IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
CONSHOHOCKEN PLANT

And ArcelorMittal Case No. 97

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 9462

OPINION AND AWARD

Background

This case from the Conshohocken Plant concerns the Union's claim that the Company violated the Agreement when it refused to allow certain employees to claim severance or to take an inter-plant job opportunity (IJOP). The case was tried in the Company's offices in Conshohocken, Pennsylvania on September 17, 2019. Patrick Parker represented the Company and Lew Dopson presented the Union's case. The parties agreed that there were no procedural arbitrability issues and that the case was properly in arbitration. They did not agree to the precise wording of the issue on the merits, which I will discuss in the Findings. The parties submitted the case on closing arguments.

The events leading to this case began in early 2018, when the Company notified the Union that it intended to idle the rolling mill at the Conshohocken facility and that it expected to layoff about 150 employees. At the same time, it said it planned to keep part of the facility in operation. By March 2018, the Company employed 197 employees in the bargaining unit. In response to a Union request for information, the Company said it estimated it would need 71

employees to staff the remaining operations. It also believed there would be up to 33 openings at ArcelorMittal's Coatesville facility, which is also in the Philadelphia metropolitan area. Thus, by August 2018, the Company anticipated that 93 employees would be laid off.

The parties' September 1, 2015 Basic Labor Agreement was due to expire on September 1, 2018, and the parties were engaged in negotiations for a new contract. The Union made effects bargaining for the rolling mill idling at the Conshohocken plant part of those negotiations. The parties did not reach a new Agreement until late September 2018, but it was backdated to September 1, 2018. As part of the new contract, the parties entered into a side letter which reads, in relevant part:

> RE: 2018 Idling of the Conshohocken Rolling Mill
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> This confirms our understandings regarding the Conshohocken Facility.
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> Notwithstanding any other provisions of the 2018 BLA, should the Company continue with their announced intention to idle certain operations at the Conshohocken plant, Employees in the Conshohocken facility (including those employees currently on Workers Compensation or on an approved leave of absence who have recall rights, shall opt for one of the following two options by October 1, 2018:
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> 1. Severance Package: One (1) week of pay at the Employee's Vacation Rate of Pay for each year of Continuous Service or portion thereof; or
>
> 2. Interplant Opportunity (IJOP): In order for an Employee to be eligible for an IJOP, such Employee would otherwise be laid off as a result of the idling or be listed on a WARN Notice(s) issued in 2018 pertaining to the idling. The offer will be in accordance with the provisions of Article Eight Section D. of the BLA, except that the sixty (60) day waiting period will be waived. MTMs and MTEs shall be considered fully qualified craftsmen at any plant they choose to transfer. Any Employee who elects an IJOP shall have a Plant Service date at their new plant of September 1, 2018, tie breakers shall be based on the Employee's Corporate Service date. Management shall use

their best efforts to release employees who file for an IJOP opportunity in seniority order and as soon as practicable. Employees who accept an IJOP shall receive the Regular Rate of Pay for the Employee's incumbent rate...or the new Regular Rate of Pay for the new job, whichever is highest, for one (1) year.

A. The number of severances to be offered will be equivalent to the number of Employees who would have been otherwise laid off less the number of Employees who elect IJOP, but in no event will the plant allow Employees to sever if by doing so there are insufficient Employees available to operate the facility.

B. Employees electing one of the two options will be given until October 8, 2018 to rescind their election form in the event they are impacted by a seniority event that would result in the employee's ability to be retained at the Conshohocken plant.

C. Effective September 1, 2018, all Employees who are retained at the plant will receive the Regular Rate of Pay for the Employee's incumbent job...or the new Regular Rate of Pay for the new job, whichever is highest, for the term of the 2018 BLA.

D. Irrespective of any actions the Company may take, the Conshohocken plant shall continue to be covered by the BLA during the term of the 2018 BLA. If a subsequent employment event occurs at the Conshohocken plant within one (1) year of the date of this letter, the sixty (60) day waiting period found under Article Eight Section D will be waived for those Employees who are otherwise eligible for an Interplant Opportunity (IJOP) during that one (1) year period.

...

After the effective date of the Agreement, numerous employees applied for and were granted severance in accordance with the terms of the side letter. No employee who applied by October 1, 2018 was denied severance. And, as the letter itself provided, the employees who were eligible for severance did not have to be on layoff at the time of their application, providing

it was submitted by October 1, 2018. In addition, several employees were able to elect an IJOP under the terms of the side letter. The nine Grievants in the instant case did not apply for severance or elect an IJOP by the October 1, 2018 deadline. Two of the Grievants requested and were denied an IJOP; their claims will be discussed below. The seven Grievants who now claim the right to severance did not make an election prior by October 1, 2018. However, all of them had been laid off for more than six months at the time of their requests for severance. Each of the employees was on layoff at some point between April 23, 2019 and July 25, 2019, when they were recalled to work. Rather than return, the seven Grievants requested severance under the terms of Article 8, Section C of the BLA:

> **Section C. Severance Allowance**
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> 1. Right to Severance Allowance
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> Employees meeting the conditions outlined below shall, upon request, receive a Severance Allowance as described herein.
>
> 2. Eligibility
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> In order to be eligible for a Severance Allowance an Employee must:
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> a. At the time s/he requests such Allowance, have accumulated three (3) or more years of Continuous Service;[1]
>
> b. Be on layoff (other than voluntary layoff):
>
> (1) For six (6) consecutive months, or in any twelve (12) month period be offered, under the terms of the Agreement, less than 520 hours of straight time work, or
>
> (2) due to a permanent closure as defined in this Section.
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> 3. Employment in Lieu of Severance

[1] There is no dispute that all of the Grievants had more than three years of service.

In lieu of Severance Allowance, at the time such Employee requests such Severance Allowance, the Company may offer such Employee a regular full-time job of equal earnings at the Employee's plant or within 50 miles of that plant if in accordance with 6 below if:

a. The job is in a bargaining unit represented by the Union;

b. The job is not a temporary job known to be of limited duration;

c. The Employee is physically qualified to perform the job; and

d. The Employee has the ability and skills to perform the job....

...

7. Consequence of Acceptance

Any Employee who requests and accepts a Severance Allowance shall permanently terminate employment with the Company.

In lieu of Severance Allowance, at the time such Employee requests such Severance allowance, the Company may offer such Employee a regular, full time job of equal earnings at the Employee's Plant or within that Plant's Region or at the Employee's option, a Plant in any other Region. It is also the Employee's option whether to accept the offer of a job or the Severance Allowance.

The Union argues that each of the Grievants requesting severance satisfied the terms of Article 8, Section C: all of the Grievants had more than three years of continuous service and all had been on layoff for six consecutive months. The Union acknowledges that none of the Grievants requesting severance opted for either severance or an IJOP in accordance with the terms of the side letter; however, the Union says there was also a third option, which was simply to do nothing – i.e., make no selection – and await developments. The Union says the side letter cannot be seen as anything other than a supplement to the BLA and, as such, did not prevent

employees from simply remaining on layoff and applying for severance once they met the BLA eligibility requirements. While the employees stayed on layoff, they would receive SUB and other benefits. In fact, the Union says the Company shared the Union's understanding of the relationship between the BLA and the side letter until April 22, 2019.

Ron Davis, the Union's Grievance Chairman, testified that a laid off employee who had not applied for severance or an IJOP asked him in November 2018 if he was eligible for severance under the BLA. Davis contacted Joanne Babaian, the Plant's Human Resources/Labor Relations Manager, and she, in turn, told him she would check with corporate. Subsequently, Babaian sent Davis an email saying that she had been advised the employees working in the plant were no longer eligible for severance under the side letter, but employees on layoff were eligible, apparently under the BLA. Davis said he emailed Babaian back and asked if employees had to be on layoff to receive severance and Babaian replied, "that's what I wrote." The Union also points out that two employees who did not opt for severance under the side letter by October 1, 2018 were nevertheless allowed to claim severance. One of them, Morris, selected the severance option on October 2, 2018. The other one, Bosco, requested severance on October 8, 2019. According to Davis, Babaian said initially that Bosco was not eligible because he had not been laid off for six consecutive months. However, her calculations were in error because the employee *had* been laid off for more than six months. Thus, he was allowed severance under the BLA. This, the Union says, was consistent with its view that employees who did not ask for severance under the side letter would be governed by the BLA.

David McCall, USW Vice President for Administration, chaired the negotiating committee for the Union in the 2018 bargaining. He described the side letter as a supplement to the BLA, not a replacement of its terms. He said during negotiations, the Company did not refer

to the side letter as a one-time opportunity. The Union's understanding of the deal, he said, was that employees who did not make an election by October 1 and who were not needed to run the remaining operations would remain on layoff. If they were subsequently recalled, they could exercise their right under Article 8, Section C to return to work or to elect severance, assuming they met the requirement of having been laid off for at least six consecutive months. McCall agreed that the side letter contained benefits for employees in excess of those in the BLA. He said employees who did not make an election under the side letter remained eligible for severance under the BLA, but were not entitled to the benefits of the side letter. On cross examination, McCall acknowledged that during negotiations for the side letter, the Company said it wanted the side letter in order to avoid having employees sit out on layoff and collect SUB payments and then creep into severance. But, he said, that was not something the Company achieved.

Two of the nine Grievants protest being denied an IJOP under Article 8, Section D:

> An Employee with more than two (2) years of Continuous Service who is continuously on layoff for at least sixty (60) days and not expected to be recalled within sixty (60) days, shall be given priority over new hires and probationary Employees for permanent job vacancies at other than his/her plant as described below ....

Like the Grievants requesting severance, the two Grievants requesting an IJOP did not make an election under the side letter. However, the Union says the same eligibility rationale that applies to severance also governs the IJOP Grievants. Moreover, the Union points out that eight or nine employees were allowed to elect an IJOP even though they did not make an election under the side letter by October 1, 2018. However, on April 22, 2019, the Company informed the Union that as it interpreted the side letter, the severance and IJOP provisions of the BLA were changed by the side letter. The Company pointed, in particular, to the language in the side letter that says,

"Notwithstanding any other provisions of the 2018 BLA...." However, according to Davis, this simply means that employees who made an election under the side letter by October 1, 2018 were eligible for severance even if they were not laid off and even if they had not been laid off for six consecutive months. But employees who did not make an election under the side letter were still eligible for severance under the terms of the BLA.

James Vilga, Division Manager of Human Resources, testified that he was second chair for the Company during the 2018 negotiations. He said the Company was content to leave severance opportunity to the terms of the BLA, but the Union wanted extra benefits, including the right of employees to request severance even if they were not laid off or had not been on layoff for at least six months. The Company agreed, he said, but the quid pro quo was that employees had to make an election to be eligible for severance; they could not remain on layoff collecting SUB benefits and medical insurance payments and then elect severance when those benefits ran out or when they were recalled. The Company introduced the Union's proposed side letter, which contains the benefits employees ultimately received. The Company's counter proposal added the October 1, 2018 election deadline and the "notwithstanding" language which, the Company says, was intended to show that the side letter was the employees' only opportunity for severance stemming from the rolling mill idling. Pat Parker, Vice President for Labor Relations, testified that employees who were laid off but did not make an election under the side letter could receive SUB and health insurance. But they could not also receive severance payments when they had been laid off for six months.

Positions of the Parties

The Union says the employees were governed by the information the Company provided. Initially, the Company believed that 93 of the 197 employees had no opportunity for a job at either the remaining Conshohocken operations or at Coatesville. As things developed, an additional 25 employees are working, albeit on a temporary assignment. The employees who did not exercise an option under the side letter were uncertain whether they would have a job and, therefore, did not know whether to elect severance. The Company did not tell them the side letter was a "one shot deal" to get severance. Moreover, the Union references paragraph 2.D of the side letter, which says the plant would continue to be covered by the BLA, and makes no provision for governance by the side letter. And, the Union contends, the "notwithstanding" language simply acknowledges the amendments the side letter makes to the BLA, like the waiver of the six months and 60 days requirements.

The Union also points out that Babaian did not rebut Davis' testimony that she told him employees who remained on layoff in 2019 were eligible for severance, but that employees who continued to work were not. This, the Union says, is consistent with the severance provisions of the BLA, and with the Union's understanding of the relationship between the BLA and the side letter. The Company's interpretation, the Union says, would require me to find that McCall waived the members' right to a severance allowance, something he would not have done. Finally, the Union says several employees were allowed to elect an IJOP under the terms of the side letter up until April 22, 2019, even if they had not made an election by October 1, 2018. Thus, the denial of the two Grievants in the instant case constitutes disparate treatment.

The Company says the BLA already provided for layoff, severance, and transfer rights. However, during the 2018 negotiations, the Union demanded to bargain about increasing those

rights and securing extra benefits. The Union achieved its ends by negotiating a waiver of the three year provision, the six month layoff requirement, and the availability of severance to employees who were not even laid off. It also achieved a waiver of the 60 day requirement for IJOP, as well as pay guarantees. In return, the Company got the right to cut off trailing SUB and health care costs by requiring employees to make an election by October 1 for severance or IJOP stemming from the idling of the rolling mill. The Company, it insists, made it clear in negotiations that it did not want employees to be able to sit out without making an election and then collect severance pay in addition to collecting SUB and health insurance benefits. The Company says in this case it simply wants to enforce the bargain it made.

Findings and Discussion

Although the side letter does not expressly offer a third option, it seems clear that one was allowed. That is, employees who were not retained at work and who did not elect either severance or an IJOP by October 1, 2018 were permitted to remain on layoff and collect whatever benefits were due them, including SUB pay. But the third option did not extend as far as the Union claims; employees could not remain on layoff for six months or more and then elect severance under the BLA. I agree with the Union's interpretation that the "notwithstanding" language can reasonably be read to mean that employees would be eligible for severance under the side letter even if they did not meet the time criteria of Article 8, Section C.2. But that is not the only effect of the language. It is equally clear that the side letter addresses how those employees affected by the idling would qualify for severance or an IJOP. The side letter ties the option directly to the Company's decision to idle the rolling mill. Given the large number of employees who might be affected, the Company clearly had an interest in determining how many

employees would elect severance and how many would choose an IJOP. Thus, the Company proposed the "notwithstanding" language and a drop-dead date for making an election. The election was mandatory; the side letter says employees "shall opt." The clear intent was that despite what the contract might otherwise provide (i.e., "notwithstanding any other provision" of the BLA), in order to receive severance as a result of the idling, employees had to make an election by October 1, 2018. There is no provision for not making an election and awaiting developments. Thus, the grievances will be denied for the seven employees seeking severance.

This reading does not, as the Union suggests, compel a conclusion that Vice President McCall waived the employees' right to a severance payment. Quite to the contrary, the side letter indicates that McCall negotiated an opportunity for severance even for employees who would not otherwise have been eligible for one under the terms of the BLA. Under the bargain he struck, employees who were not even laid off could elect the severance option. The fault, if any, lies with those employees who failed to adhere to the mandatory election created by the side letter. They could not reasonably have understood the language "shall opt" to mean that they could simply do nothing and still retain their right to a severance payment. I also reject the Union's claim of disparate treatment in the application of the severance language. Parker admitted that he allowed an employee to claim severance even though he did not exercise the option until October 2, 2018, one day after the deadline. One might question what the result would be if any of the Grievants had also attempted to claim severance on October 2. But those are not the facts. It is true that one other employee was allowed to receive severance (apparently under the BLA) several months after the election deadline. But that appears to have been a

mistake made by local management. In circumstances like these, where numerous employees were held to the deadline, one error is not sufficient to establish a disparate treatment defense.[2]

However, the same cannot be said for the Company's treatment of IJOP applicants. Although the Company negotiated the same election deadline for both IJOP and severance, the evidence indicates that the Company did little, if anything, to enforce the IJOP requirement prior to April of 2019. A joint exhibit indicates that eight employees were approved for IJOP – although some apparently did not actually transfer – following the October 1 deadline. There is no evidence that anyone who requested an IJOP after the deadline was denied, other than the two IJOP Grievants. The Company agreed that it allowed employees to take IJOP after the deadline, although pursuant to the terms of the BLA, and not with the additional benefits contained in the side letter. And, the Company said candidly that the employees were needed at Coatesville and getting them off layoff saved the Company money. In effect, then, the Company acknowledged that it elected not to enforce the October 1, 2018 IJOP deadline. This is not merely the lax enforcement of a work rule that could be reinstated on proper notice. Rather, it represented the Company's decision to disregard the commitments made in the side letter for employees seeking an IJOP. The Company cannot insist on strict compliance from Grievants when it has ignored its own obligations. Thus, the grievance for the IJOP Grievants will be sustained. They should have been permitted to select an IJOP under the BLA after October 1, 2018.

There is no inconsistency in enforcing the terms of the side letter for the severance Grievants but not for the IJOP Grievants. Although the side letter is one document, it required

[2] The Union argues that Davis' email exchange with Babaian revealed that the Company – or at least someone superior to Babaian – believed that non-electing employees retained the BLA severance opportunity until the Company abruptly changed its position in April 2019. But, however some official may have interpreted the side letter, there is only one instance of a non-electing employee being permitted to claim severance under the BLA. Given the unambiguous language of the side letter, this is not sufficient to undermine the interpretation the Company advanced in this arbitration.

selection between two distinct options, each of which afforded separate benefits and had different eligibility requirements under the BLA. The Company's enforcement of the severance requirements was reasonably consistent. But that was not true of the IJOP option, where the effect of non-compliance was less costly to the Company. There is, then, a reasonable basis for distinguishing between the treatment of Grievants under the two options afforded by the side letter.

The Union says that Grievant Mosier was denied an IJOP to Coatesville, but was subsequently recalled to work at Conshohocken. It is not entirely clear from the record when Mosier asked for an IJOP, although it was apparently after April 22, 2019. His grievance is dated May 16, 2019. He is entitled to backpay from the time he should have been permitted to take an IJOP under the BLA until the time be began working at Conshohocken. Grievant McLean applied for an IJOP in February 2019. It is not clear from the record whether there was a job for him in Coatesville at that time. But the Union points out that Coatesville hired a new MTE in July 2019, even though Article 8, Section D.1 says that employees seeking an IJOP are to have priority. Thus, I will direct the Company to offer McClean an IJOP at Coatesville and to make him whole from the date the other MTE was hired. I will retain jurisdiction to resolve any disputes concerning the remedy.

AWARD

The grievances seeking severance are denied. The grievances seeking an IJOP are sustained and a remedy awarded as explained in the Findings. I will retain jurisdiction for a period of 90 days to resolve any disputes concerning the remedy.

Terry A. Bethel

Terry A. Bethel, Arbitrator
October 16, 2019