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In the Matter of Arbitration Between:	
ARCELORMITTAL USA **Steelton, PA**	**Grievant: Class Action** **Issue: Contracting Out** **Gr. No. 170809 PLT** **Arbitrator Docket No. 180707**
and	Case 96
UNITED STEELWORKERS, **Local 1688.**	
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BEFORE ARBITRATOR JEANNE M. VONHOF

INTRODUCTION

The undersigned Arbitrator was appointed according to the rules of the applicable collective bargaining agreement. The hearing was held on September 11, 2018, at the plant in Steelton, PA.

Mr. Richard L. Samson, Ogletree, Deakins, represented ArcelorMittal USA, Steelton, hereinafter referred to as the Employer or the Company. Mr. Steve Taylor, General Manager, and Mr. John Nelson, Manager of Production Scheduling, testified on behalf of the Employer.

Mr. Patrick Gallagher, District 1 Sub-district Director, represented United Steelworkers Local 1688, hereinafter referred to as the Union or the Local. Mr. Greg Reese, Grievance Committee Chairman, testified on behalf of the Union.

Each party had a full and fair opportunity to present evidence at the hearing. Both parties filed post-hearing briefs, the last of which was received on or about October 11, 2018.

Issue:

What is the appropriate remedy for the Company's violation of the Basic Labor Agreement?

Relevant Contract Language

Article Two – Union Security

...
Section F. Bargaining Unit Work

1. Guiding Principle

a. The Guiding Principle is that the Company will use Employees to perform any and all work which they are or could be capable (in terms of skill and ability) of performing (Bargaining Unit Work), unless the work meets one (1) of the exceptions outlined in Paragraph 2 below.
...

2. Exceptions
...
b. Work Performed Outside the Plant or its Environs
...
(2) Production Work

The Company may use Outside Entities to perform production work outside the plant and its environs providing the Company demonstrates that it is utilizing plant equipment to the maximum extent consistent with equipment capability and customer requirements and the Company is making necessary capital investments to remain competitive in the steel business and is in compliance with Article 11, Section B (Investment Commitment).
...

5. Notice and Information

a. Prior to the Company entering into any agreement or arrangement to use Outside Entities to perform Bargaining Unit Work, the Company will provide written notice to the Bargaining Unit Work Committee sufficient time to permit a full determination, using the Expedited Procedure, of whether or not the proposed use of Outside Entities is permitted. Such notice shall include the following:

(1) location, type, duration and detailed description of the work;

(2) occupations involved in anticipated utilization of bargaining unit forces;

(3) effect on operations of the work is not completed in a timely fashion;

(4) copies of any bids from Outside Entities and any internal estimating done by or on behalf of the Company regarding the use of the Outside Entities.

...

9. General Provisions

a. Special Remedies

(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.

Article Five – Workplace Procedures

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4. Full Week Guarantee

An Employee scheduled to work will receive, during the payroll week, an opportunity to earn at least forty (40) hours of pay...

Article Eleven – Corporate Governance

...

Section B. Investment Commitment

1. The Company agrees to make the expenditures required to make its Steel Related Assets world-class and to maintain them as such.

2. The Union agrees to contribute to the competitiveness of the facilities and work with the Company to maintain the competitive nature of the facilities.

3. The Company agrees that, except during maintenance and repair outages, it will not directly or indirectly replace the product which could have been produced at any facility covered by this Agreement with product obtained from other than Canadian or United States facilities that provide base wages, benefits and protections such as just cause and seniority that are substantially equivalent to those provided in this Agreement, unless it is operating the relevant facilities covered by this Agreement at full capacity.

...

Background:

ArcelorMittal's Steelton plant is one of the oldest continuously operating steel-producing facilities in the country. This is a grievance over the Company contracting out orders in 2017 for the production of railroad rails. Rails of this type have been produced by this plant since its founding in 1867, and remain a major product for the plant.

The Company acknowledges that it violated the Basic Labor Agreement when it contracted out the production of rails to an ArcelorMittal facility in Spain. The Company did not provide advance notice of the contracting out of these five purchase orders placed in February through May 2017. The Union discovered them and filed a grievance, dated August 17, 2017, on behalf of all affected employees.

The parties met over the grievance and agreed that a remedy was appropriate for the Company's admitted violation of the BLA. The parties agree that 4,838 net tons was the amount of steel required for these purchase orders. The minutes of the third-step meeting dated November 22, 2017, address remedy, as follows,

> "F. Decision Reached
>
> ***Settled:*** The Company and the Union will identify the affected positions and determine the number of employees required to produce the 4388 tons of rail. Lost wages will be paid at straight time. The Union would like the Company to consider extending only the recall rights to April 2018 for those still on layoff and who might otherwise break service before then. The Company will decide once the employees affected have been identified. The grievance is settled without prejudice or precedent."

This a dispute over the extent of the remedy to which the parties agreed.

Mr. Greg Reese, Grievance Committee Chairman, has worked for the Company for 44 years, and has worked on the Contracting Out Committee for 20 years. He filed the

grievance here. He testified that Steelton commonly sells the rails at issue here to the same customers, North American railroads, that placed these purchase orders.

Reese testified that after the third-step meeting was held and the settlement was reached, the parties asked him to calculate affected employees and hours needed to produce the 4,388 net tons of steels. He said that he met with each department's managers to develop these calculations. Reese testified that it took him months to compile this information, which he entitled "Settlement Agreement," produced at arbitration as a "revised draft" dated February 8, 2018.

In the introduction to this document, the Union states that the Steelton plant was capable of producing these rails and to do so would have required an increase of the plant's operations. The document states that it is presenting a breakdown, by Department and Line of Progression, of the number of hours and crew (both laid-off and working employees), which would have been required to produce the contracted-out orders.

Reese's calculations for the affected employees are as follows:

Steelmaking Department Calculations

4,388 net tons = 46 heats
46 heats divided by 8 heats per turn, at 10 hours per turn = 5.75 turns
5.75 turns at 10 hours per turn = 57.5 hours

Reese then calculated how many crew members would have been needed on each operation to produce this amount of steel, per turn. The operations below require the following number of personnel to operate:

Furnace Shop (seven);
Caster (eleven)
Pit (two)

Reese also listed the required crew numbers for related supporting areas, such as Scrap Management; Cranes; Slag Processing; and Assigned Maintenance.

With the help of managers in each area, Reese then determined the number of employees who were on forced layoff at the time in each of these Steelmaking Department operations. His document states that these laid-off employees should be compensated at 66.25 hours each, subtracting any SUB and Unemployment Compensation they had received.

Reese then calculated compensation for those not on layoff, for each Line of Progression, as part of the total amount it would have cost to produce these orders. For example, because there were two laid-off employees in the Furnace Shop, the remaining number of working crew members necessary to produce a heat was five employees, according to the Union's calculations. These figures were used to determine a total amount of compensation for the non-laid off employees in the Furnace Shop, for example, as follows:

Furnace Shop (7 crew members needed, minus 2 on layoff)

5 (Working Employees) x 57.5 hours (46 heats)
= 287.5 hours, at the straight-time rate

The document calls for dividing this amount equally among the Furnace Shop employees who were not on layoff at the time. Reese performed the same calculations for the other Steelmaking Department operations.

Reese then calculated the number of hours and crew members needed to roll 46 heats into rails in the Rail Mill Department. The document uses the following figures:

Rail Mill Department

4,388 net tons = 46 heats
46 heats divided by 3.5 heats per rolling turn = 13.1 rolling turns

44" Mill
Required crew of 8 employees x 8 hrs./turn x 13.1 turns = 838.4 hrs.

28" Mill
Required crew of 15 employees x 8 hrs./turn x 13.1 turns = 1,572 hrs.

The document does not state that any employees were laid off from these operations at the time.

The document also calculates hours for the Long Length Rail Finishing Mill (LLRM). The Union's calculation for this area are as follows.

Long Length Rail Finishing Mill

Rotary and Associated Finishing Mill Positions

46 heats x 74 rails per heat = 3,404 rails
3,404 rails divided by 45 rails per hour = 75.6 hours
75.6 hours x 46 employees = 3,477 hours
The Union also provided figures for "the balance of Finishing Mill hours" as follows:

79.1 hours x 34 employees = 2,689.4 hours.
Adjusted Total of Hours for the LLRM = 4,929.88 hours[1]

Reese further included compensation for Assigned Maintenance for the 44", 28" and Long Length Finishing Mills; Cranes; and Metallurgical Lab. Testing. Inspection and

[1] Adding together both Rotary and other Finishing Mill hours led to a total of 6,167 hours. The Union subtracted 1,237.12 hours for crane position hours, which are counted elsewhere in its calculations, leading to an adjusted total of 4,929.88 hours to be paid to Finishing Mill employees.

Technical Support for the production operations.[2] The Union's document states that there was one employee on layoff from the Assigned Maintenance crew for the rolling mills at that time. The Union's calculations do not include all of the employees at the plant: crews at the 20" mill, for example, would not have been involved in the production of rails, and no remedy is calculated for them.

Reese testified that he had produced two earlier drafts of this document and presented them to the office of Mr. Rick Unfried in Steelton's Human Resources Department, as he was working on them. Once he completed this third draft, he presented it to Unfried on or about February 8, 2018. Unfried responded by producing a document showing payouts to individual employees in each of the areas identified in the Union's document, based upon the Union's calculations, with minor revisions. These Company calculations totaled about $330,000, according to Reese. Reese produced at arbitration the document that he said Unfried had prepared, with the amount of the payout to each employee in the Steelmaking and Rail Mill Departments, and supporting operations. He testified that he received this document from Unfried before the "second" grievance procedure. Unfried did not testify at arbitration.

The parties met again at a second second-step meeting, dated April 5, 2018. The Union took the position at that time that compensation was due to employees in the Steelmaking, Rail Mill and supporting departments. The Company's position was that the only employees who should be compensated were those in the Steelmaking Department

[2] The document states that compensation should be calculated at affected employees' incumbent rate of pay as of April 1, 2017. The Union also added a production bonus of 26.13%, calculated by averaging the existing production bonuses for each of the four April weeks.

who were laid off at the time the rails would have been produced.[3] The Company took the position that employees in the Rail Department were not fully-utilized at that time, but were being paid 40 hours per week under the contract guarantee. The Company argued that the rail orders in question could easily have been inserted into the schedule of the rolling mills, moving out less time-sensitive orders, and also that there 359.2 hours of open rolling time during the several months over which the orders would have been produced. The minutes note that the Union rejected this Company "decision."

According to the Company's minutes, the Union had admitted that the plant was underutilized during this period, but was nevertheless requesting that the employees in the rolling mills and supporting departments "are due extra compensation above being made whole." Reese testified at arbitration that this statement of the Union's position prepared by the Company does not reflect the Union's position. He submitted a document entitled "Step Two Grievance Record – Union's Position" in the grievance procedure. In this document, the Union states that the Company's reason for not compensating employees in the rolling mills "is based on its ability to have used, in hind-sight, non-productive periods of time, (some as short as 6 minutes) caused by having run out of hot steel to roll." The Union claimed that it was "implausible" that the Company could reconstruct, retroactively, time periods when it would have had the ability to produce the contracted-out rail orders, and stated that this argument ignores the fact that the work was contracted out. In its separate third-step response the Union argued that the Company

[3] The Company argues that it took the same position in the original third-step minutes, where the Company stated in the brief statement of its position, "There was certainly no intent to violate the Collective Bargaining agreement, nor was any Steelton Employee disadvantaged. Nevertheless, now recognizing that the contract was violated, the Company will make whole those Employees who could have been working in the furnace and caster less any SUB and Unemployment Compensation..." This statement appears in the paragraph before the "Decision Reached" language cited above.

would have had to be clairvoyant to know when underutilized rolling time would have been available, due to unpredictable delays. In addition, the Union argued that, in order to be able to use these periods, the Company would have had to add additional steel, in advance, to the Walking Beam Reheat Furnace.

As for remedy, the Union added in its own third-step response that the production of the disputed orders would not have required a two-turn Steelmaking operation, but rather could have been accomplished through an extension of hours per turn or turns per week. Reese testified at arbitration that nothing limits employees to working only 40 hours per week. He said that it is normal at Steelton to work 50 to 70 hours per week, when work is available. The Union also requested a special remedy in this second stage of the grievance procedure.

Reese testified at arbitration that the Company reneged on its original third-step agreement regarding the remedy, once Unfried completed the calculations of the overall cost. According to Reese, the parties' original agreement for a remedy included both the Steelmaking and Rail Mill Departments and associated departments. Reese suggested that the Company's decision not to honor the original agreement on the remedy was the reason the parties went through the grievance procedure twice. Under questioning from the Company, Reese acknowledged that the parties discussed the underutilization of the mills during the grievance procedure. He also acknowledged that the Union did not state in the records of the "second" grievance process that the Company had reneged on an earlier agreed remedy.

Mr. Steve Taylor, General Manager at Steelton, testified that he has worked for the Company for about 40 years. Taylor said that in 2017 there were about 485

employees in the bargaining unit at the beginning of the year and about 420 at the end of the year, including those on layoff. He testified further that there were about 20 to 30 bargaining unit employees on layoff in the early part of 2017 and that in the first week of March additional employees were laid off.[4]

Taylor testified further that rail production constitutes about 50% of Steelton's production. The 115 and 136 rails involved in the orders here are common "vanilla" products, according to Taylor, making up about 75% of rail production at the plant. Taylor testified that he first became aware that the orders here had been produced in Spain at the time when the Union filed the grievance in August 2017.

Taylor calculated the number of hours of production time that would have been required to produce the orders at issue here. He calculated that the orders would have required 44 heats, with 71.6 minutes required for each heat, for a total of 53 hours of melting time. He further calculated the overall number of hours of rolling time for the 44 heats as 112 hours.

According to Taylor and Mr. John Nelson, Manager of Production Scheduling, once the Company receives orders, the orders are scheduled for the rolling mills, taking into account the delivery requirements of other current orders. If a customer wants a quick delivery of an order, the schedulers discuss the orders with the operations departments, in order to move up production. Which orders are given priority may change daily, with urgent orders being slotted into an existing schedule, and other orders moved further out. Both Taylor and Nelson testified that the work here could have been

[4] Taylor said that at the time of the arbitration hearing there were about 375 bargaining unit employees, and that no one was on layoff, adding that the numbers of employees have been reduced through attrition.

slotted into existing production schedules in the Rail Mill Department, without the need of additional employees or overtime.

Taylor testified that if the orders at issue here had been produced at Steelton, they would have been produced over a period of several months. According to Taylor, there was a lot of underutilized time in the Rail Mill Department in 2017, describing the situation as "hand to mouth," with orders being put into production almost as soon as they were received. Taylor testified that rail production at Steelton had gone from 200,000 net tons in prior years to 144,000 net tons in 2016 and 133,000 in 2017. He stated that the disputed orders could have been rolled without needing additional employees or using overtime.

Taylor testified that during the grievance procedure the Company reported to the Union that there were 359 underutilized hours in the Rail Mill Department in the April through September period of 2017 when rails were not being rolled and the contracted-out orders would have been produced. For arbitration, Taylor produced another list of available rolling mill open hours, limited only to those periods of 2.5 hours or more, the minimum amount of time it takes to roll one heat. Using these parameters, he found 109.3 hours when no steel was rolling during this period, which could have been used for these orders. While he agreed with the Union that management would have had to be "clairvoyant" to slot the disputed orders into small gaps of delay time, he testified that the work could have been slotted into larger time gaps in the rolling mills' operation during this period.

Nelson testified that he has worked at the Steelton plant for 38 years. He testified that the scheduling at Steelton is a very dynamic process, balancing demands and changes

initiated by customers with the internal constraints of the facility at a particular time. He stated that there is a weekly scheduling meeting held on Wednesdays which includes representatives from the production scheduling, sales and the operations departments. Production is planned for the following week, along with more tentative schedules for the next several weeks. He presented documents showing the scheduling of orders from two to five weeks out, but he said that changes are made to the production schedules on a weekly and sometimes daily basis.

Nelson went through each of the purchase orders that were contracted out to the Spanish plant, and showed how and where they could have been slotted into the existing Rail Mill Department schedules, without requiring any additional employees or overtime. He pointed out places in the schedules where no similar product was being produced, and also situations where the Company was producing an order for another customer before it was due for delivery. These orders could have been postponed in order to accommodate the orders at issue here, Nelson said, as could the production of certain stock inventory. He also pointed out that beginning in about Week 20, orders were so limited that they were being scheduled for completion only one or two weeks out. The Company did not schedule production in Week 22 in the Rail Mill Department, due to a shortage of orders.

The Union submitted into evidence a document that Nelson said he had prepared in response to a request from a rolling mill employee who had asked him what it would take to process 4,388 metric tons, the amount at issue here. Nelson said he was aware at the time that there was a dispute over these orders, but didn't know that a grievance had been filed. The Union presented Nelson's calculations, done in pencil in his handwriting. He used approximations, he said, and produced figures in terms that he thought would be

relevant to the person who asked him for the calculations, using the number of heats per turn, rather than tons per hour. His calculations are similar to the Union's calculations, stating that 46 heats would have been required for the 4,388 net tons of rails. At 8 heats per turn, it would have taken 5.75 turns to produce the steel, and 13.1 rolling shifts to process the rails, according to Nelson's figures. Nelson stated that this document did not change his testimony that the rolling mills could have processed the rails on the existing schedules he identified.

Reese testified that he had not previously seen the documents relied upon by the Company in arbitration. He stated that the Company failed to include hours for the finishing mill in these documents. Taylor's testimony indicated that the finishing area's scheduling followed from the rolling mills schedule: if there were available hours in the rolling mills for these orders, there would have been available time in the finishing mill.

Reese stated further that the Union requested a special remedy in this grievance, as permitted under the BLA, because the Company was in clear violation of the contracting out provisions, and did not provide any advance notice before contracting out bargaining unit work. When notice is provided, the Union can examine issues like the current utilization of the workforce, according to Reese. He testified that when given proper notice the Union considers every option in order to reach mutual agreement with the Company, including the potential loss of a customer. That opportunity, however, was not provided to the Union in this case. In addition, the Company had reneged on the settlement agreement.

Mr. Anthony Sferruzza testified that he became Sales Manager for Rail Products for ArcelorMittal International on February 20, 2017. He had sold products for Steelton

since 2014 before taking the job with ArcelorMittal International. His office is still in Steelton and he testified that most of his current job remains selling rail products for Steelton; a small percentage of his work (about 10%) involves selling rail products to North American customers for ArcelorMittal's overseas operations. Sferruzza testified that there has been a significant drop in the price of rails in part because of new competitors in the field, nationally and internationally, beginning in about 2013-2104. He testified that prices had dropped from about $1,000 to $600 per ton.

Sferruzza testified that he was involved in negotiating the purchase orders at issue here. He said that the customers negotiated hard for lower prices for these orders. At the price agreed to in these purchase orders, he testified, the Company would have lost money on the rails if they had been produced at Steelton, after shipping costs were factored in.

Sferruzza further stated that at the time the orders were placed, he thought that if he could give these customers a better price on these orders of common rails, they would return later to purchase high-value products from Steelton, such as crane rails. He noted that one of the customers, Progress Rail, has utilized Steelton for its crane rail business, and had recently closed its weld facility at Steelton. He testified that he was trying to retain these customers, so that he could bring orders back to Steelton once the market improved.

Sferruzza testified that he did not know about the subcontracting prohibitions in the Basic Labor Agreement when he negotiated these purchase orders. Taylor testified that no one in plant management at Steelton knew about the contracting out of these orders until the Union brought the matter to their attention in 2017.

Position of the Union

- The Company has admitted violating the Basic Labor Agreement throughout all steps of the grievance procedure.
- The Company agreed to a settlement during the Step 3 meeting on November 22, 2017. Witness Reese testified that the Company requested he formulate a Settlement Agreement.
- Reese complied with the request and submitted a detailed Settlement Agreement.
- Based on this agreement to settle, Unfried undertook the task of totaling all liability, and determined the amount at $329,784.80. Reese was willing to settle for less than the actual liability to reach an agreement with the Company at that time.
- It is clear that when the Company saw the amount of liability, they defaulted on their agreement to settle. In doing so, they fabricated an argument that there was limited liability to the bargaining unit.
- There were bargaining unit members on layoff. Those members who were working could have had days, shifts, and hours added to their schedule to produce the rails that were contracted out.
- However, the Company did not make those rails at the Steelton facility, thus depriving bargaining unit members of work they could have performed.
- The Company did not notify the Union that it was contracting out the production of the rails, as required by Article 2, Section F, paragraph 5 of the BLA.
- The Company's attempt to conceal production of the rails at a plant overseas is proof of willful violation of this requirement.
- When there is a willful violation of the aforementioned Section, Article 2, Section F, paragraph 9, sub-paragraph 9 provides for Special Remedies.
- The case at hand is significantly different from those cited by the Company regarding a special remedy, because of the Company's lack of notice in this case; attempt to conceal the contracting out violation; the Company's awareness that the work could be produced at Steelton; and the Company reneging on the settlement agreement.
- The Company delayed the resolution of this dispute, by reneging on their agreement. The Company forced the Union back into the grievance procedure, prompting duplicate Step 2 and Step 3 meetings.

- The Company is attempting to mitigate its liability by showing how they could have filled these orders with existing schedules. It is irrelevant what could have happened, because the Company did not produce the rail products at Steelton.
- By producing rail products in Spain rather than in its Steelton facility, the Company also violated Article 11, Section B, Investment Commitments, paragraph 3.
- The Company has not acted in good faith.
- For the reasons stated, the Company's serious violations merit the declaration of a willful violation and a special remedy award.
- The Union requests that the Arbitrator sustain the grievance and make the bargaining unit whole for all losses including benefits.
- The Union further requests that the Arbitrator declare the Company's actions a willful violation of the BLA and grant the special remedy. As part of this remedy, the Union requests that the make whole remedy include overtime pay rates and not be mitigated by any Unemployment Compensation or SUB pay laid-off which employees may have received.

Position of the Company

- The issue in this case is not whether the Company violated the subcontracting provisions of the BLA. The Company has already acknowledged a technical violation; the case exclusively concerns determination of the remedy.
- As the moving party in a non-disciplinary case, the Union bears the burden to establish the appropriate remedy by a preponderance of the evidence.
- The Union has also alleged that the Company breached an agreed-upon settlement, in which virtually every plant employee would be compensated. To support this claim, the Union must prove both the existence of an agreement and the Company's breach.
- The Union has not proven that such an agreement existed between Reese and Taylor. The Company was simply trying to get a sense of the Union's potential demand in order to assess whether the case could be settled.
- There was no consensus between the parties on which employees were considered affected and would need to be made whole.

- The Union claims that the parties memorialized their agreement through Union Exhibit 2. However, that document bears no place for signatures and does not constitute evidence of an agreement.

- Rather, Union Exhibit 2 was nothing more than a settlement proposal. This is clear from page 6 of the document, which states that the Union "reserves the right to modify, add to, and withdraw this proposal prior to final agreement being reached on the above settlement conditions."

- This alleged agreement was in fact a settlement proposal, and it is well established that settlement proposals are not considered relevant or even admissible in most proceedings.

- The parties developed a full record of the grievance procedure, with two meetings after the alleged agreement between Reese and Taylor was consummated. On each of these occasions, the Company clearly stated its belief that the monetary remedy should be limited to making whole only employees of the Steelmaking Department who had been laid off in March 2017.

- The minutes do not reflect the Union's assertion that an agreement had been reached at that time, nor do they reflect the claim that the Company was reneging on such an agreement.

- In cases where there is a claim of improper subcontracting, the general rule is that monetary damages—if appropriate—should place the parties in the position they would have been had there been no violation. These damages should typically be limited to the amount needed to make the injured party whole.

- This rule has been applied in many subcontracting decisions to find that no monetary remedy is appropriate, if the subcontracting in question did not cause employees to lose work or overtime opportunity.

- The Union has not put forth evidence to support its claim that every employee in the plant is due compensation, much less compensation at a premium rate.

- To make this argument, the Union has relied on what should be a discredited claim that the parties reached an agreement to compensate employees in all departments of the plant.

- The Company has presented detailed evidence indicating that the five orders in question could have been performed by the existing workforce within regular work hours. The products were common to the plant and could have been slotted into production schedules over the five-month period when the orders were placed.

- Throughout this time period, the Company's orders were down, the plant was living "hand to mouth," and orders were being put into production as quickly as they were received.

- The Union did not dispute Taylor's calculation that the orders could have been accommodated by the existing workforce during the 109 underutilized hours he calculated in the rolling mills.

- Nelson similarly demonstrated that there were many opportunities to fill the orders in question with the existing workforce under the Rolling Mill Schedules of 2017.

- These points support the Company's assertion that employees of the plant did not in fact miss out on regular or overtime opportunities, and that no additional staffing would have been needed to complete this work.

- This evidence indicates that backpay is not an appropriate remedy. However, the Company acknowledges that during the grievance procedure it stated that employees on layoff from the melt shop would be due compensation for the subcontracting in question.

- Special remedies are available only in limited circumstances obviously not present in this case. Further, the Union has not specified what this special remedy might be.

- Remedies for contractual violations are intended to put parties in the same positions they would have been had the violation not occurred and to make whole employees who have been impacted financially. Anything further would be punitive and beyond an arbitrator's authority.

- Sferruzza was the sole person involved in the subcontracting decisions here. He testified clearly that he had no knowledge the subcontracting restrictions in the BLA: his lack of knowledge indicates that the violation was not in fact willful.

- By contrast, Sferruzza testified that he believed he was helping the Steelton plant to maintain client relationships and discourage customers from taking their business elsewhere. Although the Company itself later determined these actions to be in violation of the BLA, Sferruzza's heart was in the right place when he placed the contested orders.

- The plant's management was not aware of the subcontracted orders until the grievance was filed in August of 2017.

- The Union presented no evidence that the Company was a repeat offender in violating subcontracting restrictions, nor was there evidence that the Company was violating previous arbitration awards.

- For the reasons stated, the Union's requests for both a special remedy and a "universal" remedy seeking backpay for all employees in the plant should be denied.

- The Company requests that the Arbitrator adopt its suggested remedy, limiting monetary relief to employees in the Steelmaking Department who were on layoff when the subcontracted orders were placed, with the hours as calculated by Taylor.

Findings and Decision

This is a grievance over the Company's decision to contract out production work. There is no disagreement between parties that there was a violation of the Basic Labor Agreement's prohibition against the contracting out of work that ArcelorMittal Steelton employees were capable of performing. The Company has admitted that it violated the Agreement when it contracted out the production of railroad rails to a facility in Spain. The parties also agree on the amount of product included in the disputed purchase orders: 4,388 net tons of rails. The only question before the Arbitrator is the extent of the remedy to be afforded to employees of Steelton for this violation of the Agreement.

The purpose of a remedy for a violation of a collective bargaining agreement is to place affected employees in a position as close to the position they would have occupied had there been no violation of the Agreement. In a contracting out case, remedies are designed to compensate employees for the missed opportunity to earn additional income lost when the work was contracted out. Once disputed production work already has been performed, a make-whole remedy for the contract breach is usually calculated on the basis of "lost wages" which otherwise would have been earned to produce the contracted-out product.

During the grievance procedure, the Union and the Company expressed different views about the appropriate remedy for the violation of the Agreement, as reflected in the grievance procedure minutes. The Company took the position that only laid-off

employees in the Steelmaking Department should be made whole, arguing that they were the only employees who suffered lost wages from the loss of the work opportunity. The Union argued that all of the employees needed to produce the 4,388 net tons of rails should be compensated, including those in the Steelmaking and Rail Mill Departments, as well as the necessary support personnel. After exchanging these positions, the parties then included the following language in the minutes of the third-step meeting.

> "F. Decision Reached
>
> ***Settled:*** The Company and the Union will identify the affected positions and determine the number of employees required to produce the 4388 tons of rail. Lost wages will be paid at straight time. The Union would like the Company to consider extending only the recall rights to April 2018 for those still on layoff and who might otherwise break service before then. The Company will decide once the employees affected have been identified. The grievance is settled without prejudice or precedent."

The paragraph begins with the words, "Decision Reached" and "***Settled,***" and ends with the statement, "The grievance is settled without prejudice or precedent." This is language commonly used to indicate that a grievance settlement has been reached. In resolving this dispute over the appropriate remedy, therefore, the Arbitrator cannot ignore this language indicating that the parties reached an agreement to settle this grievance. The Arbitrator must determine, as best she can from the available evidence, the intent of the parties with regard to the settlement agreement reflected in third-step minutes.

The first two sentences of the "Decision Reached" paragraph appear to provide the method agreed to by the parties for determining the remedy for this grievance. The parties agreed that they would work together "to identify the affected positions and

determine the number of employees required to produce the 4388 tons of rail." They also agreed that "lost wages" were to be paid at the straight time rate.[5]

The Union prepared a document entitled "Settlement Agreement" in order to calculate the remedy. The Union represents that this document is a computation of the number of employees and hours which would have been required to produce the 4,388 tons of rails, listed by Department and Line of Progression. According to the Union, this "Settlement Agreement" was originally accepted by the Company as the basis for the remedy here. The Union points to the document produced by the Human Resources Department listing compensation amounts for individual employees, which is based upon the Union's document. The Company argues that the HR document is more like a "costing out" of a settlement proposal from the Union, rather than a settlement agreement.

The Union argues that once the Company saw the total amount of compensation in the document produced by its Human Resources Department, Management reneged on their original agreement to compensate all of the employees who would have been required for the production of these rails, including those in the Rail Department. The evidence does not support a conclusion, however, that either the Union's "Settlement Agreement" or the document prepared by the Company represent a final calculation of an agreed-upon remedy. In the Union's document, the Union "reserves the right to modify, add to, and withdraw this proposal prior to final agreement being reached on the above settlement conditions." The Union also stated in its post-hearing brief that when the

[5] The settlement language also discusses extending recall rights. The parties did not address this issue during the arbitration hearing or in the post-hearing briefs. The Arbitrator concludes that either this issue was settled or has become moot. If not, the Arbitrator has retained jurisdiction over the remedy.

Union presented its proposal, it was willing to accept less than the full amounts listed in the document, suggesting that it was a proposal for settlement. There are no signatures on either the Union's document or the Company's document.

Based upon this record, there is not convincing evidence that these documents represented a calculation of a final remedy. Rather, these documents appear to represent the calculations of the number of employees (and hours) required to produce the 4,388 tons of rails, as described in the first sentence of the third-step settlement agreement. If the third-step settlement agreement ended with the first sentence, then perhaps these documents would be sufficient to determine the extent of the remedy. However, the third-step agreement also refers to "lost wages" in the second sentence.

The settlement agreement does not explicitly define "lost wages." The Company has consistently argued throughout the grievance procedure that employees in the rolling mills did not suffer any lost wages due to the contracting out of this work. According to the Company, the disputed purchase orders easily could have been placed into the existing schedule for the Rail Mill Department, and produced without requiring any additional employees or overtime hours. The Union disputes that contention.

The Union argues that although it may be easy to look back in time now and retroactively piece together enough open periods between the processing of other rail orders when these rails could have been rolled, it would have been more difficult at the time to actually slot these orders into unpredictable delay periods. If the Company's case were based solely upon its evidence regarding open minutes on the rolling mills, this might be a persuasive argument. However, the Company produced convincing evidence that the orders could have been placed in the planned weekly schedules of the rolling

mills, ahead of production. The number of rails being produced by Steelton was significantly lower than in earlier years. The evidence shows that for at least part of this period, orders were being produced almost as soon as they came in, even if the customers did not need or expect them that soon. Rail orders were so low that no production was scheduled for one week in April.

In addition, the evidence shows that schedules are changed up until a few days before the rails are processed, on a regular basis, with orders for some customers pushed out further in the future to accommodate more urgent orders demanding shorter delivery times. There is convincing evidence that, over the period of several months when the purchase orders would have been worked, the regular scheduling process, coupled with the underutilization of mills at this time, provided the rolling mill schedulers with substantial flexibility to fit these contracted-out orders into the schedule, without the need to schedule additional work time.

In addition, the Employer is under a contractual requirement to pay employees 40 hours per week, once they are scheduled, even if there is not sufficient production work to occupy them full-time. The evidence demonstrating underutilization of the rolling mills during this period suggests that employees in the Rail Mill Department were being paid under this provision for at least part of the period when these orders would have been produced. Considering all the evidence, there is persuasive evidence that if the Company had produced these orders, the employees in the Rail Mill Department would not have been required to work any more hours than what they were already working.

Lost wages for a contracting out violation may be calculated in a number of different ways. Monetary remedies for contracting out violations are often reduced or

denied in situations where the employees would not have been likely to earn additional wages for the contracted-out work, if the work had been produced in the plant. See, Monitor Sugar Company, 2005 BNA Supp. 111522 (McDonald, Arb. 2005)(arbitrator concluded that no monetary remedy was appropriate for a contracting-out violation because no employees were laid off and the employees were not accepting overtime work at that time, even though there was overtime work available). The reason for denying monetary relief in these cases is that it goes beyond making the employees whole, by providing more income to them than they would have earned if the Agreement had not been violated and the work had been produced in the plant.

The Union bears the burden of establishing that the remedy they seek complies with the general principles of make-whole relief and also with the third-step settlement agreement. Here the third-step settlement agreement does not explicitly state that all of the employees needed to produce the rails would be compensated. After calculating the number of employees needed to produce the contracted-out product, the settlement agreement refers to "lost wages." There is not sufficient evidence on this record to conclude that the Rail Mill Department employees would have earned additional wages if they had produced the contracted-out work, because they could have produced this work within their regular 40-hour workweek. Therefore, it is difficult to conclude that wages were lost by this group as a result of the contracting out of this work. The parties discussed this issue during the grievance procedure and the settlement agreement could have stated that "lost wages" was nevertheless to include a remedy for Rail Mill Department employees, if the parties intended that result. However, no such language was included in the final "Decision Reached." On the basis of all the evidence, the

Arbitrator cannot conclude that the "lost wages" language of the third-step settlement was clearly intended to include hours for this work that could have been performed in the Rail Mill Department during employees' regularly-scheduled work hours.

The Company did not produce similar scheduling evidence for the Steelmaking Department, however, as it did for the Rail Department. The Steelmaking Department produces steel for various products in addition to rail products and there is not evidence in the record from the Steelmaking Department showing that the steel for the contracted-out rail orders could have been produced within the 40-hour schedules of working employees in this Department. There were employees laid off from the Steelmaking Department at that time, and the Company agreed to compensate them for the loss of income associated with producing this steel.

The Company argues that only these laid-off employees should receive compensation, however. However, the Union produced convincing evidence that in order to make up the full crews needed in each area to produce this tonnage of steel, working employees would have been needed, in addition to the laid-off employees. For employees already working 40 hours per week, the orders could have been produced during overtime hours. The Union presented uncontradicted evidence that employees commonly work substantial overtime, when there is enough work to do so.[6] The parties could have limited the remedy in their settlement agreement only to laid-off employees, as this was the position taken by the Company during the grievance discussions, but no such language appears in their settlement. Therefore, the Arbitrator concludes that the term "lost wages" in the settlement agreement was intended to include compensation for all the hours that

[6] This fact sets this case apart from the Monitor Sugar decision cited by the Company, above.

would have been worked by employees in the Steelmaking Department to produce the 4,388 tons of steel, including employees who were working at that time.

In addition, support personnel needed to produce the steel for these orders, such as crane operators and maintenance personnel, must also be included in this remedy. The parties agreed in their third-step settlement, however, that all lost wages shall be paid at the straight-time rate. Therefore, although the evidence shows that working employees most likely would have produced these orders on overtime hours, the parties have agreed that the work will be compensated only at the straight-time rate.

The Union presented uncontradicted testimony that it worked with local management in each area to produce detailed calculations for the number of crew members and hours necessary to produce the 4,388 net tons of steel. The overall numbers of heats and hours (57.5 hours) used in the Union's figures as necessary to produce this steel is close to the figure produced by the Company at arbitration (53 hours). The Union's 57.5-hour figure is supported by the calculations of Company Witness Nelson, who produced his figures before he knew that a grievance had been filed. Therefore, the figure of 57.5 hours shall be used as a basis for the calculation of the remedy.

The Union also included in its document a calculation for bonus pay which the employees would have received if they had performed this work. If the employees would have received bonus pay on the hours needed to produce these orders, then they should be awarded bonus pay as part of the make-whole remedy for lost wages. If bonus pay is due, the parties should attempt to reach agreement about the proper period of time when these orders likely would have been produced, in order to determine the average bonus pay percentage over that period. The Union calculated in its settlement document that laid-off

employees would have SUB and Unemployment Compensation deducted from the amount of compensation they would receive, under the customary practice for such awards.

The Union now requests a "special remedy" in this case, however, for the Company's willful violation of the Basic Labor Agreement. In its post-hearing brief, the Union has requested that under this special remedy, compensation be paid at the overtime rate and that SUB and Unemployment Compensation *not* be deducted from any remedy.

The Union did not request a special remedy in its original grievance and no such remedy was discussed as part of the "Decision Reached" settlement in the third step. It was only when the parties returned to the grievance procedure a second time to discuss the extent of the remedy under the original settlement agreement that the Union raised a special remedy. The Union's request for a special remedy thus appears to have been triggered by its view that the Company was delaying the payment of a remedy and had reneged on an agreement to extend a remedy to all of the employees who would have been required to produce the disputed orders, regardless of whether they lost wages on the contracting out of this work. For all of the reasons discussed above, however, there is not convincing evidence to conclude that there was a clear settlement agreement between the parties encompassing all of these employees.

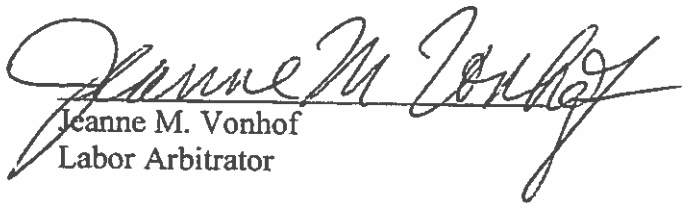
All of the other reasons provided by the Union for a special remedy, including the fact that no notice was provided to the Union before the work was contracted out, were known to the Union at the time the original grievance was filed. However, no request for a special remedy was made at that time. The specific details of the special remedy requested by the Union were not provided until its post-hearing brief. Thus, the

arguments for a special remedy which are raised by the Union here, as well as the details of the nature of the special remedy sought by the Union, were not raised or discussed during the grievance procedure leading to the third-step settlement. Some of the special relief requested now, including compensation at overtime rates, is specifically addressed in the parties' third-step settlement agreement. The parties may have arrived at a different settlement agreement if the special remedy request had been discussed as part of the settlement in this case.

The parties' third-step settlement agreement forms the basis for the scope of the remedy awarded in this arbitration decision. Because the request for a special remedy was not raised at the time that the settlement agreement was reached by the parties over this grievance, the Arbitrator concludes that no special remedy may be considered by the Arbitrator in regard to this grievance at this time. Therefore, this Award does not encompass the relief requested by the Union as a special remedy: pay at overtime rates or an award that does not deduct SUB or Unemployment Compensation from compensation awarded.

AWARD

The grievance is sustained in part, in accordance with the Findings and Decision above. The Company violated the Agreement when it contracted out the production of rails under the disputed purchase orders. In accord with the third-step settlement agreement, compensation for the total number of hours necessary to produce the 4,388 net tons of steel in the Steelmaking Department, by laid-off and working employees, as well as by support personnel, will be paid at the straight-time rate. If bonus pay would have been paid on this compensation, it shall be included in the make-whole remedy, as well as any other benefits that would have accrued, had the work been performed in the Steelmaking Department at the Steelton facility. For laid-off employees, SUB and Unemployment Compensation will be deducted from the compensation. The Union may determine how compensation will be distributed among employees who were working in the plant at the time. The Arbitrator will retain jurisdiction solely over the remedy portion of this Award.



Jeanne M. Vonhof
Labor Arbitrator

Decided this 23rd day of August 2019.