IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL STEEL COMPANY
COATESVILLE PLANT

And Mittal Award No. 25

UNITED STEELWORKERS, USW
LOCAL UNION 1165

OPINION AND AWARD

Introduction

This case involves the Union's claim that the Company improperly terminated red-circle incentive rates when the parties agreed to new incentive plans. The case was tried in Coatesville, Pennsylvania on May 28, 2008. Patrick Parker represented the Company and Lew Dobson presented the case for the Union. The issue on the merits will be discussed below. T he Company argues that the primary issue in the case is whether the Union filed the grievance within 30 working days of the time it knew or should have known of the alleged violation. Facts concerning both the procedural issue and the issues on the merits were presented at the hearing. The parties submitted the case on closing argument.

Background

The ArcelorMittal Coatesville Plant was formerly a unit of Bethlehem Steel. ISG, a predecessor of ArcelorMittal, purchased certain assets of Bethlehem, and the former Bethlehem locations came under the umbrella of the ISG-USWA December 15, 2002 Agreement as of June

16, 2003. The Agreement – renegotiated in 2005 – covers the parties in the instant case. One part of the contract existing in 2003 was headed "Incentive Plans" and concerned certain understandings between the parties about incentive plans at former Bethlehem locations.

Under Paragraph D of the Incentive Plans Memorandum of Understanding (MOU), the parties agreed that

> Effective with the date of the closing, the parties have agreed to preserve the same incentive earnings for each employee at the level of performance that he or she had in a representative period ... prior to the closing. In addition, such protection shall include such things as red circled rates, personal incentive additives, and personal out of line differentials....

There were apparently more than one hundred incentive plans under the Bethlehem-USWA relationship. The MOU also provided for the creation of a Corporate-wide Incentive Task Force that was to

> develop and implement, only after securing mutual agreement, new incentive plans to achieve the following objectives:
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> 1. A significant reduction in the number of incentive plans;
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> 2. Incentive pay that is a percentage addition to the base rate of pay of each employee (discontinuation of the ICR);
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> 3. An average incentive opportunity of 20% above the Employee's Base Rate of Pay.
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> The parties realize that red circled rates, personal income additives, personal out of line differentials (Protected Rates) must be addressed before implementation of said plans. The remedies must be mutually agreed to and may include but are not limited to the following options:
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> 1. A buy out of the protected rates with mutual agreement or;
>
> 2. A termination date (sunset clause) for the protected rates which will be mutually agreed to by the affected parties.

There is no disagreement that the parties negotiated new incentive plans that became effective on June 16, 2003. The dispute is whether the red circle incentive rates survived that agreement.

The parties agree that there were two kinds of red circle rates – one for base wages and one for incentive rates. As required by the MOU, the parties calculated the red circle rates for each employee, and introduced an exhibit detailing those rates. Larry Henck, a Union member of the CITF, explained the calculation process, using as an example an employee who had an hourly rate of $17.94 under the Bethlehem contract. The new contract reduced his hourly rate to $16.50, which was $1.44 less than the previous rate. This employee, then, received an hourly $1.44 red circle rate. Under the representative period used for calculation, the employee had an average hourly and red circle rate of $22.72, meaning that his incentive rate had been $4.78. That figure and the hourly red circle rate of $1.44 were added together to produce a total red circle rate of $6.22. That number represented 29% of the new hourly rate of $16.50. This meant that the employee was guaranteed a total incentive rate of 29% under the new agreement. Thus, if the employee received an incentive payment of 20%, the Company would owe him an additional 9% under this rate.

The parties reached agreement on new incentive plans, and the Company implemented those plans on November 16, 2003. As required by the MOU, the new plans provided for an average incentive opportunity of 20% over an employee's base rate. The Company reads the MOU to mean that the red circle rates described above were to remain in effect until the parties reached agreement on new incentive plans. Once the parties agreed to the new plans, the Company implemented the plans and terminated the incentive red circle rate. The Company argues that the quid pro quo for implementation of the new plans was the termination of the red circle rates, pointing to the language quoted above that the parties had to address red circle rates before implementation of the new plans. The Company said the parties addressed the red circle rates and agreed to terminate them coincident with implementation of the new plan.

In support of its position, the Company introduced a fax that John DeMarco, former Manager of HR/LR, testified he sent to the Union on November 21, 2003. The document, introduced as Company Exhibit 1, reads, in part:

> Pursuant to our discussion on November 14, 2003, attached are the agreed to incentive plan bulletins for the Coatesville Plant which were implemented in place of the red circled incentive rates effective November 16, 2003 in accordance with the provisions contained in Exhibit B, paragraph 6, Incentive Rates of Pay Issues, of the Combined Steel Company Collective Bargaining Agreement between the USWA and ISG....

Attached to the document were descriptions of the three principal incentive plans agreed to by the parties, along with some provisions of limited applicability. DeMarco said he faxed the document to Robert Hamscher, who was the incentive Chairman at the Burns Harbor Plant in Indiana, which, like Coatesville, was a former Bethlehem property. DeMarco said he also faxed the document to the local Union in Coatesville.

DeMarco said he had been instructed by Thomas Woods, Vice President of Labor Relations, to negotiate incentive plans that eliminated the incentive red circle rates, but not the hourly red circle rates. DeMarco said from his prospective, the parties discussed the red circle rates in the negotiation of the incentive plans and agreed to eliminate them, as reflected in the faxed document. DeMarco said no one from the Union responded to his fax and no one questioned him when he eliminated the red circle rates. He said he received calls from employees who had difficulty reading a new format check stub, but the inquiries were not related to a changed incentive rate. DeMarco agreed that the document was not signed by the parties, but he said his understanding was that the relationship between ISG and the Union was one of trust and that the parties could operate on "handshake deals."

On cross examination, DeMarco agreed that he did not talk to Union District Director Dave McCall about the absence of a signed MOU, although he was "pretty sure" McCall knew

about the document. He also agreed that there were adjustments for some individuals because of the significant impact the new incentive plans would have on their earnings. DeMarco said he did not have a fax receipt showing that he had sent the document to the Local Union or Hamscher.

Union Representative Henck testified that he was involved in the discussions about the new incentive plans and that no one from the Company said the new plans would replace the red circle rate. He said the matter came to his attention because of an inquiry from a bargaining unit employee in January 2007. Henck said he contacted the Local Union president, and they had a conference call with Company representatives, including HR Manager Al Fuller on February 1, 2007. Henck said he saw the fax for the first time during that call. On cross examination, Hench said he received copies of the incentive plans, but he did not receive the faxed cover sheet summarized above. He also said the red circle rates were never discussed, as required by the MOU, and that the Company never should have implemented the incentive plans.

Hamscher testified that McCall, the Co-Chairman of the Union Bargaining Committee, appointed him as the Union Chair of the CITF. He said he had some discussions with the Local Union at Coatesville. Coatesville was the first location to agree to new plans, and the Local Union asked him to review the plans. Hamscher said he did not receive a fax from DeMarco, and did not see Company Exhibit 1 until January 2007. There was no discussion, he said, of eliminating the red circle rates at Coatesville and that, to his knowledge, there had been no agreement to eliminate them at other plants where the new incentive rates were implemented. Hamscher said the liability in this case could cost "hundreds of thousands of dollars." On cross examination, Hamscher said the MOU requires that red circle rates be addressed and says the

parties can terminate them, but the local Union did not agree to do so at Coatesville. He also said he believed the red circle rates are still in effect at the Company's Conshohocken location.

As noted above, one of the issues in the case – the Company says the principal issue – is whether the Union's grievance was timely. The grievance clearly was not filed within the 30 day limit imposed by the Agreement. However, Article 5-I-4-e of the Agreement says the grievance "shall be initiated within 30 days of the event on which the grievance is based, or the date on which such event should reasonably have become known." The issue is whether the Union should have known of the Company's action more than 30 days prior to the February 16, 2007 grievance. The Company points out that more than 3 years elapsed between the time it implemented the new incentive plans and terminated the red circle rates, and that employees or the Union would have, or at least *should* have, recognized that the red circle incentive rates were no longer being applied. It points out that some of the incentive rates fell significantly once the Company eliminated the red circle rates and the reduced incentive pay should have alerted employees who believed the rates were to remain in effect.

Union witness Henck identified a document detailing the incentive rates for various departments. In nearly July 2004 the Company wanted to add a crew to the melt shop, so the parties agreed to a 23% minimum incentive rate, which was higher than any of the red circle rates for that department. Those employees – numbering about 225 – would have had only limited impact from the red circle rates. The same thing was true for about 125 maintenance employees, whose average incentive rate had been 10 to 14 percent. The new incentive plans created an opportunity to earn a 20% incentive rate, meaning that the red circle rates had little effect on their earnings. In addition, Henck said the incentive rates were "tweaked" from time to time and pay was adjusted. After a time, most of the plans were paying equal to or more than the

individual red circle rate, so there was no reason to question whether the red circle rates remained in effect, he said.

On cross examination, Henck acknowledged that there were weeks when some departments earned a smaller incentive than would have been true under the red circle rates. In the first week, for example, the rolling department got only 6.5% and two weeks later received only 2.6%. During the week of November 29, 2003, the finishing department got 1.47%. Even in the melt shop, there were weeks prior to the July 2004 agreement to pay 23% when the average incentive rate was low, including an 8.21% rate in May 2004. Henck also agreed that there were Union officials in some of these department.

Hamscher also disagreed with the Company's claim that employees should have realized that their red circle incentive rates had been eliminated. He said he received calls from employees questioning their pay, but they were mostly related to design changes in the check stubs, which were complicated. In addition, at some plants employees went from a weekly pay to bi-weekly pay. On cross examination, Hamscher said the Union had circulated leaflets explaining how to calculate pay and read the pay stub.

HR Manager Fuller testified that he received calls from employees after the Company implemented the new incentive plans. Some employees complained about receiving less money and Fuller said he told them the red circle rates had been replaced by the new incentive plans. Most of the calls were near the time of implementation, he said. Fuller said he thought the red circle rates had been eliminated at the Conshohocken plant and the Lackawanna plant. Fuller also testified that in 2005, he created a notebook that contained all of the agreements affecting Coatesville, including the cover page of Company Exhibit 1, where he notified the Union that the Company had eliminated the red circle rates. He gave a copy of the notebook to the Local Union

President and the Grievance Chairman. He agreed that he did not specifically tell them about the document.

Ken Harlan is an HR Representative who has worked in the payroll area since 1993. He said in November 2003 he received calls from over 100 employees questioning their incentive earnings. Harlan said he told them the red circle rates had been eliminated. Harlan identified copies of pay stubs for some Union representatives. A stub dated November 20, 2003 indicated an incentive rate of 14% for both weeks covered by that check. A December 4, 2003 stub from the same employee shows an incentive rate of only 1.47% for one of the two weeks. There were similar examples for other Union representatives.

Positions of the Parties

The Union argues that the issue in the case "comes down to the fax." Union witnesses testified that there had never been any discussion of eliminating the red circle rates and that they had not seen the cover page from Company Exhibit 1 until January 2007. The Union notes the lack of a signed agreement, and argues that matters of such significance cannot be settled without a signature. It argues that this alleged agreement was more than a grievance settlement, for which I had said there was no signature requirement in Mittal No. 18. The Union says there are other plants in which the parties agreed to new incentive plans but left the incentive red circle rate in place. The Union also questions the validity of the alleged agreement by noting that the same document obligated the parties to meet and reach agreement about the treatment of 9 employees who had very high incentive rates. No one from the Company was able to say what had happened with those employee. Thus, the Union argues that the Company did not treat

Company Exhibit 1 as a binding obligation, and it similarly cannot claim that the alleged agreement to eliminate red circle rate has any force.

The Union also says it filed the grievance within 30 days of having learned of the Company's action, and that circumstances indicate the Union should not have known of the situation earlier. There were numerous problems with paychecks, meaning that employees could not be expected to tie any errors or concerns to the incentive rate. In addition, there were more than 325 employees who were guaranteed a higher rate as a result a subsequent agreement, or who had very low red circle incentive rates, and would not have been affected as long as the plans were performing well.

The Company describes the Union's approach as "bipolar" – the Union says there could be hundreds of thousands of dollars at stake, but also contends that the lost incentive earnings were too insignificant to have alerted employees to the elimination of the red circle rate. The Company says it notified the Union of the elimination of red circle rates by sending a fax in 2003 and by delivering a copy of the MOU in a notebook in 2005. The Company reads the MOU to mean that employees are given incentive protection by red circle rates, and that those rates had to be addressed during the negotiation of the new incentive plans. That is exactly what happened, the Company says, and the parties agreed to eliminate the red circle rate on incentive earnings.

Findings and Discussion

A finding that the parties agreed to eliminate the incentive red circle rate – as the Company claims – or that they did not agree to do so – as the Union claims – would not of itself resolve this case. Whether the parties agreed to eliminate the red circle rate or not, the Company argues that the Union failed to file the grievance within the time period provided for by the

Agreement. The Agreement says the consequence of not filing on time is that the grievance is considered withdrawn. One might question whether the Company could unilaterally ignore a provision of the contract without notice to the Union, and then subsequently claim that the contract provision was not enforceable because the Union had failed to file a timely grievance. Such conduct would seemingly undermine the agreement, especially in circumstances where the Union had no reason to monitor the Company's action in the affected area.

But that does not explain what happened in this case. The contract says expressly that the red circle rates "must be addressed before the implementation of [new incentive] plans." Henck testified that the Company should never have implemented the new plans, apparently because there had been no discussion of what to do about the red circle rates. This would suggest that he did not even know the plans had been implemented by the Company. But surely that is not the case. Both Henck and Hamscher testified that they received copies of the newly negotiated plans, but not the accompanying cover sheet that asserted the red circle rates had been eliminated by agreement. I have difficulty concluding that having negotiated the plans in 2003, the Union thought they had not yet been implemented as of January 2007, even though Coatesville was the first location to finish incentive plan negotiations, and even though there apparently were new incentive plans in effect at other locations. The reasonable conclusion is that the Union knew the new plans were in effect, but that it also believed the new plans did not eliminate the red circle incentive rates.

I can accept at face value the Union's claim that it did not realize that the Company had eliminated the red circle incentive rate. It did know, however, that the plans were in effect, and it understood, as Henck acknowledged, that the red circle rates were to be discussed prior to implementation. The contract said that one consequence of those discussions could be the

elimination of the rates. I recognize that the red circle rates might not have been a factor for employees in some areas, like maintenance and the melt shop. But there were at least as many employees who were or were likely to be affected including, as the Company's evidence showed, some Union representatives.

In general, I agree with the Union's argument that bargaining unit employees are not required to audit their pay to insure they are being paid correctly. But this situation went on for more than 3 years, which makes it hard to conclude that no one should have noticed a disparity between their actual incentive percentage – which was printed right on the pay stub – and their red circle rates. And this is especially true given Harlan's credible testimony that he received numerous calls about the incentive rates and told employees the red circle rates had been eliminated. The should-have-understood language in Article 5-I, quoted above, is intended to prevent a Union waiver or acquiescence when it did not know, and reasonably might not have known, of action that allegedly violated the contract. The should-have-known concept is necessarily subjective; it is difficult to say exactly when someone should have known something. But in the circumstances of this case, and when the matter at issue concerns something as important as correct pay rates, I cannot conclude that a the language excuses a lapse of over 3 years. Therefore, I find that the grievance was untimely and is considered to have been withdrawn.

AWARD

The grievance is dismissed.

Terry A. Bethel
July 31, 2008