IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

And

Grievances 8-23 and 8-24
Hennepin, IL Plant Closing

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 7367, USW

OPINION AND AWARD

Introduction

This case concerns two grievances challenging the Company's right to close its Hennepin, Illinois plant. The case was tried in Merrillville, Indiana on March 9, 2009. Arthur Smith represented the Company and Melvin Stein presented the Union's case. There are no procedural arbitrability issues. The parties did not agree to a statement of the issue on the merits, although it is fair to say that the issue is whether the Company retained its right to close the Hennepin plant under Article 5, Section B in view of the parties' commitments in the 2008 Basic Labor Agreement. Both parties filed post-hearing briefs by e-mail. I received the briefs on April 10, 2009.

Background

On September 1, 2008, the effective date of the parties' current collective bargaining agreement, ArcelorMittal USA operated 14 plants in the United States, plus an iron ore mine in

northern Minnesota. When the parties began negotiations for the 2008 Agreement, the steel industry was, in the parties' word, "robust." Negotiations for the 2008 Agreement were set to begin in mid April 2008. Dave McCall, the Union's District 1 Director, was a member of the Union's bargaining committee. He testified that there were discussions about the new contract in late 2007 and early 2008. Part of those talks were devoted to the Union's goals in the negotiations, which McCall said were employment security, retirement security, and economic security.

Employment security, McCall said, included such things as improving supplemental unemployment payments in the event of a downturn. More important, however, was the Union's interest in securing a capital commitment which would help insure the Company's "long term viability." McCall testified that Company officials said they shared the same goals. To that end, in early April the Company made a presentation to the Union – attended by USW President Leo Garard – for what came to be known as the "footprint." The presentation included a slide show, which was introduced into evidence. Among other things, the presentation highlighted some weaknesses **[REDACTED]** and called for a strategy to meet those concerns. The presentation said "A stronger ... Partnership with the USW is at the core of this strategy." The strategy included **[REDACTED].**

The Company said the strategy would require a **[REDACTED]** capital commitment over the term of a 5 year collective bargaining agreement. Ultimately, the parties agreed to a 4 year contract, with a capital commitment of $3 billion. Article 11, Section B recites the agreement:

1. The Company agrees to make the capital expenditures required to make its Steel Related Assets world class and to maintain them as such.
2. The Union agrees to contribute to the competitiveness of the facilities and work with the Company to maintain the competitive nature of the facilities.

> 3. The Company agrees that, except during maintenance and repair outages, it will not directly or indirectly replace the product which could have been produced at any facility covered by this Agreement....
>
> 4. The Company agrees that it will make capital expenditure at the facilities covered by this Agreement of no less than $3 billion over the term of the Agreement with a material portion of such spending made in each year of the Agreement.
>
> ...
>
> 7. The Strategic Committee established under Article Six, Section A-Partnership of the Agreement shall be responsible for the oversight and implementation of the commitments outlined above.

McCall said the presentation was impressive, but the Union wanted an "absolute contractual commitment," which is what led to Article 11, Section B-4, above. It also led to the investment side-letter, relevant portions of which follow:

> This will confirm our understanding in connection with implementation of Article Eleven Section B – Investment commitment of the Basic Labor Agreement.
>
> The core of Article Eleven, Section B is reciprocal commitments focused on enhancing the long-term employment security of USW members through a financially successful enterprise. Without in any way derogating the commitments in Article Eleven, Section B the Company commits to spending **[REDACTED]** Billion per year in repair and maintenance expenses and to a $3 Billion capital expenditure "footprint" program, which has been described to the Union. This program will commence immediately and be completed in no more than five years. The USW commits to encourage a work environment of world class performance and make and maintain those facilities as competitive.
>
> The 2008 negotiations have focused on how the parties could build on the success achieved to date stabilizing the US steel industry, and in constructing together a platform for continued recovery and growth. The parties want to further enhance the competitiveness of ArcelorMittal, which in turn enhances employment security.... Therefore, subject to all the terms and conditions of Article Eleven Section B, we have agreed to the following in the 2008 Agreement:
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> ...
>
> 6. Pursuit of the ArcelorMittal business strategy previously shared with the USW, including capital expenditures described therein. The Union has concerns regarding the future viability of certain facilities under that business strategy. The Company has committed to working with the Union to develop a joint plan to promote the continuing operation of all facilities during the

term of this Agreement. The joint effort will include full and extensive consultation with the USW and careful consideration of all USW input.

7. If the Company believes market and industry conditions change in the future and warrants adjustment regarding a particular capital project, the Company will seek USW's consent to such adjustment, and such consent will not be unreasonably withheld. The parties will jointly inform the ArcelorMittal Investment Allocation Committee of the undertakings herein.

McCall also said the Union wanted to understand how the capital projects would impact individual plants. The Union knew Hennepin worked at about **[REDACTED]** of capacity, so the footprint contemplated using it for different products. The Hennepin, Illinois plant was essentially a cold rolling facility that did not operate a blast furnace or a hot strip facility. Its equipment and products were duplicated at other Company facilities, which had the capacity to replace Hennepin's production. Even in the robust market, Company witnesses said, the Hennepin plant operated at about **[REDACTED]** of its capacity. Company witnesses testified that the footprint contemplated operating Hennepin by converting most of its product to **[REDACTED]** and **[REDACTED]**.

The projection for Hennepin's conversion to new product lines was estimated for completion in 2010. Hennepin Union leaders wanted to know what would happen in the interim period, and they were concerned that the Company had not made the upgrades needed to continue operating. This led to what the parties call the Hennepin side letter:

> This confirms our understandings regarding operating levels and capital investments at the Hennepin facilities.
>
> The Company and the Union believe that, by working together, changes can be identified to reduce operating costs at Hennepin by a minimum of **[REDACTED]**, which would yield about **[REDACTED]** million/year at the current level of operations. The Company commits to spending no less than 50% of such savings (about **[REDACTED]** million) in capital expenditures at Hennepin each year. The Company further commits to spend the first year's savings up front, before the detailed changes have been finalized

> In addition, the Company, acting in a commercially reasonable manner, commits to secure an adequate supply of hot band (without diverting hot bands currently used at other USW-represented facilities) to operate Hennepin at full capacity, consistent with market demand for product from Hennepin. The Company and the Union shall act in a commercially reasonable manner in connection with this commitment.
>
> The Commitments in this letter are subject to the parties' understanding in connection with the implementation of the Article Eleven Section B – Investment Commitment of the Basic Labor Agreement.

The yearly **[REDACTED]** million investment was to upgrade existing plant and equipment. In addition, the Company said it would invest **[REDACTED]** million to make the switch to **[REDACTED]** products.

McCall pointed out that the Company did not make such commitments to all operating units. It made no commitment to the Lackawanna plant, and told the Union that it thought that plant would be closed. The Company said it would continue to explore options, but the parties negotiated a Lackawanna side letter that provided alternatives for employees if the plant should close. At Weirton, the Company told the Union it would use only the tin facilities. In a side letter, the Company agreed to take reasonable actions to maintain Weirton's non-tin assets. A separate letter said the Company would invest **[REDACTED]** million in capital expenditures at Weirton over a five year period. Although the parties discussed the possible closings of Lackawanna and the steel producing facilities at Weirton, McCall testified that there was no discussion during negotiations about the need to close Hennepin.

The collective bargaining agreement was ratified and went into effect on September 1, 2008. At the time, the steel industry was thriving and, presumably, business conditions posed no threat to the commitments the Company had made in negotiations. But this did not last. The market for steel fell dramatically in October and November 2008 – as though, one witness said, someone had flipped a switch. This led to what Louis Schorsch, CEO of Flat Carbon America,

characterized as a very serious crisis. Nothing like it had been seen in the steel industry, he said, since the 1930's. By November 2008, the Company was producing at about **[REDACTED]** of the rate of the previous year.

On November 4, the ArcelorMittal Chairman and CEO had a conference call that included other management and Union leaders from around the world. On November 10, Company officials met with Union leaders in Pittsburgh to review the situation. The Company made a presentation outlined in a series of slides, including one that said, "Current crisis challenges both parties as well as the partnership itself; we must respond." The exhibit detailed some of the recent developments in the industry and in those industries who were the primary consumers of steel. The outlook was "ominous" the Company said, and the Company's financial performance was "deteriorating rapidly." The Company listed some of the cost-cutting measures it had taken and issued a "call to action" to deal with the crisis. It also proposed other cost saving measures, including "Responsible but rapid closure of outmoded and/or redundant facilities (Lackawanna, Hennepin)." Schorsch said the point of the meeting was to begin a dialogue with the Union and persuade it to help "deal with the crisis." However, he said the Union's response was cautious. Schorsch said the Union did not want to deal with specifics because the crisis might be short-lived and extreme measures might not be necessary. The Union did not claim that the contract prevented the Company from closing the Hennepin plant, Schorsch said.

There apparently were some discussions about closing the Hennepin and Lackawanna plants following the November 10, meeting. Then, on December 9, 2008, the Company sent McCall a letter announcing its intent to close both facilities. The letter said there had been challenges facing both plants which were known even during the negotiations in the summer of

2008. Those problems had been exacerbated by the downturn in the steel industry. As to Hennepin, the letter said:

> With respect to ArcelorMittal Hennepin, the decision is also a purely economic one based on the company's excess manufacturing and processing capacity and the extraordinary economic conditions we face today, which added further pressure to Hennepin's distance from its substrate supply and freight cost disadvantage. The company has duplicate pickler, tandem mill, batch anneal, temper mill and coating line operations. The target date for closure is February 9, 2009 for production, March 20, 2009 for shipping, and the company will consolidate operations at other company facilities, chiefly Indiana Harbor.

The parties met again on January 7, 2009. The Company gave a presentation headed "Call to Action Renewed" saying that markets were deteriorating "even beyond what we expected when we last met in early November." It also said, "The partnership must respond." The presentation indicated that the situation was worse than it had been in 1982, that billings were off by **[REDACTED]**, and that the financial prospects were "very daunting." As it had in the November meeting, the Company outlined measures it had taken to generate cash and called for a response from the partnership. This included the "Responsible but rapid closure of outmoded and/or redundant facilities (Lackawanna, Hennepin)." Schorsch said the Company told the Union that it needed to significantly reduce capital expenditures, and that the crisis had caused the Company to suspend the footprint. The footprint would get another look, Schorsch said, when things got better. Schorsch said the Union did not mention the December 9 letter announcing the intent to close Hennepin and Lackawanna.

Schorsch said he met with Union leaders in February, along with Illinois Senator Richard Durbin and Congressman Aaron Schock, whose district included Hennepin. Both stressed the importance of the Hennepin facility to the state. Schorsch said the Company understood the impact, but the crisis in the industry and the Company's longstanding concerns about excess capacity had forced the decision. Schorsch said the Company had moved some production from

Indiana Harbor to Hennepin to support its operations. He also said the Company was willing to entertain offers to buy the plant, but the only one to date asked for customer lists. The Company seeks to consolidate its operations, Schorsch said, and wants to keep its customers.

Dennis Arouca, Vice President of Labor Relations, said the footprint was not a bargaining proposal to the Union. Instead, it represented the Company's strategic plan for the light flat-rolled part of the business, which the Company shared with the Union. Arouca described the bargaining history of contract provisions applicable to this case. At one point, the Union had proposed language for Article 11-B that required the Company to complete certain capital projects during the term of the Agreement, which Arouca said would have required completing the projects outlined in the footprint. The Company did not agree. However. it ultimately agreed to spend $3 billion in capital projects over the life of the contract, but without reference to any specific projects. Similarly, during negotiations over the capital commitment side letter, the Company resisted Union efforts to compel completion of the footprint projects. Arouca also said the Company made a presentation to the Union about the capital project approval process, which the parties acknowledged in the last sentence of the side letter: "The parties will jointly inform the ArcelorMittal Investment Allocation Committee of the undertakings herein." Nothing in Article 11, Arouca said, prevented the Company from closing plants.

There were, however, discussions about plant closings during the 2008 negotiations. The Union advanced what Arouca said the parties called a "no casualties" position, meaning that there would be no plant closings. At one point during side letter negotiations, Arouca said, the Union proposed that the Company commit that "it will not lay-off any Employees nor will it permanently close any plant covered by this Agreement." The Company did not agree and the

Union modified the proposal to say, "The Company has committed to working with the Union to develop a joint plan to ensure the continuing operation of the Weirton, Hennepin and Lackawanna facilities during the term of this Agreement." Again, the Company did not agree, and the Union's modified proposal deleted "ensure" and substituted "promote." A Company counter proposal struck the reference to specific plants. Ultimately, the parties agreed to language which obligated the Company to pursue the footprint strategy, and recognized that the Union had concerns about the continued viability of certain facilities under that plan. The Company agreed to "commit to working with the Union to develop a joint plan to promote the continuing operation of all facilities." In addition, under what is now paragraph 7, if changes in market conditions warranted adjustment in the commitment for "particular capital project," the Company would seek the Union's consent, "which will not be unreasonably withheld."

Arouca agreed with Schorsch about the importance of the November 10 meeting in Pittsburgh, and the need to obtain Union cooperation to react to the deteriorating market conditions. But he said both in that meeting and in subsequent meetings, the Union seemed to think the Company was overreacting, and made no substantive response to the Company's proposals. Arouca said he had informal discussions with McCall following the November meeting, but there was no agreement. Ultimately, the Company sent the Union the December 9 letter announcing its intent to close Hennepin and Lackawanna. In discussions after the December 9 letter, the Union proposed some alternatives to closing the Hennepin plant. These included idling the plant, or reducing production and work hours, as had been done at the Burns Harbor plant. Arouca said those proposals did not address the Company's need to consolidate the finishing operations.

On cross examination the Union challenged Arouca about the proposal dated August 18 that said the Company would not lay off any employees or close any facilities. Unlike other exhibits, this one does not identify who made it. Arouca said he thought it was a Union proposal, but agreed there was no way to tell from the document itself.

Mark Whalen, Vice President and General Manager of ArcelorMittal Indiana Harbor, has oversight responsibility for Hennepin. He said there was nothing unique about the Hennepin plant, and that almost all of its production could be duplicated at other facilities. He also said there were added costs associated with Hennepin plant production. The Indiana Harbor plants shipped hot band to Hennepin, where it was pickled and hot dipped or batch annealed. Then **[REDACTED]** of the finished product went to destinations in the east, meaning that it had to be shipped back in the direction of the Harbor Works facility. All of the work performed at Hennepin, he said, could be done at Indiana Harbor, thus saving the transportation costs to and from Hennepin. In addition, rail rates from Indiana Harbor are lower than those available from Hennepin. Whalen said the Company has overcapacity for cold rolling and that it can justify using the Hennepin facility only "in the most robust markets." In fact, the Company would continue to have an overcapacity even when Hennepin and Lackawanna were closed, and the capacity will continue to increase, Whalen said.

Whalen identified a document that he described as a summary of the footprint. The document was shared with the Union in a meeting on July 24, 2008. It showed that Hennepin's motor lam work would be moved to Indiana Harbor and that the plant would focus on **[REDACTED]** products. The proposed capital expenditure for Hennepin was **[REDACTED]** million, most of which was related to the entry into **[REDACTED]**. Whalen said he told the Union this figure was speculative and subject to revision after a study. In a later meeting,

Whalen said, Local Union President York asked what was in the capital expansion for Hennepin if the planned conversion to **[REDACTED]** did not work out. Whalen said he told York, "Not much." A few days after that, Whalen said, York told him that unless the Company could give him more assurances about the future of the Hennepin plant, he (York) would have a difficult time endorsing the tentative Agreement. Whalen said he told York he was "not empowered to give him that promise."

Whalen said the feasibility study for **[REDACTED]** at Hennepin determined that the facility could not be converted for **[REDACTED]** million. The estimate was in the range of **[REDACTED]** million. This meant the return on investment would not satisfy the Board's criteria for capital projects. According to Whalen, the **[REDACTED]** million targeted toward Hennepin was not guaranteed, but had to compete with other investment opportunities, some of which had a better return on investment. This also would have been true even if the market had not fallen. Whalen said the demand for **[REDACTED]** had slowed dramatically, and that a **[REDACTED]** plant that made such products was "essentially idled."

Whalen addressed the Hennepin side letter's goal of reducing operating costs **[REDACTED]** per ton. Even if it reached that level of savings, the plant would lose over **[REDACTED]** million a year, he said. He also identified an exhibit indicating that the annual benefit of shutting down the Hennepin plant would exceed **[REDACTED]** million per year. Whalen said the decision to close Hennepin was not related to the cost of production time. The cost of production was **[REDACTED]**. But closing the plant meant the Company could avoid increased transportation costs, repair and maintenance, utility costs and others. The Company does not need Hennepin for the products it had traditionally produced, Whalen said. Moreover, the plan to begin producing **[REDACTED]** turned out to be significantly more expensive than

the Company had believed, and one of the two American companies that produce **[REDACTED]** had announced **[REDACTED]**.

On cross examination, Whalen agreed that transportation costs and over-capacity were the same in August 2008 as they were four months later, when the Company gave notice of its intent to close the plant. He also agreed that the Company would get the same reduction in capacity if it idled Hennepin as it would get from closing the facility. Whalen said there were two meetings with York at which he (Whalen) said he had doubts about the plant's future if the conversion to **[REDACTED]** did not work out, and that he regarded the project as "speculative."

Whalen acknowledged that the Company had not given the Union a copy of the **[REDACTED]** study until the night before the hearing, and he said the Company could have done a better job of sharing that information. However, he also said the Company told the Union in the January 9, 2009 meeting that the results of the study were not good and that it was not going to work. He also noted that the footprint document given to the Union in April 2008 said of the **[REDACTED]** venture that "technical viability must be proven before project can be pursued." Studies were going on at that time, Whalen said.

Local Union President York said the Company did not spend any of the **[REDACTED]** million annual commitment referenced in the Hennepin side letter, and he said there had been no discussion with the Union about how to spend it, even though there had been steps to reduce costs, like a reduction in overtime. Whalen testified that the Company had planned to use part of the **[REDACTED]** million commitment to replace an air compressor and driers, which would have amounted to about **[REDACTED]** million, and that he had discussions with local management about how to spend the remaining money the first year. Whalen said when he receive the air compressor project paperwork from local management he had questions and he

sent it back. Local management answered the questions and returned the proposal to Whalen. By that time – in October 2008 – markets had started to slide and all projects had to be reevaluated. Whalen said he did not submit the proposal to higher management.

Positions of the Parties

The Union says that during bargaining the Company refused to make any capital commitment for the Lackawanna plant because it knew it would close the facility. In contrast, the Company made specific capital commitments for Hennepin, including maintaining and improving its current equipment while it developed its electric steel capacity. The former was to be accomplished by a **[REDACTED]** million annual investment, and the latter by a **[REDACTED]** million investment in new equipment.

The Company relies, in part, on the Management Rights clause, Article 5, Section J:

> The management of the plants, the direction of the working forces, including the right to hire, transfer and suspend or discharge for proper cause, and the right to relieve employees from duty, is vested exclusively in the Company.
>
> In the exercise of its prerogatives as set forth above, the Company shall not deprive an Employee of any rights under any agreement with the Union.

The Union points out that this language says nothing about permanently closing plants. But the Company also points to Article 5, Section G, which expressly covers plant closures:

1. Before the Company decides to permanently close or discontinue a plant, department or substantial portion thereof (a Closure), it shall give the Union advance written notice at least ninety (90) days prior to the proposed Closure date. Along with such notice, the Company shall provide the Union with a detailed statement of the reasons for the proposed action, all information on which the proposed decision is based and how and where the work which was performed at the closed unit will be performed.

2. Thereafter, the Company will meet with appropriate Union representatives in order to provide them with an opportunity to discuss the Company's proposed course of action, provide the Union with any additional requested information and bargain in good faith over any suggested alternatives.

3. No less than thirty (30) days prior to the Closure date, the Company shall advise the Union of its final decision, which decision shall be the exclusive function of the Company.

4. Any employee affected by a Closure shall, after exercising any rights to which s/he may be entitled, may (sic) be placed on layoff in accordance with this Agreement.

The Union says Section G requires "a protracted consultative process with the Union," as well as a detailed statement about why the plant is being closed, the information leading to that decision, and information about where the work will be done. In addition, and central to the Union's position in this case, Article 5, Section J says the Company's right to exercise its prerogatives is limited by employee rights granted "under any agreement with the Union."

The Company's "exclusive function" in deciding whether to close a plant is, the Union says, subject to restrictions on management prerogatives, whether "express or implied." In this case, the Union argues that management's right to close the Hennepin facility must be viewed in the context of the investment commitment found in Article 11, Section B, the investment commitment side letter, and the Hennepin side letter. The investment side letter ties the $3 billion dollar investment commitment to the footprint, which included a **[REDACTED]** million dollar commitment for Hennepin. Obviously, that commitment cannot be met if the Company closes the facility, the Union says. This means, the Union argues, that there is an implicit promise to operate the Hennepin plant over the life of the Agreement.

In addition, the investment side letter committed the parties to develop a plan to "promote the continuing operation of all facilities", which included "extensive consultation" with the Union. And paragraph 7 of the investment commitment side letter contains a requirement that

the Company consult with the Union and seek consent if market and industry conditions "warrant adjustment of a *particular* capital project." (emphasis added.) But, the Union says, the Company has made no effort to engage the Union in the discussions contemplated in Paragraph 7. In fact, the Union says, the Company did not even inform the Union that its study convinced it that the **[REDACTED]** project was not feasible – or, at least, did not do so until the night before the arbitration hearing.

In August, before the parties had concluded negotiations, Whalen said he told Local Union President York on two occasions that there was "not much" in the capital commitment for the Hennepin plant if the **[REDACTED]** project did not work out. But, the Union points out, in the Hennepin side letter, the Company committed to make **[REDACTED]** million in capital expenditures during the life of the Agreement that were not related to or a part of the **[REDACTED]** million **[REDACTED]** project. The **[REDACTED]** project was not even referenced in the Hennepin side letter, the Union says. Nor, the Union argues, can the Company say that the **[REDACTED]** million investment obligation under the side letter was subject to commercial reasonableness. The second paragraph of the side letter contains the **[REDACTED]** million per year capital commitment; however, the Union points out that it says nothing about conditioning that commitment on "commercial reasonableness." That language is in the third paragraph, which says the Company "acting in a commercially reasonable manner" committed to finding enough hot band to operate the Hennepin facility at full capacity. But the third paragraph opens with the words "in addition," the Union points out, meaning that it is in addition to the investment commitment in the first paragraph. The commercial reasonableness language, the Union argues, applies only to the third paragraph full-capacity endeavor.

The Union also contends that the Company cannot justify its decision to forego the investment commitment because of the process used by the Investment Allocation Committee. The capital commitment side letter makes the $3 billion commitment without condition, other than that the parties jointly "will inform" the committee of "the undertakings herein." If commitments were to be modified, the Union says, then paragraph 7 says it will be accomplished by Company and Union action, not by committee decision.

The Union denies the Company's claim that the Union is trying to obtain in arbitration what it was unable to achieve in negotiation. The Company's argument is based on the Union's inability to obtain Company agreement to the Union's proposal to operate Hennepin, Lackawanna and Weirton throughout the Agreement. The Union acknowledges that it did not achieve that language. But it points to the final language – proposed by the Company – that the parties would promote the continuing operation of all facilities. The Union argues, in effect, that the Hennepin side letter was part of that effort; in contrast, there were no capital commitments at Lackawanna, and the side letter for that facility recognized that it would likely close. The side letter for Weirton insured only a curtailed operation. The Hennepin side letter, however, contained a capital commitment for each year of the 4 year contract, which, the Union argues, was an implied promise to keep it in operation.

The Union argues that the Company cannot rely on excess capacity or duplicative facilities to justify closing the Hennepin plant. Those facts existed before the economic downturn in the industry and before the parties agreed to the $3 billion commitment and the Hennepin side letter. Nor can the Company justify its action from the industry downturn itself, the Union argues. The Company negotiated an "out" in the investment side letter, which shows that it made provision for a decline in market conditions. Having proposed that language, the

Union contends, the Company cannot walk away from its commitment without proposing adjustments to the Union and bargaining in good faith.

The Company argues that the Union must do more than prove that the Company violated its agreement to invest capital in Hennepin, or that it did not properly exercise the escape clause in the investment side letter; rather, the Company says, the Union has to prove that the Company gave up its "exclusive" right to determine whether to permanently close a facility, as recognized in Article 5, Section G-3. The Union's case, the Company says, depends on proving that the side letter precluded the Company from closing the Hennepin plant.

There is no claim, the Company says, that it has not complied with the plant closing procedures required by Article 5-G. There is not a "no plant closing" commitment in the side letters nor in the Agreement itself. But it is significant, the Company contends, that the Union sought that commitment during the negotiation of the capital commitment side letter and failed to achieve it. A Union proposal, the Company says, was that the Company would not "permanently close any plant covered by this agreement." Subsequently, the Union narrowed that proposal to specific plants, including Hennepin. Again, the Company would not agree. The language was softened even further, the Company says, when the Union proposed that the parties agree to develop a joint plant to keep the three facilities open. Finally, the parties settled on language that the parties would agree to a plan to "promote the continuing operation of all facilities," with the word "promote" having been substituted for the word "ensure." This is not, the Company argues, a commitment to continue operating the Hennepin plant.

The Union also understood that the future of the Hennepin plant depended on the feasibility of converting its principal production to **[REDACTED]**, the Company says. Whalen testified that York asked "what was in it" for Hennepin if the **[REDACTED]** initiative failed,

and Whalen replied “not much.” In addition, the Company says when York told Whalen that he could not support the tentative contract unless the Company agreed not to close Hennepin Whalen responded that he could not make that commitment. York did not rebut this testimony, the Company says, which makes the lack of any “no closing” language even more significant.

Although the Company argues that the only real issue in the case is whether it agreed not to close the Hennepin plant, it also says the Union cannot prove a violation of Article 11, the investment side letter, or the Hennepin side letter. The Company says it did not make a “hard and fast” commitment to invest despite economic conditions. Company representatives told the Union this during negotiations, the Company contends, and the Company brought in capital projects experts who described the approval process to the Union. The Company also secured language that allowed it to make adjustments. McCall said the language was agreed to because there could be changes in the market or other unanticipated events. The Company argues that McCall acknowledged it would be unreasonable for the Union to withhold its consent to an adjustment for a capital expenditure that did not make sense economically.

The Company says that is what happened in this case when the industry went into crisis. The Company contacted the Union and sought its help to deal with the new market conditions. Part of this was the “call to action” meeting in Pittsburgh on November 10, 2008, which included a rapid closure of the Hennepin plant. The Union did not respond to this call for help, the Company says. The Company sent the December 9 closing letter, and told the Union it was open to negotiation about the decision. At the January 7, 2009 meeting in Pittsburgh the Company again raised the need to close the Hennepin plant. These efforts, the Company argues, were sufficient to comply with both Article 11, Section B, and with the adjustment language in the investment side letter. The Company made it clear to the Union, the Company argues, that it did

not make economic sense to invest capital in Hennepin, given the stark change in economic conditions.

Similarly, the Company argues that its action did not violate the Hennepin side letter. The parties recognized that the Company had too much cold rolling capacity, so that the future of the Hennepin plant depended on the ability to change its product line. But that change proved to be far more expensive than the Company had anticipated, and it did not make economic sense to pursue the project, especially given the economic downturn. The Company acknowledges that it did not share the feasibility report with the Union until shortly before the hearing. However, it says the Union knew of the Company's efforts to make the conversion, and it knew by the end of 2008 that the Company did not plan to continue operating the Hennepin plant. Even so, the Company says, the Union did not request information about the results of the **[REDACTED]** feasibility study.

The Company also references the "commercial reasonableness" language in the Hennepin letter. As noted above, the Union contends that this language applies only to the part of the letter that concerned the Company's pledge to secure enough hot band to keep Hennepin running at full capacity. But the Company argues that the language applies to the side letter commitment itself. The **[REDACTED]** million per year investment was intended to keep Hennepin running subject to the conversion to **[REDACTED]**. But the feasibility study indicated that conversion was cost prohibitive and the Company had no need for Hennepin's cold rolling capacity. Thus, it would have been commercially unreasonable to continue operating the plant.

Finally, the Company says if the Hennepin plant cannot close, then the burden of over-capacity and the economic downturn will fall on other employees in other plants. Nor is there an option to sell the plant or idle it pending a possible increase in demand. There have been no

realistic offers to buy the facility and idling the plant would preclude the Company from taking advantage of Hennepin's equipment by moving it to other plants, the Company argues. In any event, the Company says nothing in the Agreement or the side letters obligates the Company to pursue a sale or idle the plant.

Findings and Discussion

Article 5, Section G unambiguously gives the Company the exclusive right to close a plant. The question in this case is whether the parties agreed expressly or implicitly that, despite the language in Article 5-G, the Company would not close the Hennepin plant during the term of the Agreement. I find no express commitment. The investment commitment contained in Article 11, Section B appears in the same document – the collective bargaining agreement – that gives the Company, under Article 5-G, the exclusive right to close a plant. Absent express and unambiguous language, I cannot assume that the parties intended Article 11-B to negate the effect of Article 5-G.

Nor is there any express language negating Article 5-G in the investment side letter, especially given its bargaining history. Paragraph 6 of the investment side letter says the parties agreed to develop a "joint plan to promote the continuing operation of all facilities during the term of this Agreement." Obviously, Hennepin was one of the facilities in operation when the parties agreed to this language. But the evidence established that this language evolved from attempts to insure that no plant would close. The Union proposed express language that would have committed the Company to no layoffs and no plant closures during the term of the contract. Subsequently, the proposal was modified to propose that the Company not close Hennepin and Lackawanna, and that it would make no reduction in operations at Weirton. When the Company

balked at that language, the Union proposed that the parties commit to "ensure" the operation of all facilities during the contract. Ultimately, the word "ensure" was changed to "promote."

I cannot assume that "ensure" and "promote" are synonymous, or that they were viewed as such by the parties. Had that been the case, there would have been no reason to substitute "promote" for "ensure." In ordinary usage, the word "ensure" connotes a guarantee or a certainty. "Promote," on the other hand, is less definite. As defined in the Oxford English Dictionary, "promote" means "to further the progress of (a cause, venture or aim); support." This meaning is consistent with the bargaining history of paragraph 6. The Company did not agree to give up its right to close facilities, but it did commit that it would make a good faith effort to keep all facilities in operation.[1] I find nothing in the case warranting a conclusion that the Company breached that commitment. The Company spent **[REDACTED]** to determine whether the conversion to **[REDACTED]** products was feasible. There is no reason to believe that the Company had deliberately understated the amount of investment needed to convert the Hennepin plant to **[REDACTED]** products. If the Company had not intended to use the facilities, it would have been easy enough to refuse to make any commitments, as it had done for Lackawanna, or to forego the feasibility study. But the Company's good faith belief that it would continue operations at the Hennepin plant is not the same as a commitment not to close that facility. The substantially increased cost and the sharp and unexpected industry downturn are sufficient to persuade me that the Company's decision to close Hennepin was made in good faith.

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[1] I have observed in other cases between these parties that failed contract proposals do not always mean the unsuccessful party has conceded the issue. Parties sometimes try to make explicit what they believe is already implicit. But that is not the case here. The contract unambiguously gives the Company the exclusive right to close a plant. The Union's proposal would have suspended that right for the term of the Agreement, at least with respect to Hennepin. In these circumstances, the failure to secure agreement means that the language of Article 5-G controls.

The evidence also convinces me that the Union understood that the Company's efforts to maintain operations at Hennepin were tied to Hennepin's ability to produce **[REDACTED]** products. Whalen testified that York asked about the future of the plant if the **[REDACTED]** initiative did not work out, and that York said he could not support the tentative agreement without a guarantee of continuing operation. But Whalen testified without rebuttal that he told York there was "not much" in the capital investment for Hennepin except **[REDACTED]**, and that he could not make a commitment that the Company would continue operations at Hennepin. Significantly, this conversation occurred before ratification of the tentative Agreement. Moreover, even if one views the footprint projects as contractually mandated, the document itself says that "technical viability must be proven before **[REDACTED]** project can be pursued." Whatever the footprint may have meant with respect to other commitments (an issue that is not before me), the **[REDACTED]** conversion for Hennepin was not guaranteed. The Company's failure to give the Union the feasibility study document is troubling, but it does not detract from the conclusions therein. Moreover, the Union did not question the Company's assertion that the **[REDACTED]** conversion would be significantly more expensive than originally believed.

I also find nothing in the Hennepin side letter that can be viewed as either an express or implied commitment to continue operating the Hennepin plant. I agree with the Union's argument that the introductory language in the third paragraph seemingly applies only to the Company's commitment to secure enough hot band to run the Hennepin plant at full capacity; the Company would do so as long as its actions were "commercially reasonable." But there is some ambiguity about similar language in the last sentence of the same paragraph. The sentence says, "The Company and the Union shall act in a commercially reasonable manner in connection with this commitment." Obviously, this can be read to modify the commitment to secure hot

band, as the first sentence seems to do. But the sentence would be redundant if applied only to the Company, because it had already made the "commercially reasonable" commitment in the first sentence. The last sentence, however, can be seen as an acknowledgement by the Union that the Company had the right to determine whether it was commercially reasonable to continue the full capacity commitment.

The circumstances existing in November 2008 and continuing through the date of the arbitration would have made it commercially reasonable for the Company to suspend that commitment. It may be, as the Union contends, that the Company could not have claimed it was commercially unreasonable to operate Hennepin at full capacity merely by pointing to excess capacity and increased freight costs, circumstances that were already known when the Company agreed to the Hennepin side letter. But the supposed language saying the Company would operate Hennepin at full capacity has to be viewed in context.

The Union had already tried and failed to secure an express commitment not to close the Hennepin plant. The third paragraph of the Hennepin side letter does not change that result. Rather, the Company agreed to operate at full capacity only so long as it was commercially reasonable to do so. By November of 2008 it was clear that the steel industry in general and ArcelorMittal in particular were experiencing a severe economic downturn, described by Company witnesses as the worst financial crisis since the Great Depression. It probably was not unreasonable for the Union to adopt a wait-and-see attitude following the Company's presentation on November 10, 2008. Only weeks before, after all, markets had been booming and the industry outlook was good, as evidenced by the Company's commitment to invest $3 billion in its facilities. But the bad economic news persisted. Securing hot band to operate the Hennepin facility at greater cost than other facilities – that were also not being operated at

capacity – no longer made economic sense. The third paragraph of the Hennepin side letter was not a firm commitment to operate the Hennepin plant at full capacity – or at any capacity – for the term of the Agreement. Rather, it premised the obligation to run at capacity on “commercial reasonableness,” and the evidence is sufficient to establish that after November 2008, it was no longer reasonable to do so.

It could also be, as the Company argues, that the repetition of the “commercially reasonable” language meant that the commercially reasonable criterion applied to all of the commitments in the Hennepin side letter, including the **[REDACTED]** million annual expenditure. But even if it did not, the Company established sufficient grounds to close the plant and, thus, not make that investment at Hennepin. The Union does not argue that other parts of the Hennepin side letter *expressly* commit the Company to keep the Hennepin plant open. However, the parties did agree to spend **[REDACTED]** million dollars per year on capital expenditures (in excess of the **[REDACTED]** million estimated for conversion to **[REDACTED]**) and, as the Union points out, the Company cannot keep that commitment if it closes the plant. The Hennepin side letter, the Union argues, along with the investment side letter and Article 11-B, create an implied agreement that the Company would not close the Hennepin plant. But this overstates the effect of the agreements. Although the Hennepin side letter is not reprinted in the contract, it was part of the 2008 negotiations and is part of the Agreement. These were the negotiations in which the Company rebuffed Union efforts to have the Company commit not to close any plants, including Hennepin. In light of that bargaining history, if the Hennepin side letter was intended to prevent closure of the Hennepin plant, then one would expect language that said so directly. It would not have made sense for the

Company to resist Union proposals not to close plants – including an express proposal not to close Hennepin – if the parties understood the side letters and Article 11-B to preclude closing the Hennepin plant.

In addition, there was evidence that the **[REDACTED]** million annual commitment was intended to foster more efficient production at Hennepin pending conversion to **[REDACTED]**. But the footprint made it clear that **[REDACTED]** products at Hennepin depended on a feasibility study. Once that study proved the **[REDACTED]** conversion was not workable, the Company did not need Hennepin's production; there was no longer any reason to keep it operating pending the conversion. The Union understood that the continued operation of Hennepin depended on the conversion to **[REDACTED]**. Also, York did not rebut Whalen's testimony that he told York there was "not much" for Hennepin in the $3 billion commitment if **[REDACTED]** could not be produced there. Whalen also refused to assure York that the facility would continue to operate. In these circumstances, I cannot find that the side letter contained an implied commitment to keep the plant in operation.

Despite the Company's statement to the contrary, the Union *does* contend that the Company's decision to close Hennepin did not follow the requirements set forth in Article 5-G. The Union argues that by the time of the closure letter on December 9, the Company had given the Union only an overview of the economic downturn for the steel industry in general, and "the briefest of conclusionary statements" to justify closing the Hennepin plant. There was, the Union says, no detailed statement and the associated information disclosure as required by Article 5, Section G.

Article 5-G does not require negotiations with the Union prior to sending a notice of the intent to close the plant. Rather, it says the Company must notify the Union 90 days prior its

decision to permanently close a plant. The Company complied with that requirement by sending the December 9 letter. After having given the notice, the Company was required to meet and negotiate with the Union. The December 9 letter referenced the November 10 meeting which the Company designated as the "call to action." That document summarized industry conditions and circumstances faced by ArcelorMittal, and it expressly mentioned the need to close the Hennepin plant. Subsequently, the Company met with the Union again, on January 7 and January 9. The record also contains evidence that the Company responded to the Union's requests for information about the decision. These actions satisfied the Company's Article 5-G obligation to give the reasons for the proposed closure and to furnish the information that influenced the decision.

The disclosure of information did not include the **[REDACTED]** feasibility report, which the Company neglected to give the Union until the night before the hearing. This was a significant omission, but not one that prejudiced the Company's right to close the plant. Whalen testified credibly that in the January 9 meeting in Chicago he told the Union that the results of the feasibility study were "not good" and that "it was not going to work." There is no evidence that the Union asked for more information about that conclusion, or for a copy of the study. This does not excuse the Company's failure to furnish a relevant document to the Union, but it contributes to my finding that the omission did not preclude the Company from exercising its right to close the Hennepin plant pursuant to Article 5-G.

Finally, the Union contends that the Company has not complied with the procedures outlined in paragraph 7 of the investment side letter:

> If the Company believes market and industry conditions change in the future and warrants adjustment regarding a particular capital project, the Company will seek USW's consent to such adjustment, and such consent will not be unreasonably

> withheld. The parties will jointly inform the ArcelorMittal Investment Allocation Committee of the undertakings herein.

The Union's construction is plausible – the decision to close the Hennepin plant was based, in part, on the rapid decline in the market. The Company's recourse, the Union says, was not simply to walk away; rather, it was required to bargain with the Union over the adjustment of that particular project. But the requirement for Union consent to a change in a particular project cannot be understood to require Union consent to the Company's decision to close the plant. Article 5-G makes it clear that the Company has the exclusive right to close a plant, and as already explained, the Union was not able to obtain an agreement to keep the Hennepin plant in operation. I cannot interpret paragraph 7 to mean indirectly what the Company refused to agree to directly. That does not mean that paragraph 7 has no meaning; nothing in Article 5-G seemingly prevented the Company from agreeing that, in the event of a plant closure, it would comply with paragraph 7 by seeking consent from the Union about how the funds would be used. In response to my question, the parties agreed that the status of the $3 billion commitment was not an issue in this case. But if and when it becomes an issue, this opinion should not be understood to mean that the decision to close Hennepin necessarily reduced the amount of the capital commitment or freed the Company from its obligation to discuss the adjustment with the Union.[2]

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[2] The Union submitted with its brief a news story quoting a Company official's comments about a recovery in the steel industry. The Company objected to the after-the-fact submission, but also sent along articles containing contrary information. Even if the submissions are proper, I cannot conclude that they establish a reliable prediction for the future or have relevance to the issue in this case.

AWARD

The grievances are denied.

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Terry A. Bethel
May 16, 2009