IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL STEEL COMPANY
CONSHOHOCKEN PLANT

And Award No. 18

UNITED STEELWORKERS, USW
LOCAL UNION 9462

OPINION AND AWARD

Introduction

This case from the Conshohocken Plant concerns the Union's claim that the Company improperly eliminated Grievant Brian Williams' red circle rate when he bid off his job to another job in the same department. The case was tried in the Company's offices on November 19, 2007. Patrick Parker represented the Company and Lew Dopson presented the Union's case. Grievant was present throughout the hearing and testified in his own behalf. The Company raises a timeliness issue and the Union argues that the case has been settled. Both of these arguments will be addressed below. The parties submitted the case on closing argument.

Background

When ISG purchased the assets of the Conshohocken plant from Bethlehem in 2003, the employees fell under the 2002 BLA that was already in effect at the former LTV and Acme plants. As they did at other locations, the parties included an appendix covering matters unique

to the former Bethlehem plants. One such provision concerned incentive pay and, in pertinent part, reads as follows:

> Effective with the date of the closing, the parties have agreed to preserve the same incentive earnings for each employee at the performance level he or she had in a representative period ... prior to the closing.

The parties also agreed to establish a task force to create new incentive plans. This procedure included an obligation address the red circle incentive rates, which could result in a buyout of the rates or agreement to a sunset date. There is no dispute that Grievant's protected incentive rate was $2.16 an hour. There were also red circle hourly pay rates, owing to the fact that some hourly rates under the ISG Agreement were lower than the rates employees worked for at Bethlehem. Those rates are not at issue in this case.

For some period of time after ISG took over the plant, Grievant worked as a senior operating technician at labor grade 5, the highest labor grade provided for in the BLA. Grievant's red circle hourly rate was $22.91, significantly above the labor grade 5 rate of $20.50. And, in addition, Grievant had the protected incentive rate of $2.16. Effective on January 18, 2004, Grievant bid out of his labor grade 5 position into a labor grade 4 position, with an hourly rate of $19.25. Grievant said he was told when he took the job that he would lose his $2.41 red circle add-on to his hourly rate. However, no one said anything to him about losing his red-circle incentive rate.

The Company says employees lose their red circle incentive rates when they bid out of the jobs to which the rate applied. Here, Grievant moved to a different job at a different pay grade and, in the process, forfeited both his hourly red circle rate and his incentive red circle rate. The Union says employees do not lose their incentive rate when they bid to another job within the same line of progression, which is what Grievant did. But employees do lose the rate when

they bid out of their department. The Union's Grievant Chairman, Ron Davis, testified that a Union Contract Coordinator who works on incentive issues for the various plants told him that at the Burns Harbor facility, employees did not lose their incentive red-circle rate unless they bid outside their department.

The Company argues that the grievance is untimely, pointing to Article 5-I-3, which says grievances must be filled within 30 days from the "date the Employee first knew or should have known of the facts which gave rise to the grievance." Grievant moved to the lower paying job and lost his incentive protection in January 2004, but he did not file a grievance until October 27, 2006. Grievant said in October 2006 he heard other employees discussing incentive rates, including their red circle rates. Grievant said he then checked his pay stubs and realized for the first time that he had not been receiving his red circle rate. Grievant acknowledged that he received pay stubs from the Company during the period of nearly three years after he changed jobs. However, he said he did not read them because there was a "lot going on" in his life, including changes of residence, a family illness, and the renovation of a commercial building. He said he had a mail box, but that he sometimes did not visit it for weeks. The Union says, then, that the grievance was timely because it was filed within 30 days of the time Grievant became aware that he was not getting his red circle rate.

The Union also argues that the case has been settled. Davis testified that following the third step grievance meeting, Human Resources Manager Joanne Babaian sent him a two page document via e-mail. The first page was addressed to Davis, Local Union President Faddis, and Lew Dopson. The text said: "Attached is resolution for the Brain Williams grievance. Please look it over and let us know what you think." The second page read as follows:

In the hopes to come to a resolution Management is offering the following:

1. The Company will make the Grievant whole from the time he was awarded and accepted the Maintenance Technician Mechanical position back on January 2004 and provide him the same red circle rate as those who were MTMs at the time of the ISG take over.

2. The Company will also make whole Joseph Madonna. Who accepted a lower rated position of MTM in September 2006 from a SOT position. He will be made whole and will be given the same red circle rate enjoyed by his fellow co-workers who were MTMs at the time of the ISG take over.

3. In the future the Company will add the following to all job postings: "If you are the successful bidder for this posting and you have a red circle rate, your red circle rate will go away will [sic] the acceptance of this job."
   All award letters will have the following: "If you have a red circle rate, bidding to another position will cause you to lose your red circle rate."

   Any future job movement by an employee with a red circle rate will cause the red circle rate to go away.

Davis said he understood the reference to the red circle rate to apply to the incentive rate. Davis testified that he had some concern about paragraph 3 and the possibility that it would inhibit employees from accepting promotions, so he met with Babaian to clarify the meaning. However, he said the Union agreed with the proposed resolution. Subsequently, he said, the Company began using the language from paragraph 3 on postings and award notices. On cross examination, Davis agreed that there was no signed document or e-mail or other written evidence of a settlement.

Once he agreed to the resolution, Davis said, he thought another management employee was calculating the amount of money due Grievant under paragraph 1. On April 27, 2007, Davis sent an e-mail to Babaian telling her that Grievant had been calling him about the payout, and that Davis had told Grievant to see Babaian. Babaian responded: "I hope you didn't misunderstand me before. Part of the agreement is going to have to do with red circles or and how we are handled them and or what we are going to do with them. I don't mean to put anyone off, I want to resolve this issue."

Babaian testified that the grievance was not settled at the meeting with Davis. She testified that during the meeting Davis told her the proposal "looks good, let's make it happen." However, she said she replied that the parties had to deal with the issue of how the red circle rates would be eliminated, as contemplated by the BLA Appendix covering former Bethlehem plants. She agreed that the proposal did not mention that issue, but she said it became an issue for her after she sent the settlement proposal. On cross examination, Babaian agreed that there was no discussion of buying out the red circle rates at the second or third step grievance meetings in this case. On rebuttal, Davis testified that he told Babaian after agreeing to the resolution that the eventual elimination of the red circle rate was something that would have to be dealt with at a higher level.

Findings and Discussion

Grievant's story that he was too busy to look at his mail was not convincing and, moreover, might not be determinative even if it were true. The problem, however, is that the Company raised the timeliness issue in the grievance meetings, but the Union continued to claim that the grievance was filed in a timely manner. Timeliness, then, was a contested issue, and remained so at the time Babaian sent Davis the settlement proposal. The proposal was intended to resolve the outstanding issues, which would have included the timeliness dispute. The question thus becomes whether the parties agreed to the proposed settlement.

Both Davis and Babaian testified that Davis accepted the proposal at the meeting, although Babaian said she told Davis there would be no agreement without a resolution of the future of the red circle rates. I believed Babaian's testimony that during the meeting with Davis she mentioned the need to deal with the red circle rates; but I reject her claim that she made the

settlement conditional on that issue. Instead, I thought Davis was credible when he said he told Babaian that the issue would have to be addressed at a higher level, and was not part of the grievance that was the subject of the settlement agreement. Whatever Babaian might have been thinking, the objective evidence – which is the real test of assent – supports the Union's position.

I recognize that there is no signed document or other writing acknowledging agreement. A written acknowledgement is obviously the best evidence of assent. But the beginning of performance under an agreement can also suffice. Here, the most important objective evidence is the fact that the Company began using the language proposed in paragraph 3 following Babaian's meeting with Davis. This was the benefit the Company sought to realize under the proposal and, having taken advantage of it, it cannot deny that it considered the settlement to be binding.[1]

In these circumstances I find that the parties settled the case. As I understood the Union's position at the hearing, it does not seek a remedy for Madonna, who did not file a grievance when he lost the incentive rate, and did not file a grievance when the Company refused to comply with the settlement agreement. I will order a make whole remedy for Grievant, but not for Madonna.[2]

[1] It could be that the Company could take this action unilaterally. But there was no evidence that Babaian told the Union, either in the negotiations or afterward, that the Company's use of the language did not depend on the settlement. Nor did Babaian testify to that effect.

[2] The Company argued that the Union did not file a grievance over its claim that the Company had violated the settlement agreement. I understood this principally to be an argument that the lack of a grievance meant the Union did not believe there was a settlement. But the grievance already pending was broad enough to encompass the Union's claim that the Company had failed to live up to its settlement.

AWARD

The grievance is sustained. The Company is ordered to make Grievant whole, as provided for in the settlement agreement.

Terry A. Bethel
January 21, 2008