IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
INDIANA HARBOR EAST PLANT

And ArcelorMittal Case No. 99

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010, USW

OPINION AND AWARD

Background

This case from the Indiana Harbor East Plant concerns the Union's claim that the Company failed to notify the Union of its use of Outside Entities – contractors – to perform work similar to that done by members of the Cleaning Services Branch of the Internal Logistics Line of Progression (LOP). The Union also claims the Company violated Article 2, Section F.3 of the 2018 BLA. That provision, which is part of the Bargaining Unit Work article headed "Commitment," requires the Company to replace contractors with bargaining unit employees when the amount of work contracted out justifies a conclusion that there is sufficient work available for one or more full time employees.

Article 2.F.1.a establishes the Guiding Principle, which says, in relevant part,

> 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.

This language is followed by certain exceptions in paragraph 2, for work performed both inside the plant and outside the plant. The relevant inside-the-plant exception in the instant case is for surge maintenance in Article 2.F.a.2:

> Surge Maintenance Work is that portion of maintenance and repair work which is required by bona fide operational needs performed on equipment where the Company temporarily uses Outside Entities to supplement bargaining unit forces and where (a) the use of Outside Entities would materially reduce the downtime of the equipment; and (b) the work cannot reasonably be performed by bargaining unit forces.[1]

The exception language is followed by the Commitment provision, which reads as follows:

> In addition to the understandings described in Paragraphs 1 and 2 above, the Company agrees that:
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> a. Where total hours worked by employees of Outside Entities in or outside the plant reach or exceed the equivalent of one (1) full time employee, defined as forty (40) hours per week over a period of time sufficient to indicate that the work is full time, the work performed by Outside Entities will be assigned to Employees and the number of Employees will be appropriately increased if necessary, unless the Company is able to clearly demonstrate that the work cannot be performed by the addition of an Employee(s), or that assignment of the work to Employees would not be economically feasible. In determining whether the assignment of the work to Employees is or is not economically feasible, the lower wage rates, if any, of an Outside Entity shall not be a factor
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> b. The parties agree that the Union may at any time enforce the obligations described above, irrespective of the Company's compliance with any other obligation of this section or any other part of the Agreement, and that an arbitrator shall specifically require the Company to meet the above Commitment, including imposing hiring orders and penalties.
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> c. The Company shall supply the Bargaining Unit Work Committee (as defined below) with all requested information regarding compliance with the Commitment.

[1] The surge maintenance exception also carries a requirement that the Company make certain overtime offerings. That language is not at issue in the instant case.

The work at issue concerns tasks performed by vacuum trucks, hydroblasters, and hotsys. The Company owns this equipment and employs workers to operate it, which includes truck drivers and laborers who use a hose to suck material into the truck. The Union's complaint on the Commitment issue is that despite owning the equipment, the Company frequently contracts out work requiring the use of vacuum trucks, hydroblasters, and hotsys. In brief, the Union claims that the Company does not have sufficient employees to do the required work and it says the Company's equipment sometimes sits idle while the Company uses contractors to perform work bargaining unit employees could do. The Union introduced a series of exhibits based on data received from the Company concerning the hours of work performed by seven contracting companies from late March 2016 through the 2018 calendar year. The exhibits show the hours worked by both vacuum truck operators and the laborers who use the hose. The Union used the contractor hours figures from the Company to press its claim that the Commitment language required the Company to increase the number of employees in the cleaning services branch of the Internal Logistic LOP.

There was some dispute at the hearing about the relevant time period for calculating contractor hours. There is no question that the Union raised concerns about the use of vacuum truck contractors at least as early as mid-2016. However, the Company pointed out that its footprint was substantially reduced in recent years and that it would be misleading to include contractor hours worked in operations that have since been idled. Thus, the Company argued that the relevant time period should be 2018, which represents the first full year since the reductions were completed and was the year the Union filed the grievance. Initially, the Union questioned the Company's claim, pointing out correctly that some of the footprint changes the

Company claimed had been made more than five years ago. Ultimately, however, the Union said it would not contest using 2018 as the relevant period.

The Union argues that the Company should add 30 employees to the cleaning services LOP, a number it calculated, in part, by totaling the hours worked by contractor operators and laborers and then dividing the sum by 40 hours. For example, in week 3 of 2018, the Union's exhibit showed that contractor laborers worked 847.60 hours and operators worked 595.90 hours, for a total of 1443.50 hours from contractor employees. The FTE for laborers was 21.19 (i.e., 847.60 hours divided by 40) and the FTE for operators was 14.90. The total combined FTE was 36.09. For all of 2018, the Union's exhibit shows that contractors worked 57,251 hours performing work that could have been done by cleaning services employees. This is equal to about 27.5 FTE employees (57,251 hours divided by a yearly FTE of 2080 hours per employee). The Union argues that 30 new employees in the cleaning services branch would allow the Company to operate five of its seven vacuum trucks around the clock, and would not include any employees permanently assigned to water blasters or hotsys. The number apparently includes an additional planner and three employees to fill temporary vacancies.

The Company says the issue cannot be resolved merely by counting employee hours and dividing by FTEs. The Company points out that not all of the hours worked by contractors can be counted. The Company cites a letter of agreement included on page 127 of the 2018 BLA – a form of which first appeared in earlier contracts – headed "Non-Core Functions." The letter reads, in part:

> Notwithstanding any local understanding to the contrary, the Company may contract out any non-core functions limited to, janitorial, mail activities, landscaping, snow removal, garbage and trash removal, railroad track repair and general plant housekeeping which is not directly associated with general labor work on a production facility.

The Company relies, in part, on my decision in *ArcelorMittal Case No. 64*, which found that the vacuum truck operators (drivers) were performing the non-core work of garbage and trash removal, but that the laborers operating the hoses were doing core work. Thus, the Company says that the Union improperly included the hours worked by vacuum truck operators in its calculations. In the alternative, the Company says if the work is not garbage or trash removal, it is "general plant housekeeping which is not directly associated with general labor work on a production facility" and, thus, still qualifies as non-core work. The performance of non-core work, the Company says, is not subject to the Commitment language in Article 2.F.3. The Company also points to the "Guiding Principle" of Article 2.F.1.a. and says bargaining unit employees are not capable of performing some of the work done by contractors because they have not been trained to do it or because the Company lacks the necessary equipment. Thus, these contractor hours cannot be considered, the Company says, in determining whether the Commitment language applies.

The Company contends that much of the work contracted out falls under the surge maintenance exception of Article 2. F.a.2. Unlike non-core work, the Company acknowledges that surge maintenance work is subject to the Commitment language of Article 2.F.3. However, this work is often performed during downturns and outages, where time is a factor and where regular bargaining unit forces are fully utilized. The work can also depend on weather events which require immediate action to prevent the facility from being shut down. The result is that the work can be sporadic and, according to the Company, cannot lead to the kind of regular work schedules envisioned by the Commitment language.

The Company introduced what it referred to as a snapshot of the cleaning services work performed by contractors throughout 2018. Each entry was categorized as MS (surge

maintenance), H (general plant housekeeping), G (garbage and trash removal), or NC (bargaining unit not capable). After reviewing and classifying the work as core, non-core, or not capable, MEU Field Forces Division Manager Mike Traczyk, the Company's witness, prepared a graph showing the core hours worked each day in 2018. There were weeks when contractors worked five or six days, including the second week of the year when contractors worked 48 hours on one day and more than 14 hours on five other days. But, the Company points out, there were 26 weeks in 2018 when contractors did not work the equivalent of five consecutive eight hour days, which Article 5.C.1.a. recognizes as the normal work day and normal work week. There were weeks when contractors worked more than 40 hours, but did not meet the five-day threshold. For example, in week 7 contractors worked 162.8 hours over four days. But almost 150 of those hours came on Tuesday and Wednesday and they could not be spread out to other days because it was work that needed to be performed to avoid downtime or a shutdown. Similarly, in week 27, contractors worked 159 hours over three days in increments of 47 hours, 74 hours, and 37 hours.

The point of the exercise, the Company says, was to evaluate the contracting out experience under the Commitment language. As noted above, Article 2.F.3.a. says the Company will increase the number of employees when there is an FTE of at least one employee for 40 hours per week "over a period of time sufficient to indicate that the work is full time...unless the Company is able to clearly demonstrate...that assignment of the work to Employees would not be economically feasible." The Company says its figures show that the portion of the work subject to the Commitment provision is "sporadic and irregular" and that in fully half the weeks of 2018 there was not eight hours of work over five consecutive days. In these circumstances, the Company says, it is not economically feasible to hire additional employees. The Company also

points out that in *ArcelorMittal Case No. 26*, I said that the purchase of equipment was not economically feasible if it was "unreasonable and impracticable." The Company contends it would be unreasonable to hire additional employees under the circumstances of this case.

The Union's case-in-chief did not include any information concerning the core/non-core distinction because, the Union said, the Company had not raised that issue prior to the arbitration hearing. On rebuttal, the Union called Vince Brandon, a vacuum truck driver. He described the work he performed, which he said was mostly picking up oil, but also included other tasks, like picking up bags from the bag house, and crushed coal. The coal and much of the oil were recycled, he said. On cross examination, he said some oil is taken to the dump, particularly if it has too much water in it. An oil recovery form submitted by the Union shows that oil is taken to Oiltec, the sludge lagoon, or the open hearth disposal area. In its brief, the Union argued that it was improper to consider all of the material handled by the vacuum trucks as trash or garbage. Some of it, including coal, iron ore pellets, and oil is reused or recycled. The Union also introduced testimony in response to the Company's claim that bargaining unit employees were not capable of performing work requiring a self-contained breathing apparatus (SCBA) because they were not trained to use them. A bargaining unit employee from no. 7 blast furnace said the training takes only half an hour. He also said contractors did not use SCBA very often. Finally, the Union introduced a proposal the Company made during local issue negotiations in 2018, calling for a contracting out agreement for vacuum truck services. The local contracting out agreement ultimately negotiated did not include vacuum trucks.

As noted at the outset, the Union also claims that the Company violated the notice provision of the contracting out language, Article 2.F.5, which provides, in part:

> 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 in sufficient time to permit a final determination, using the Expedited Procedure, of whether or not the proposed use of Outside Entities is permitted. Such notice shall include the following:
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> (1) Location, type, duration, and detailed description of the work;
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> (2) Occupations involved and anticipated utilization of bargaining unit forces;
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> (3) Effect on operations if work is not completed in a timely fashion; and
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> (4) Copies of any bids from Outside Entities and any internal estimating done by or on behalf of the Company regarding the use of Outside Entities.
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> b. Should the Union believe a meeting to be necessary, a written request shall be made within five (5) days... after receipt of such notice. The meeting shall be held within three (3) days.... thereafter. At such meeting the parties shall review in detail the plans for the work to be performed and the reasons for using Outside Entities. The Union shall be provided with all information available to the Company concerning the use of Outside Entities
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Maximino Carrasquillo, Union Chair of the Joint Bargaining Unit Work Committee, said over 80% of the contracting out work orders for vacuum services are entered as emergencies. The Union did not object to this characterization at the arbitration hearing, with Carrasquillo agreeing that there are times – particularly weather events – when the Company must act quickly to insure the plant stays in operation. Carrasquillo said the parties have agreed that he will receive a phone call for a discussion of the circumstances in the event of an emergency request. He then receives a written notice within a day or two. The problem, he said, is with non-emergency notices. Carrasquillo said he receives proper notice with sufficient time for a meeting

less than 5% of the time. In addition, many of the notices do not include all of the required information. He does not typically receive the shift, a detailed description of the work, the number of hours expected, or the number of trucks. He has asked for contracts the Company has with contractors, as well as invoice, bids and quotes, but has not received them. Carrasquillo said he has routinely objected to the Company's use of the surge maintenance exception for vacuum truck work, but the Company says that is the only exception that will fit their computer system. Carrasquillo identified a series of letters to the Company concerning contracting out, including one that asked for more precision in contracting out notices.

On cross examination, Carrasquillo said the Company no longer brings notices it wants to discuss to contracting out committee meetings. He also said the Company no longer offers to talk to the Union about notices before the work is done, except for notices involving the BOF. The Company does not bring people to the meeting to discuss the notices but merely "shows up and takes notes." Carrasquillo agreed that he receives information from the tabware system, but he said it does not include everything required by the contract. He agreed that he receives a report concerning the number of contractors who swipe in and out the day after the event.

The Company argues that any alleged notice and information violations are not properly at issue in this case. The Union's letters moving the case to expedited arbitration all concern the Commitment issue from Article 2.F.3. Even if notice and information were at issue, the Company says the record establishes that it met the requirements of the BLA, largely because of information it disclosed through its tabware system. The Company also challenges the Union's right to a special remedy, a claim the Union advanced for the first time following presentation of the Company's case-in-chief.

Findings and Discussion

Notice Issue

At the beginning of the arbitration hearing, the Union alleged there were two issues: first, whether the Company was improperly notifying the Union about the use of contractors who performed cleaning services work and, second, whether a hiring order was appropriate under the Commitment language. But in its opening statement, the Company said the only issue was the Commitment provision of Article 2.F.3. The Company pointed out in its brief that Article 2.F.5, the Notice and Information provision, says the Union may bring a grievance for the Company's failure to give notice within 30 days of the beginning of the work or the date the Union learned of the work. This does not mean, necessarily, that notice issues are excluded from the expedited procedures of Article 2.F.7. It is clear that the original intent of the expedited procedure was to resolve contracting out issues before the work was given to an Outside Entity or, at least, before the work was performed. Thus, the language calls for an expedited hearing and an arbitrator's decision within 48 hours. Nevertheless, it is common for the parties to use the expedited procedure even after the work has been performed. Nor does the BLA necessarily exclude using the procedure for notice issues; the language says the Union can invoke the expedited procedure for "an expedited resolution of any dispute under this Section," and the Company's notice obligations are part of Section F.

Cases brought under the expedited procedure often lack the full record developed under the regular grievance procedure and issues sometimes emerge for the first time at the hearing. That happened in this case when the Company indicated in its opening statement it intended to argue that non-core work could not be considered under the Commitment language. Although it was proper to raise the issue in expedited arbitration, I have found in similar situations that basic

fairness requires enough notice to allow the other side to prepare a defense to the new issue or, in the alternative, a postponement of the hearing. The Union's claim of notice violations, however, is not merely a new defense or a new theory advanced in support of an existing claim.

The parties introduced a packet of letters identified as Joint Exhibit 2 which constitutes the Union's demand for expedited arbitration. The first one, dated November 13, 2018, says "the Union is demanding arbitration concerning Article 2 Section F.3 Commitment...." The Union also asked for a response to its letter of May 24, 2018 concerning the contracting out of vacuum services work. That letter is not part of the record, but letters the Union sent to the Company on May 15, 2018 and May 31, 2018 also concerned Commitment language issues, and did not mention any notice issues.[2] Also included in Joint Exhibit 2 are letters from March 5, 2019; June 4, 2019 (headed "**SECOND NOTICE"**); and June 20, 2019 (headed "**THIRD AND FINAL NOTICE"**). All of the letters allege that the Company continued to be in violation of the Commitment language; none of them mentions any notice issues. In addition, the Union had sent a letter on April 3, 2018 demanding expedited arbitration over the Commitment issue. The only mention of a notice issue in the record was a February 7, 2017 letter, which alleged a violation of the notice provisions in Article 2.F.5. The letter said if the Company did not stop violating the notice provisions there would be "no other alternative than to seek expedited arbitration." But the letter does not demand arbitration and there is no evidence of any other demand for arbitration on the notice issue.

I don't know what advance discussions, if any, the parties may have had about the subject of the hearing held on October 1, 2019. The Company said it did not know the Union would raise a notice violation in the hearing and there is no evidence to the contrary, even though there

[2]Although it did not mention notice issues, the May 31, 2018 letter claimed the Company was failing to have quarterly meetings with the Bargaining Unit Work Committee.

was testimony that Carrasquillo has questioned the adequacy of the Company's notices over a period of some years. I cannot resolve a new claim of contract violation advanced for the first time at the arbitration hearing. Even if I could, the record in the instant case would make it difficult to consider the notice issue. There is evidence that the information the Company furnishes under its tabware system does not include all of the material required by Article 2.F.5, and there is reason to question whether non-emergency notices are made sufficiently in advance of the actual decision to contract out. But there are no specific contracting out instances identified in the record and no evidence concerning what may have been said about them, if anything, in contracting out meetings. In short, the record lacks the specificity necessary for me to consider the notice issue, even if it were properly before me. This finding also resolves adversely to the Union its claim to a special remedy for repeated notice violations.

Commitment Issue

Although the issue has apparently not been decided before this case, I accept the Company's claim that non-core work is not part of the calculus of the Commitment obligations in Section F.3. The introduction to Section F.3 says "In addition to the understandings in paragraphs 1 and 2 above, the Company agrees that" when hours worked by contractors reach certain levels, it will increase the number of employees. In paragraph 1, the Company commits to having bargaining unit employees do work they are capable of performing, *except* to the extent the Company has the right to contract the work out under the exceptions in paragraph 2. I understand the Commitment language to mean that even though the Company has the right to contract out work pursuant to an exception or exceptions, it cannot substitute contractors for bargaining unit employees once contracting out hours reach certain levels. This is consistent

with the Guiding Principle that the Company will use bargaining unit employees to do work they are capable of performing. But the exclusion of non-core work under the side letter is not part of paragraphs 1 or 2. And, under the terms of the letter, the Company is free to contract out the work even if there is a contrary local understanding. The only exceptions noted are for incumbents to the jobs or layoffs, neither of which applies here. In these circumstances, I cannot conclude that the parties agreed the Company would need to add additional employees because of the amount of non-core work performed by contractors.

a. Housekeeping

The issue then becomes identifying which work is non-core. I addressed this issue in *ArcelorMittal Case No. 64*, where I found that vacuum truck operators (drivers) were performing non-core work when they collected materials properly considered trash or garbage under the core/non-core side letter. In the instant case, however, the Union presented evidence that at least some of the material collected by the vacuum trucks is not trash or garbage. Although the trucks dump some (maybe most) material in landfills or waste dumps, some of it is recycled. Thus, there was testimony that there is an oil route, that trucks collect oil that is taken to Oiltec, or crushed coal that is recycled, or iron ore pellets that have fallen off conveyors. It is not clear from the record whether the Company recycles this material on its own or supplies it to a third party in return for some consideration. What is clear, however, is that material that is not disposed of in a land fill or its equivalent[3] is not trash or garbage, and is not protected as such

[3]The fact that material may be subject to special handling in its disposal does not mean it is not trash or garbage as those terms are used in the core/non-core side letter. For example, there are apparently some limitations on the Company's disposal of bag house dust, which cannot simply be discarded in a landfill because of the presence of contaminants. But if the material is of no further use to the Company, it is still trash or garbage.

under the core/non-core letter.[4] Those operator hours, then, cannot properly be considered non-core work.

However, some of the work qualifies as general plant housekeeping. The Company relies, in part, on my decision in *Mittal Case No. 10*, in which I found sweeping the roadways in the plant was general plant housekeeping, even though the sweeping at issue was primarily directed at controlling particulate matter from the steel producing process. There was testimony that the vacuum trucks clean spills on the roadways as well as rain or flood waters from the roads and other areas of the plant. And, consistent with the decision in *Arcelor Mittal Case No. 64*, cleaning work in non-production areas satisfies the non-core requirements.

b. Surge Maintenance

One of the principal controversies in the case involves the Company's categorization of much of the work at issue as surge maintenance. The surge maintenance category was introduced in the initial agreement between International Steel Group (ISG) and the Union in 2002. The concept found acceptance in other segments of the industry, although with some changes or limitations. It is probably fair to say that the exception did not mean the same thing to interested parties throughout the industry. But it is also fair to point out that prior to the surge maintenance language, there were often difficult disputes about an employer's ability to contract out maintenance and repair work, particularly during downturns or outages. The surge maintenance provision eased that burden and allowed contracting out during periods of peak demand, providing the requirements were met, including the offer of overtime. Thus, contractors could perform "maintenance and repair work" on equipment to materially reduce the downtime when the work could not reasonably be performed by bargaining unit employees, which was

[4] This finding is consistent with the Company's argument in ArcelorMittal Case No. 64 that garbage is "discarded or useless material." Recycled or reused material is neither discarded nor useless.

typically when they were fully engaged on other work during the same outage or shutdown. As the Union contended at the hearing, the exception has probably most often been applied to the subcontracting of craft work that would otherwise have been performed by millwrights or electricians, now called maintenance technicians mechanical (MTM) and maintenance technicians electrical (MTE). That does not mean, however, that the exception could never be applied to other categories of workers.

The Company points out that the job description for service technicians, the classification applicable to cleaning service employees, includes the language "Performs and assists in maintenance tasks as directed by Senior Operating Technicians and Maintenance Technicians as required." Actually, the same language appears in the job descriptions for operating technician, plant transportation specialist, and utility person, suggesting there is nothing unique about the help service technicians offer to maintenance employee. Nevertheless, Traczyk said service technicians sometimes assist maintenance technicians by unclogging a pipe. As he described it, the MTE dismantles the pipe and the service technician blows out the clog. I agree that such activity could be considered maintenance work because the service technician's action actually fixes the defect in the equipment.

But not every task a service technician performs in support of a maintenance activity is "maintenance and repair" work for purposes of the surge maintenance exception. Traczyk also testified about situations in which contractors clean machines or equipment before they can be repaired. This, Traczyk said, is part of the critical path of the project. It is not clear exactly what "critical path" means, but it is clear that work does not become maintenance simply because it has to be done before a repair can be made. Parts have to be ordered and delivered to the work site before a repair can be made, too, but presumably no would call that maintenance work. Nor

is it maintenance work to clean a conveyor belt so it can operate, another example Traczyk offered. In short, maintenance and repair work, as that terminology is used in the surge maintenance exception, does not encompass upkeep intended to keep equipment clean; rather, it applies to repairs or maintenance on the mechanical components of the equipment.

The Company contests this interpretation, pointing to language in *ArcelorMittal Case No. 64*. In that case, the Company argued that cleaning activities performed by the laborers who operated vacuum truck hoses amounted to "general plant housekeeping which is not directly associated with general labor work on a production facility" under the core/non-core letter. Some of the laborers' work met that requirement, but not all of it. In the course of the analysis, I said:

> Although line-drawing is hard, the parties' decision to describe cleaning work that can be contracted out as "housekeeping" is significant; it suggests a distinction between keeping the facility clean on a routine basis, as the road sweepers did in ArcelorMittal Case #10, and cleaning industrial equipment during downturns, or even when the facility is running. The latter is not merely keeping the facility clean, but, rather, is part of the maintenance and upkeep required to protect the machinery and its associated structures, like, for example, the flume and scale pits. The same is true of emergency calls to unbury a belt, or to address flooding in the caster. This is core work, not the kind of housekeeping chores that the parties agreed could be contracted out.

As the quotation makes clear, In *Case No. 64*, the issue was whether the work at issue was core or non-core, with the Company claiming it was non-core because it fell under the general plant housekeeping language. The effect of the quoted language was to classify it as housekeeping or service work that did not fall under the "not directly associated with general labor work" limitation and, thus, as core work. My use of the word "maintenance" was not intended to classify the work as such, especially for purposes of the surge maintenance exception. In fact, in

Case No. 64 the Company did not argue that the cleaning work was maintenance, so there was no reason to make that determination.

The quotation from *Case No. 64*, above, also makes clear that digging out a pit so equipment can be reached and repaired or uncovering equipment from standing water, both examples mentioned by Traczyk, are not "general plant housekeeping not directly associated with general labor work on a production facility." Rather, such activities are core work under the side letter because they are intended keep machinery and equipment running, and they are likely not surge maintenance because they are not part of the actual repair or maintenance work on the equipment.

The problem in this case, as the Company's brief points out, is that the Union did not directly challenge the Company's use of the surge maintenance exception. Carrasquillo testified credibly that he had complained to the Company about its use of the exception. But there is no evidence the Union invoked the expedited procedure or filed grievances claiming that the exception had been used improperly either for specific items of work or certain types of work in 2018. A procedure invoking the Commitment language is not the appropriate vehicle to determine whether the exception applies. Rather, as discussed above, the Commitment language imposes hiring obligations on the Company when it contracts out work under the exceptions in Section F.2. Even though the Company has the right to contract out in certain circumstances, the Commitment language recognizes that there are limits to how much work the Company can give to contractors without increasing its own workforce. The Union's claim with respect to surge maintenance, however, is that the Company did not have the right to contract out some work at all. It is true, as the Union points out, that the Company has the burden of proving an exception to the Guiding Principle. But that burden exists when the Union disputes the legitimacy of

contracting out decisions. It does not arise in a Commitment case absent evidence that the Union has contested the Company's right to contract out the work.

c. Capability

The Company contends that contractor hours for work bargaining unit employees are not capable of performing should be excluded from the Commitment requirements of Section F.3. This is obviously correct. Article 2.F.1.a. defines bargaining unit work as work employees "are or could be capable" of performing. And the exceptions in Section F.2 apply only to bargaining unit work. It does not make sense to believe that the Company would have to hire bargaining unit employees based on the volume of contracted-out work that bargaining unit are not capable of performing. There are two claims of non-capability in the instant case. One is for work requiring SCBA training. The fact that employees are not trained to perform work does not, of itself, mean they are not capable, as that terminology is used in the Guiding Principle. Language similar to that currently in the BLA has existed in the industry – and at the Indiana Harbor East facility – through various owners since at least the mid-1980's. It has generally been understood to mean what it now says expressly, i.e., that capability goes to skills and ability. And, unlike some earlier versions, the language now says expressly that capability includes work employees "*could* be capable" (italics added) of performing, which suggests that a lack of training is not determinative. The Union says the training involved for SCBA work is not extensive, a claim questioned by the Company. But even if little training is required, the Union's own witness suggested that the actual work requiring SCBA equipment for cleaning services employees is di minimis. On this record, then, I am not prepared to find that SCBA-required work contributes significantly to the Commitment obligations under Section F.3.

The same determination is not possible, however, for work the Company says bargaining employees cannot perform because the Company does not have the equipment. As noted, the Guiding Principle language has been understood to mean what it now says expressly, namely that capability is tied to the ability to perform the work. At one time, the cost of acquiring equipment was a reasonableness factor relevant only in contracting out cases involving certain kinds of work to be performed on site. But the language that debuted in 2002 did not include the reasonableness factors. Under the current BLA, the need to purchase equipment might be a factor for work to be performed outside the plant, but it is not related to whether bargaining unit employees are capable of performing work inside the plant.

Remand

On this record, I am unable to determine whether the Union has satisfied its burden of showing that the Company has violated Article 2, Section F.3, or, whether the Company has satisfied its obligation to prove that hiring employees would not be economically feasible. This is, in part, because the Union was not aware of the Company's core/non-core argument prior to the arbitration hearing. As indicated above, non-core hours can properly be excluded from a determination under the Commitment language. These include hours when drivers were engaged in garbage or trash removal. However, the record suggests that there were some hours classified as garbage removal when the drivers were actually engaged in core work. Thus, the parties will need to assess the number of non-core work hours contracted out.

There may be merit to the Company's claim that the Commitment language does not require it to hire employees when the sporadic nature of the work contracted out prevents it from being assigned to employees on a regular work schedule. For reasons already explained, I agree

with the Company's claim that for the 2018 determination at issue here, the work the Company claimed as surge maintenance on contracting out notices must be deemed to have been properly contracted out, unless there are unresolved grievances pending over such issues. My understanding, however, is that the Union did not know in advance of the hearing that the Company would argue that some of the claimed surge maintenance work could not be spread out to other work days. Because this argument may affect the Union's claim about whether or how many employees the Company should hire, the Union is entitled to evaluate those instances in which the Company said the work could not be divided. Finally, I cannot tell from the record whether the Company improperly contracted out work by claiming the bargaining unit was incapable because of a lack of equipment.

Thus, I will remand the case to the parties to reassess the core/non-core work determinations, to assess whether any of the work classified as surge maintenance could have been spread across additional work days, and to consider the capability issue. If the parties are not able to resolve the case within 60 days on remand, I will schedule an additional hearing to determine those issues. I will retain jurisdiction over the case until these issues are resolved.[5]

[5] The Union argues, in part, that the Company recognized it did not have the right to contract out at least some of the work at issue because in negotiations over local issues in 2018 it sought a contracting out agreement that included vacuum truck work. Evidence of contract proposals is sometimes relevant for such purposes. Here, however, the parties knew the subcontracting of vacuum truck services was an issue before they entered the 2018 negotiations, and they suspended discussions within the bargaining unit work committee pending negotiations. Thus, the Company's proposal is best seen as an attempt to resolve a continuing issue and cannot properly be viewed as any sort of admission.

AWARD

The Union's claimed notice violation is denied. On the merits, the case is remanded to the parties, as explained in the Findings. I will retain jurisdiction until the issues in the case are resolved.

Terry A. Bethel

Terry A. Bethel, Arbitrator
December 13, 2019