegel, HR Representative, said the Company typically cannot release numerous bidders from an operation at the same time. Employees know this, she said, and take advantage of it. She said employees can submit as many bids as they want at once and that when they bid on a job they have no intention of taking, it clogs up the system. Spiegel identified a hostage report from August 11, 2017, which was before the change complained of in this case, which showed 134 employees had been held beyond 60 days. A hostage report that was current as of the time of the arbitration hearing showed only two employees held beyond 60 days. The Company believes the reduction was due in large part to the fact that employees stopped bidding on jobs they did not intend to take because they could no longer receive hostage pay unless they accepted the job and worked in it for 30 days.

The Company also called Andre Joseph, Division Manager of No. 4 Steel Producing. He said when he took over in December 2016, there were upwards of 30 craft employees receiving time-and-a-half hostage pay, some of whom had been getting it for a very long time. This created challenges, Joseph said, because he could not afford such a mass exodus of maintenance employees. According to Joseph, one craft employee told a manager he was only bidding out to get hostage pay. A maintenance supervisor encouraged Joseph to "purge" all of the employees who had gotten bids, some of whom, he said, he knew were bluffing. When Joseph released some employees, one of them asked what was going on and Joseph replied that he had called their bluff. The employee immediately signed a refusal paper, Joseph said. If the employees had actually left when he called their bluff, Joseph said he would have been short-handed.

Positions of the Parties

The Union argues that the parties agreed to the penalty language in 2008 in order to discourage the Company from keeping employees in their former jobs beyond the 60-day period provided for in Section E-10-e. The Union points to the Company's exhibit showing that in August 2010, there were 134 employees being held beyond the 60-day period. But this was prior to the September 1, 2010 effective date of the time-and-a-half penalty and, the Union says, shows why the penalty language was needed. Prior to September 2010, there was no real incentive for the Company to release employees within the 60-day limit.

The Union says it is no defense to claim that employees were playing games by bidding on jobs they had no intention of taking. This would not be an issue, the Union says, if the Company moved people within the 60-day period the parties agreed to in Section E-10-e. The Union agreed to delay the implementation date of the penalty for two years after the effective

date of the 2008 Agreement to allow the Company an opportunity to put a plan together to avoid holding employees more than 60 days. But, the Union says, the Company was unable to do that, so it decided to change the rules and reduce the impact of the 60-day penalty, which defeats the parties' purpose in agreeing to it.

The Union scoffs at the Company's claim that it could implement the rule under Article 5, Section E-7-b. That language, the Union says, applies only to the bidding process itself; it does not permit the Company to make rules concerning how and when employees are paid pursuant to Section E-10-e. Had the parties intended to allow the Company to impose such rules, the Union claims, they would have included express language to that effect. The Union also says the Company's own actions show how to prevent employees from playing games. Division Manager Joseph said he called the employees' bluffs by transferring them within the 60-day period, which stopped them from bidding on jobs they did not want. This, the Union argues, was consistent with how the contract is supposed to work.

The Company says the language of Section E-10-e is not ambiguous. It says the hours worked will be "calculated at overtime rates"; it does not say when the overtime penalty is to be paid. The Company's rule is reasonable, it says, as evidenced by the fact that other ArcelorMittal plants do the same thing and by the Company's policy for paying make-up pay after the initial two weeks. The penalty payment was not intended to be a windfall for employees, although the Company insists that is what it became once employees realized that they could get overtime without actually accepting a transfer. Moreover, the employees' actions prevented employees from transferring who actually wanted to do so. The Company discounts its bargaining proposal to delay the penalty payment until after an employee was on the new job for 30 days. Many things are addressed in negotiations, the Company says, to gain traction with

the Union. The Company also denies that it should have to play the employees' games by "calling their bluff."

Findings and Discussion

The Company cannot rely on the right-to-make-rules language in Article 5, Section E-7-b. That language is clearly limited to the bidding process itself. Subsection 7 is headed "Posting of Job Openings" and Section E-7-b is directed at how employees who want to apply for a vacancy – i.e., bid – can do so: "in accordance with reasonable rules developed by the Company." It is noteworthy that other than specifying that bids are to be in writing, Subsection 7 is silent about how bids are to be submitted. Thus, the parties left it to the Company to implement reasonable rules concerning the details of the writing and its presentation to the Company. But this rule-making language cannot be extended to cover other facets of the job transfer process, particularly in instances where there is specific language dealing with an issue, as exists in Section E-10-e, which contains unambiguous language about how employee wages are to be calculated.

It is true, as the Company says, that Section E-10-e says hours worked on the 61st and subsequent days will be "calculated" at the overtime rate, and does not say when the overtime penalty will be paid. Thus, the Company says it is free to "calculate" the amount due employees and pay them the excess over straight time rates after their transfer is complete. But the Company's argument places more weight on the word "calculate" than it can bear. Section E-10-e is not the source of the Company's obligation to pay employees for the hours they work. Rather, its function is to specify what amount employees will receive as a penalty if they are held in their old job beyond 60 days. Section E-10-e says that penalty is to be calculated at the

overtime rate, which is the amount employees are to be paid for their services when the penalty period is triggered. In short, the last sentence of Section E-10-e simply identifies the rate at which employees are to be paid for their work during the penalty period. Nothing in that section allows the Company to withhold part of that payment until a later time.[2] Nor does the Company have the right to impose a rule that alters the plain language of Article 5, Section E-10-e.[3]

I understand the Company's concern about employees playing games with the bidding process and the availability of hostage pay. Frankly, the documentary evidence the Company submitted does not demonstrate the scope of the problem. Company Exhibit 2 lists 134 employees who were eligible for hostage pay as of August 11, 2010. But this was *prior to* the Company's obligation to actually pay hostage pay, which by agreement had been delayed until September 1, 2010. Thus, there appears to be some merit to the Union's suggestion that rather than showing that employees were abusing the system, Company Exhibit 2 shows why the Union wanted to negotiate a penalty payment for employees who were held in their old jobs for more than 60 days.

Nevertheless, I credit Company testimony that employees had been bidding on jobs in which they had no real interest as a way of gaming the system, and that such conduct made it difficult to fill positions with employees who actually wanted the jobs. But that does not allow

[2] Even if one were to conclude that the language was ambiguous, the fact that the parties administered it consistently from September 1, 2010 until November 1, 2017 is strong evidence of what they understood it to mean. The Company cannot simply abandon that interpretation unilaterally.

[3] The Company relies, in part, on my decision in the *Sun Coke, Inc. and USW Local 1010* Attendance Policy Grievance, decided in 2015. In the course of that opinion concerning the Company's right to implement a no-fault attendance plan, I said "it is not unreasonable for an employer to adopt a new strategy aimed at controlling abuse of an existing plan." But that observation has no application in the instant case. In the *Sun Coke* case, the contract did not specify a particular kind of attendance policy. Thus, the Company simply replaced one employer-promulgated policy with another one. In the instant case, in contrast, the contract contains specific language about how much employees will be paid as a penalty. Moreover, even in the *Sun Coke* case, I found that the new attendance plan could not limit rights expressly provided by contract.

the Company to change the contract unilaterally. The proper way to change the system was through negotiation, which the Company tried unsuccessfully in 2015. Moreover, the Company did not explain why it has difficulty releasing employees from their new jobs within 60 days. The Union says the Company does not move employees out of their old jobs before the penalty kicks in because it lacks sufficient trainers. There is no evidence in the record concerning the Company's training staff or practices. However, the parties established the 60-day limit in the first Mittal-USW Agreement in 2005, which suggests the Company believed any necessary training or ancillary movements could be completed in that period. That conclusion is strengthened by the 2008 agreement for an overtime pay penalty, and the establishment of a two year grace period to allow the Company sufficient time to make any necessary adjustments. If the 60-day period is not sufficient to permit the necessary training, the Company cannot avoid the effect by withholding penalty pay.

Finally, my decision is not influenced by the fact that the Company holds make-up pay until after an employee has moved to the new job and remained there for 30 days. As I understood the testimony, there might be some difficulty paying make-up pay on a current basis because the amount an employee would have earned depends on hours worked by others, presumably those actually working in the job to which he will ultimately transfer. More important, however, is the difference between make-up pay and penalty pay. Make-up pay is the commitment to pay an employee as though he were actually working in the new job. Although the legitimacy of the Company's decision to delay the payments until transfer is complete is not an issue in this case, one might contend that an employee should not be paid as if he were actually in the job until he begins working it. Make-up pay compensates an employee for what he actually lost by not being moved to the job within two weeks; but if he never moves to the

job, or if he moves and then reverts, then he really didn't lose anything. In contrast, the time-and-a-half payment does not compensate an employee for what he loses by not being moved. It is, rather, a penalty intended to spur Company action and move employees to their new jobs before 60 days has elapsed. The penalty loses some of its force if the payments can be deferred indefinitely or withheld even when an employee loses interest in the new job because the delay persisted for so long.

In sum, I find that the Company does not have the right to defer penalty payments until employees have completed the transfer process. The Company is directed to make employees whole, to cease withholding hostage pay, and to pay it on a current payroll basis.

AWARD

The grievance is sustained. The Company is directed to make employees whole, to cease withholding hostage pay, and to pay it on a current payroll basis.

Terry A. Bethel

Terry A. Bethel, Arbitrator
May 2, 2019