IN THE MATTER OF THE ARBITRATION BETWEEN

MITTAL STEEL COMPANY

And Award No. 14

UNITED STEELWORKERS, USW
LOCAL UNION 1010

OPINION AND AWARD

Introduction

This case from Indiana Harbor concerns the Union's claim that the Company improperly terminated a local working condition that required travel pay for employees in the Utilities Department and various other departments around the east side of Indiana Harbor Works, the former Ispat Inland facility. The case was tried in East Chicago, Indiana on May 21, 2007. Robert Cayia represented the Company and Bill Carey presented the Union's case. There are no procedural arbitrability issues. The original grievance came from the Utilities Department. Subsequently, the Union filed a plant-wide grievance over the same subject matter. The parties agree that the two grievances are intertwined and that they want this decision to resolve both grievances. The parties submitted the case on closing argument.

Background

There is no dispute that prior to the action at issue here, several departments offered travel pay as an incentive to get employees to report for unplanned events. The Company

terminated travel pay on February 1, 2006, relying on changes made in the contract that was effective November 1, 2005. The change was made first in the Utilities Department and later in other departments around the plant. Although the Company does not concede there was a local working condition, to the extent there was, the Company argues that its action was justified under Article 5, Section 4 of the November 13, 2005 Basic Agreement:

> The Company shall have the right to Change any Local Working Condition if the basis for the existence of the Local Working Condition is Changed, thereby making it inappropriate to continue such Local Working Condition; provided, however, that the Change shall be reasonable and equitable.[1]

There was similar language in the August 1, 1999 Agreement between the Union and Ispat Inland, although there was no corollary to the last clause of the 2005 contract; i.e., "provided, however," etc. The Company argues there was a change in the basis for the existence of any travel pay practices, the specifics of which will be detailed below.

Although there was no consistent practice throughout the plant, the parties agree that various departments paid travel time as an inducement for employees to report when called out during off time. Otis Cochran, a Grievant in the Utilities Department, said when he received a call to come in because of a break down, he would note the time of the call, and he would be paid from then until he stopped working that day. He lived about an hour from the plant, so he typically received an hour of travel pay. Cochran said if the work lasted less than four hours (including travel time), and he went home after it was completed, he would receive four hours pay, as provided in the 1999 contract. However, he said even though the Company could send him home after the work was completed, it did not do so. Typically, Cochran said, he would stay and work until he had completed eight hours, including travel time and the time spent working

[1] Capitalization of the words Change and Changed is not inadvertent or meaningless. Article 5, Section A.1 says, in part, that it is not possible to set forth in the contract the local working conditions that "should be changed or eliminated (Changed or Changed)." Thus, the capitalized words Change and Changed used in Section 4 (quoted in the text), include the possibility of elimination.

on the breakdown. He said he was never sent home after a call-out, although he did elect to go home on some occasions. He said he is not aware of any employees who were sent home after being called out. Cochran said when he was called in prior to his regular shift, he worked until he finished a total of eight hours, including travel pay, and then left. However, he could, and sometimes did, stay until the end of his regular shift.

The Union had other witnesses available to describe their experiences, including some from other departments, where the practice differed. The Company agreed it was unnecessary for the Union to call other employees to testify to the same facts. The Union pointed out that it had requested information from the Company about employees who had been sent home following a call-out, but the Company did not furnish reports of any such incidents. A response to the request from the Company, which is part of a joint exhibit, says the Company has never kept those kinds of records.

Roger Hughes, Labor Relations Representative, testified that the travel pay practice was born out of a need to get employees to come in for unplanned events, like breakdowns. Hughes testified that when he received the plant-wide grievance, he sent a questionnaire inquiring about department practices. He discovered that not every department paid travel time, and that for those that did, the practices varied. In addition, there were departments where some sections paid travel time and others did not. The Company introduced an exhibit detailing the results of Hughes' investigation. It is not necessary to reproduce the entire exhibit, although it is worth noting some things. The exhibit shows that some departments paid travel time from the time of the call, while others paid up to one hour or two hours. No. 4 BOF Operations stopped paying travel time in 1996 and No. 4 BOF Maintenance reported that it used travel time "infrequently." No. 3 Cold Mill said it paid travel time "at times," when the employee requested it, which was

about 20% of the time. One department said it used travel time to fill out eight hours of work. Three departments said they used travel time when there was more than four hours of work on the call-out; it was added to the time worked. However, if there was less than four hours, the employee was paid the four hour minimum provided for under the 1999 Agreement. This was the practice in the Utilities Department, the exhibit says.

Hughes outlined the changes in the 2005 Agreement that the Company claims justified the elimination of the travel pay practices:

1. Under the 1999 contract, employees who were working in the plant were guaranteed 4 hours pay if they were sent home. Under the 2005 Agreement, employees who report to work are guaranteed 8 hours of pay, unless they leave voluntarily in less time. In addition, the contract says employees are to be paid for all shifts that are part of their posted schedule.

2. Under the 1999 Agreement, an employee who reported for work as scheduled or on a call-out only to find no work available was guaranteed 4 hours of pay. The employee would not be paid, however, if the Company notified him more than two hours prior to the scheduled starting time. Under the 2005 contract, employees who report are guaranteed 8 hours if they report and for all scheduled shifts.

3. The 1999 contract provided that when the failure to supply work was the result of a condition beyond the Company's control, like an act of God, and the event occurred less than 5 hours before the employee's starting time, the employee who reported for work did not receive any pay, even if the Company had not notified him not to report. When the event occurred more than 5 hours from the start of the shift, the Company did not incur a reporting pay obligation if it notified the employee not to report 2 or more hours from the start of the shift. There is no comparable provision in the new contract. Employees have an 8 hour guarantee, and are paid for all originally scheduled shifts. In addition, if an employee is scheduled for a shift that was not part of the original schedule, he is paid at time-and-one-half, even if the employee did not work one of the originally scheduled shifts because of an unplanned event.

4. The 1999 contract provided that when an employee was absent, he had to inform his supervisor of his intent to return to work three hours before the end of that scheduled shift. This meant the employee had to give 19 hours notice of his intent to return. If he did not, then the Company could send him home without liability for the 4 hour reporting pay requirement. There is no specific language about reporting-on in the 2005 contract. But the Company says if the shift when the employee wants to return is part of the originally posted schedule, the employee "arguably" could report-on only a short

time prior to the start of the shift and still get paid. The supervisor has no option to send him home, as was true under the 1999 contract.

5. The 1999 Agreement provided that no schedule changes could be made after Thursday of the preceding week and, if there was such a change, the employee qualified for 4 hours of reporting pay if he did not work on the scheduled day. However, Hughes said "technically" the Company could have scheduled the employee to work on a different shift within the same day without incurring any liability for the change, even if it occurred after Thursday. This is because of the focus on changing "day[s]" worked under the old agreement. This does not apply under the new contract. Employees are to be paid for all shifts that were part of their originally posted schedule. In addition, the 2005 Agreement says all shifts that were not part of the originally posted shift are to be paid at time-and-one-half. Thus, Hughes said, an employee whose shift is changed is to be paid for the original shift plus time-and-one-half for the new shift. "Arguably," Hughes said, an employee could be paid 100 hours if all five shifts in one week were changed, even though the employee worked only 40 hours.[2]

Although most of the scenarios Hughes described are not directly related to travel pay, the Company says they are part of a package of changes in the new contract that deal with unplanned events. Travel pay, too, was a reaction to unplanned events, so it falls within the group of conditions that were affected or changed by the new agreement, the Company argues. All of these changes benefitted bargaining unit employees, Hughes said. This was evident, Hughes testified, because they were portrayed as benefits in the Union's summary of the new contract that was given to employees.

On cross examination, Hughes acknowledged that scenarios 1 and 3, detailed above, did not involve employees who were called out but, rather, employees who were told not to come in. Similarly, employees subject to the 19 hour rule (scenario 4) are not called out. In determining whether the basis for the travel pay local working condition had changed, Hughes said the Company focused on provisions that involved unplanned events, and did not consider other changes in the 2005 Agreement. These unplanned event changes, he said, meant that all

[2] A Union rebuttal witness said the Union agrees with this interpretation. However, he said there is a grievance pending on the issue, and that the Company has denied that pay should be calculated in the manner described by Hughes. There apparently is some dispute about how a side letter affects the matter. That grievance is not an issue in this case and nothing said here is intended to comment on its merit.

employees received a reasonable and equitable benefit that offset a procedure that was inconsistent and not applied everywhere. He agreed, however, that inconsistency was not, of itself, a reason to eliminate a local working condition. Hughes also acknowledged that under the 1980 contract, there had been only a 32 hour guarantee, which was improved to 40 hours in 1993. The travel pay benefit was not changed at the time of that increase.

On rebuttal, Dennis Shattuck, Grievance Chairman, said there were also benefits for the Company in unplanned event coverage in the 2005 Agreement. Under the old contract, for example, Shattuck noted that the Company could change an employee's schedule without penalty after Thursday of the preceding week only if there was a breakdown or an event beyond the Company's control. Under the new contract, there are no restrictions on when the Company can change the schedule, although Shattuck acknowledged that the penalty for doing so is greater than it was under the old contract. Shattuck said the biggest change, and one that was controversial with employees, involved posting the schedule. Under the old contract, the schedule had to be posted by Thursday of the preceding week. It was usually posted by about 3:00 p.m., Shattuck said. Under the new contract, the schedule is not posted until 2:00 p.m. on Friday of the week preceding the calendar week in which it takes effect. There were some areas of the plant, Shattuck said, where schedules had been posted as much as two weeks in advance, but those practices did not survive the new contract. This was something the Company had wanted for a long time, Shattuck said, and it affects every employee every week.

Shattuck testified that there was no change in travel pay immediately after the effective date of the 2005 Agreement on November 1, 2005. The change in the Utilities Department was made on February 1, 2006. Shattuck said the change was made by a manager who formerly had worked on what is now the west side of the Harbor Works, the old LTV and ISG plant, where

there had been no travel pay. Shattuck also said the Company did not raise the changed circumstances argument until the second step of the grievance procedure. Shattuck identified some scenarios in which employees who are denied travel pay would receive less money under the 2005 Agreement, even with the 8 hour guarantee. Two of the three involved instances in which an employee elected to leave work.

On cross examination, Shattuck agreed that under the new contract, employees called in when they are not scheduled to work automatically receive time-and-a-half. Although not provided for expressly under the old agreement, Shattuck said employees usually were paid at premium rates for call-outs under the old contract because the time would be in addition to their normal 40 hour week. He also acknowledged that the 1999 contract provisions mentioned in this case had been essentially the same since 1977. The travel pay practice, he said, had been in effect prior to that.

Positions of the Parties

The Union says the Company's error is to consider travel pay and work time guarantees to be related. They are different benefits, the Union argues, that do not overlap; the travel time pay ends when an employee gets to the plant and the guarantee begins then. The Union also cites cases in which arbitrators had considered and rejected the argument that a local working condition had been submerged by another benefit. These cases recognized, the Union says, that local working conditions can provide benefits in excess of those provided by contract. It also cited cases indicating that a new benefit justified elimination of a local working condition when the benefit served the same basis as the one leading to the practice. The Union says the Company's argument amounts to a claim that additional pay guarantees adequately compensate

employees for being called in. But this makes no more sense, the Union contends, than saying an increase in vacation time justifies eliminating breaks because both deal with paid time off work. The Union also says the Company did not establish that the basis for the local working condition had changed or, if it did, that it would be reasonable and equitable to eliminate it.

The Company says the issue in the case is when or how a local working condition should yield to the arrival of new contract language. The Company also questions whether there is even a local working condition over travel pay, noting the differences in payment from department to department, and even within departments. The Company said it concedes there is a long and consistent history of travel pay in the Utilities Department, but notes there is no plant wide travel pay concept. The Company contends that travel pay originated in an era when the Company had a greater ability to change schedules, often with only minimal and even no penalty. This was true from 1977 until the 2005 Agreement and was the contractual backdrop for travel pay as an inducement for employees to report for an unplanned event. However, this historical purpose and structure was turned on its head in 2005, the Company says, when the right to change schedules became more restricted and when doing so was accompanied by greater liability.

The Company points to the five changes outlined by Hughes' testimony, and asserts that numbers 1, 2 and 5 "directly relate" to the basis of the travel pay concept, and that all five changes support that reasonableness and equity of the change. The changes, the Company notes, affect every employee in the plant, and not just those who received travel pay. The Company says an effect of the new contract was to cause travel pay to become submerged in the new hours of work provision.

Findings and Discussion

There is clearly no plant-wide local working condition, and the Union does not claim there is. The plant-wide grievance, as I understand it, argues that various areas around the plant enjoyed some sort of travel pay local working condition, and the Union grieved the Company's action of eliminating those without justification. Thus, the plant-wide grievance is not limited to the Utilities Department, as was the original grievance. In its final argument, the Union said the Company agreed during the grievance procedure not to contest the status of travel pay as a local working condition. The Company did not respond to this contention directly; however, it did contest the existence of a local working condition, at least in areas other than the Utilities Department. Hughes acknowledged that local working conditions can apply in limited areas; moreover, the Company agreed at the outset of the case that there can be a narrow practice, although it also said the lack of a plant-wide practice is relevant.

The evidence was sufficient to establish a travel pay local working condition in the Utilities Department. The Company's closing argument acknowledged that the Utilities Department had a long and consistent practice of paying travel time to employees called out. The Company did not contest Cochran's testimony about how he was paid for travel to the plant. The record is less clear about the existence of a practice in other areas of the plant. Exhibit 1 indicates there was no real controversy about the use of travel time in many departments. One might question whether the practice was consistent in No. 3 Cold Mill Finishing, which said it was used only 20% of the time, or in No. 4 BOF Maintenance, where it was used "infrequently." In addition, No. 4 BOF Operations apparently has no practice. The fact that practices differed across the plant does not mean there was no past practice. Many of the local working conditions that have been an issue between these parties applied only to specific areas, as in crew size or wash-up time cases. There was obviously no consistent crew size throughout the mill and the

fact that a wash-up time might have varied from one department to another would not necessarily have invalidated either one.

The Company's principal argument is that it could eliminate the practice because of new provisions in the 2005 Agreement. In particular, it says three of the five changes enumerated at the hearing changed the basis of the local working condition: the new minimum 8 hour guarantee for an employee who begins the shift and is sent home (no. 1, above); the 8 hour guarantee when an employee is called out (no. 2, above); and the elimination of the right to change shifts within the work day without penalty (no. 5, above). In addition, the Company cites those three changes along with the other two (conditions beyond the control of the Company, no. 3, and elimination of the 19 hour rule, no. 4) as establishing the fairness and equity of eliminating the local working condition because they provide a benefit to all employees and not merely to a few. This last argument is not persuasive. As already noted, it is not unusual for local working conditions to have limited application. Carried to the extreme, the Company's argument would mean that any local working condition could be eliminated simply by looking to new benefits for the bargaining unit as a whole. But local working conditions are expressly protected by the Agreement and the basis for their existence has to change; it is not sufficient to point to an increase in the welfare of the entire group, especially where, as here, most of the changes have nothing to do with the local working condition at issue.

The parties seem to be in agreement that the travel pay benefit was intended to provide incentive for employees to come to work when they were otherwise scheduled to be off, either on an unscheduled day or at a time during a work day when they were not on duty. I am not influenced by the Company's argument that the five changes quoted above changed the basis of the travel pay practice because they were a package of changes related to unplanned events. The

fact that the Company has more or less discretion to deal with unplanned events, or that it may have less need to call out employees does not mean there was a change in the basis for the practice, which was an inducement for employees to report for unscheduled work. Not every response to an unplanned event is related to the Company's ability to entice employees to work. The Company's ability to change a shift assignment (no. 5), or the penalty it pays for doing so is not related to the employee's incentive to report for a call-out. Similarly, the fact that an employee who is sent home gets paid for 8 hours rather than 4 hours (no. 1) is not related to the travel pay incentive, unless it is applied to an employee who was called out, in which case it does not differ at all from the 8 hour minimum for employees called out on off-time (no. 2). The increased minimum pay for a call-out is the only justification the Company asserts that relates to an incentive to report for work.

The argument with respect to the increased minimum is that, under the old contract, travel time was an inducement for a called-out employee to report because the employee knew that if no work was available when he got to the plant, or if the job took only a short time, he could be sent home with only four hours of pay. Now, however, the employee would get 8 hours of pay, meaning that the incentive for responding to the call-out has increased. This is a better argument than the Union admits. Cochran, for example, said when he reported under the old 4-hour system, he typically used the travel time to tack onto the hours he worked until he reached 8 hours. Because other witnesses' testimony would have mirrored Cochran's, presumably those employees would have said the same thing, had they testified.

Of course, Cochran's testimony is also consistent with the Union's argument that employees were usually not (maybe never) sent home involuntarily after reporting on a call-out prior to the 2005 contract. Thus, the Union argues that the basis for the practice has not changed

because the Company usually allowed employees to remain at work, meaning that they typically received 8 hours pay in any event, sometimes counting the travel pay. But the Company's right to send the employees home cannot be ignored, even if it elected not to exercise it. Otherwise, the Union would be contending, in effect, that there was not only a past practice for travel pay, but also one that allowed employees to stay 8 hours, which seemingly would have conflicted with Section 10.17. The Union cannot support its case, then, by claiming that the new guarantee did not really change the effect of the old guarantee.

The Union is obviously correct when it says travel pay and reporting pay do not overlap because travel pay ends when the employee arrives at the plant and starts working. However, that distinction is relevant only if one assumes that the basis of the travel pay local working condition was to pay employees before they began to work. But that doesn't make sense; the Company had no incentive to pay employees for time spent away from the plant, except when doing so amounted to an incentive to come to work. Travel pay was, in effect, a bonus for employees who otherwise might have decided that a four hour guarantee wasn't worth giving up a day off or a full night's sleep. Stated differently, it is not possible to consider travel pay as a benefit separate from the amount of pay an employee was to receive for accepting a call-out; the travel pay was part of the call-out pay.[3]

It is possible to argue, as the Union does, that retaining travel pay along with the 8 hour guarantee would give an employee even more incentive to report for work. But the basis for the practice has to be evaluated in the context in which it arose. At that time, an employee had only a four hour guarantee, so the practice, in effect, increased the minimum payment and, as

[3] This is the difference between the instant case and the Union's vacation time-break time argument outlined in the Background section, above. An increase in vacation time would have no effect on a local working condition over break time; neither is related to the other and an increase in vacation time would not change the basis for a break time practice. But in the instant case, the hours guarantee and the call-out pay served the same purpose.

Cochran's testimony indicated, helped an employee fill out an 8 hour shift. If the basis of the practice was to provide more money for a call-out at a time when the guarantee was low, then that interest has now been served by increasing the guarantee to 8 hours, which is what is normally paid as a regular work day, and which is what Cochran said he typically used the call out pay to accomplish. This does not mean that any pay or benefit increase would justify elimination of the practice. Here, however, the increased minimum served the same interest as travel pay and makes it appropriate to eliminate the local working condition.[4] In addition, in these circumstances, the Company's action satisfied the reasonableness and equitable standard imposed by Article 5, Section 4.

AWARD

The grievances are denied.

Terry A. Bethel
July 10, 2007

[4] This is what distinguishes the instant case from Umpire Crawford's decision in American Bridge, 3 Steel Arb. 8163 (1953). There, the drafting employees had traditionally received a half-day off on Christmas Eve. The parties bargained a new holiday article that did not provide for Christmas Eve, and that gave the drafting employees an additional wage increase to compensate them for the value of the holiday increase given to production employees. But the new holiday provision did not submerge the Christmas Eve benefit to the drafting employees because it was an additional benefit. The point of the decision is that the basis of the practice had been to insure that the drafting employees received a half-day on Christmas Eve, and the make-up wage increase had nothing to do with Christmas Eve. Thus, the wage increase did not change the basis for the local working condition. Here, however, the basis of the call-in pay was to insure that employees received additional compensation for reporting to work when called out. The increased guarantee serves the same interest. Thus, this case is more like USS-8228 than the American Bridge decision.