IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

And ArcelorMittal Case No. 34

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1010, USW

OPINION AND AWARD

Introduction

This case from the East Chicago Harbor Works concerns the Union's claim that the Company violated the contracting out provisions of the 2008 Agreement when it contracted out the work of repairing and rebuilding a belt wrapper in March 2009. The case was tried in the Company's offices in East Chicago, Indiana over three days in April and August 2009. The parties filed post-hearing briefs.

Background

The contracting out language of the parties' 2008 Agreement (now headed "Bargaining Unit Work") includes Article II-F-1-a, which reads as follows:

> The Guiding Principle is that the Company will use Employees to perform any and all work which they are or could be capable (in terms of skill and ability) of performing (Bargaining Unit Work), unless the work meets one of the exceptions outlined in Paragraph 2 below.

This language is understood to impose on the Company the obligation to prove that it meets one of the exceptions. The exception at issue in this case applies to fabrication and repair work performed outside the plant. According to Section F-2-b-1, such work may be performed off site by an Outside Entity (a contractor):

Only where the location of the work's performance is for a bona fide business purpose and the Company can demonstrate a meaningful sustainable economic advantage to having such work performed by an Outside Entity.

The work at issue in this case is the Company's decision to have a belt wrapper from the cold strip mill rebuilt by a contractor named **[REDACTED]** .

The Company initially provided notice of its intent to contract out the work in October 2008. For reasons that will be explained below, the Union did not protest the notice at that time. At some point prior to December 13, 2008, the Company told the contractors to suspend work on any projects in their shops. **[REDACTED]** had not started work on the belt wrapper before that notice. On March 9, 2009, the Company told the Union it was proceeding with the belt wrapper job. That notification led to this grievance, which alleges both that the Company did not meet the Section F-2-b-1 exception, and also that the Company's notice violated the notification requirements of Section F-5.

The Evidence – Notice Issue

A significant part of the second day of hearing was devoted to the Company's use of a system called Tabware to make contracting out notifications. The Union contested that process on a variety of grounds. At the beginning of the third day of hearing, the Union said it was no longer interested in pursuing the Company's use of Tabware in this case. However, the Union did not withdraw its claim that the substance of the notification violated the contract. Article II-F-5-a, b, and c cover the notification requirements:

a. Prior to the Company entering into any agreement or arrangement to use Outside Entities to perform Bargaining Unit Work, the Company will provide written notice to the Bargaining Unit Work Committee in sufficient time to permit a final determination, using the Expedited Procedure, of whether or not the proposed use of Outside Entities is permitted. Such notice shall include the following:

1. Location, type, duration and detailed description of the work;

2. Occupations involved and anticipated utilization of the bargaining unit work forces;

3. Effect on operations if the work is not completed in a timely fashion; and

4. Copies of any bids from Outside Entities and any internal estimating done by or on behalf of the Company regarding the use of outside entities.

Subsection b allows the Union to request a meeting within 5 days and says "The Union shall be provided with all information available to the Company concerning the use of the Outside Entities at issue." Subsection c. is not implicated in this case.

The Union provided testimony that it had not contested some contracting out decisions because employees in the machine shop were working unlimited overtime. But that changed near the end of 2008. Max Carrasquillo, the Union's Chair of the Contracting Out Committee, said he became aware the belt wrapper had been contracted out in December 2008, when the parties met to discuss the economic downturn. The Company wanted to eliminate overtime in the machine shop. The Union said if that was the case, then the parties needed to identify all of the work that had been contracted out before the elimination. In response, the Company gave the Union a list of jobs that included the belt wrapper. In addition, the Company gave the Union a document titled "The Tap if Off" which said no more work would be subcontracted because of the Company's economic condition. If anything was contracted out, Carrasquillo said, the Company agreed to send a notification.

In December 2008, the parties agreed to begin auditing contractors that had Company work in their facilities to determine how much work had been done. Carrasquillo said the Company told the Union that if the work could not be retrieved, no work would be done on the belt wrapper unless the Union received notification. The Union received a written notice about the belt wrapper job on March 24, 2009. Prior to that, however, the Company gave the Union its SEA calculations for the belt wrapper, which Carrasquillo said was the first SEA the Union had ever received. He also said the Company advised him verbally on March 12 that the belt wrapper work would go forward. There had been a contracting out meeting earlier that day, Carrasquillo said, and the Company had not mentioned the belt wrapper. The notice covered repair, so Carrasquillo said he asked the Company about strip and advise (S&A), a process used to dismantle and/or inspect the machine to determine the scope of the rebuild; the Company did not respond to his query, Carrasquillo said. He said he later learned that the S&A had been completed by the time the Company gave the Union the SEA document.

Don Siefert is Griever for Area 20, which includes the machine shop, and is also a member of the contracting out committee. He said the parties met in late October and early November 2008 because the Company wanted to discuss eliminating midnight and weekend turns and reducing overtime. Siefert said the Union did not object, although the Company did not eliminate overtime at that point. The Company did not actually end overtime in the shop until the end of January 2009. Siefert said he was one of the Union representatives who audited contractors to determine if the base line established by the Company was accurate. The Union saw no problems, he said. When overtime was stopped at the end of January 2009, Siefert said Company representatives told him they would notify the Union before having contractors resume work. He heard nothing else about the belt wrapper, he said, until the Company gave the Union the SEA document. His testimony about notification was echoed by employee Cornell Smith and by Machinist Joe Duran. Gerry Mulox was at **[REDACTED]** sometime in early December when he noticed that the tuck arm was off the belt wrapper.

James Stahl, Division Manager for the Shops, testified that he began meeting with the Union in October to discuss a response to the Company's economic problems. At the time, shops employees were working unlimited overtime and work was being contracted out. Stahl said he wanted to talk about how to mange overtime and how to get the work done. The parties had a second meeting in November when they discussed a list of work categories, the most important of which was work the bargaining unit was capable of doing ("capable work") that the

Company had contracted out when employees were working unlimited overtime. On December 15, the Company gave the Union an updated packet listing jobs the Company has contracted out. The belt wrapper project was one of about 500 jobs on the 14 page list. At the November meeting, Stahl said he told the Union the Company would contract out only work the bargaining unit was not capable of performing. This, he said, was when he told the Union the Company was "shutting off the tap." Stahl said he gave the Union a "Tap is Off" power point presentation in December.

In January, Stahl told the Union the shops would begin managing overtime at the beginning of February. He said he informed the Union the Company did not intend to contract out work the bargaining unit was capable of doing, although there might be work they wanted to contract out under the sustainable economic advantage exception. Stahl said he told the Union he would provide SEA information for any such cases. At the same time, Stahl said he contacted the contractors and told them to stop working on the capable work, which included the belt wrapper. Subsequently, the tandem mill said it was going to have an outage and would need the belt wrapper by September. Stahl said at management planning meetings they discussed bringing the belt wrapper back inside, but decided they could not do so because they had already taken back a mandrel. It was at that point, he said, that the Company began to consider whether the SEA language would be used for the belt wrapper.

Dennis Shattuck, the Chairman of the Union's Grievance Committee, represented the Union in the discussions with Stahl. Shattuck testified that it was obvious by September or October that the Company was having problems and he advised the Union's contracting out committee to talk to the Company about shops work. Shattuck said the Union did not fight the Company in its desire to eliminate the midnight shift and weekends because shops employees were continuing to work overtime. By November, he said, things were getting worse and the Company approached the Union and said there was a "new game" and the parties needed "new rules." Shattuck said the Union recognized that the parties needed to figure out how the Company could get through the economic crisis. He said the Company proposed eliminating overtime and said it would shut off the tap to contractors, including telling them to cease work on jobs they already had. Shattuck said the Company was not obligated to offer overtime, but he told Stahl the Union would not agree to contracting out work the bargaining unit was capable of doing if overtime was stopped.

In Mid-December, Shattuck said, the Company told the Union the tap was off. Shattuck said there had been similar declarations in the past that turned out not to be true, so the Union proposed auditing the contractors. Afterwards the Union proposed bringing the work back to the shop, but the Company resisted because it would have to pay for the work already performed. Shattuck disagreed with Stahl's testimony that all he told the Union about notification was that the Company would furnish SEA data if it wanted to use that exception. He also said the Union told the Company that it wanted notification for any work that was going forward. There were no issues about notice until March 2009, Shattuck said, when the Company approached the Union and said it was going to go forward with the belt wrapper under the SEA exception. The Union received the SEA documents about two days later, Shattuck said, but received no other notification.

The Company called Ed Livorine, Human and Labor Relations Manager at the Harbor Works, to respond to Shattuck's testimony. He said during the discussions about overtime he and Shattuck agreed that there were two "taps" – work that was going to be sent out and work that was already sent out. He said the parties looked at the work leaving the mill at about the time of the December 13 meeting. The Company told the Union there was no work going out that bargaining unit employees were capable of doing. The Company then complied a list of capable work that was already out, which was supplemented from time to time. The audit established that the percentages were accurate, Livorine said. He also said he was getting pressure from management about machine shop overtime, so he told the Union he would shut off the tap on the capable work already with contractors. Livorine said he told Shattuck the Company was going to manage the overtime, although there could be a need for overtime under the established priority system. He said the Company did not agree to give a new contracting out notice if it decided to go forward with work that was already out; it simply agreed to inform the Union of that decision.

The Evidence – Merits

Both parties called numerous witnesses over the course of the three day hearing. Some witnesses testified more than once, partly due to rebuttal, but also because the parties tried the notification issue and the merits separately. Robert Bainbridge, Senior Planner in the Mill Shop testified about the circumstances that led to his decision to contract out the work on the belt wrapper. At the time the decision was made, the machine shop had a back log of about 47,000 man-hours, which is about 15 weeks of work. At that point the employees in the machine shop were not working overtime, but even if they had been, the backlog would have amounted to a range of about 30,000-36,000 man-hours; it never goes away Bainbridge said. When a belt wrapper is repaired in-house, he said the MTMs spend about 650 hours taking the equipment apart and rebuilding it, which is about half of the total repair time.

When the job comes into the machine shop, the planners plan the work and determine an approximate number of hours. The witness considers such factors as whether the employees are good at the repair, whether the cost of doing it in-house is competitive, and the backlog. When the job at issue here came in, he said, the backlog was "huge" and the belt wrapper work was critical because there was only one spare. He also said the machine shop was "not good" at repairing belt wrappers. Bainbridge said they did not have the MTMs do a strip and advise (S&A) on the belt wrapper at issue here because it didn't make sense. It would have taken longer than the entire rebuild by the vendor. The contractor does a S&A in such cases and then sends the Company a repair estimate. The vendor also warranties the work, although Bainbridge said he could not remember a belt wrapper failing after a repair, whether done inside (by the bargaining unit) or outside (by a contractor).

On cross examination, Bainbridge said the backlog figures did not mean the machine shop was behind on work; the shop would have met the deadlines needed by the departments, even if the belt wrapper was done in-house, although other work would have to wait or be contracted out. Bainbridge acknowledged that the Company had agreed to hire **[REDACTED]** additional people with machining skills, but had not done so because of economic conditions in

the industry. Bainbridge testified that by being "good" at certain work, he evaluated efficiency, cost, and quality. But he agreed that quality was not an issue for belt wrappers since in-house work is not inferior to contractor work. The problem is the number of hours it takes bargaining unit employees to do the work. Bainbridge said the Company has to repair one or one-and-a-half belt wrappers a year. The contractor will see two or three repair jobs, counting those from other companies. He also said his impression from the plant tour the morning of the hearing was that the contractor had not finished stripping the belt wrapper.

Union witnesses testified about the strip and advise process, and compared the in-house process to work being done by the contractor. Witnesses said bargaining unit employees disassemble the belt wrapper completely and inspect and clean each part. If a repair or replacement is needed, they describe it in "extreme detail," according to Mike Joseph, the bargaining unit Machine Shop Customer Representative for the 80" Hot Strip Mill. He said his view of the contractor's work on the belt wrapper indicated that it had not been fully stripped and that the components had not been cleaned. He also said the Job Scope document the contractor sent to the Company omitted several things that needed to be done. The document quotes a total price of **[REDACTED]**, including the strip and inspect function. If the Company elected not to have the contractor do the rebuild, the strip and inspect work would have cost **[REDACTED]**. Joseph identified several items of work mentioned in the Job Scope and contrasted it with the functions bargaining unit employees performed. In one instance, for example, he said rather than weld and machine a part – which the bargaining unit would have done, and which would have required disassembly of the part – the contractor had simply replaced it with used parts. He also said there was no reference in the Job Scope about roll reconditioning or making new rolls, even though that work would have to be done.

Joseph said it was clear from inspection of the work that either the S&A work had not been completed, or the process as done by the contractor was "not even close" to the kind of job done in-house. Although Bainbridge was critical of the contractor's work, he did not question the Company's right to select the kind of rebuild to be done. He testified, however, that the bargaining unit's rebuild of a belt wrapper would cost significantly less that other in-house rebuilds if the Company asked employees to do the level of work performed by the contractor. He also criticized the Company's SEA comparison because, he said, the Company chose the worst belt wrapper rebuild the bargaining unit had ever done. It involved about 50% more work than other jobs, he said. On cross examination, Joseph said he understood the Job Scope to mean that if the contractor did additional work not identified on that document, it would add to the cost.

Ruben Valdez, a Machinist since 1980, described the S&A process in some detail. He said the 2006 bargaining unit job the Company used for its SEA analysis involved a lot of damage, including cracks and bent areas, and a wreck in the plates. It also took significant time, he said, to burn out a pair of frozen rolls. He said the work done in-house was much more thorough than the work done by the contractor. **[REDACTED]** used shortcuts, he said, like not removing the trunions to check them, or using old parts, which in one instance resulted in elongating the holes. On cross examination, he said the report from the contractor did not identify all of the work that needed to be done. He said he didn't know if the contractor expected to do that work and, if so, whether it would cost more.

John Hanrahan, Plant Manager of MRO for Indiana Harbor, testified that the Company had used **[REDACTED]** for more than 10 years He said the price shown on the job scope was "firm" and that **[REDACTED]** "has never come back for more." He also identified a more detailed strip report from **[REDACTED]** that it sent to an engineer in the plant. The Union did not object to the exhibit, but said it had asked for the document and was told it did not exist. The witness said he had not seen the report until a half hour before the hearing and that he had no information about its contents. Dale Midkiff, Maintenance Manager for Finishing East, said he has seen belt wrappers rebuilt both by the bargaining unit and **[REDACTED],** and there is no difference in the repairs.

The Company called Tami Mongaraz, a Maintenance Cost Analyst, who was charged with compiling and reporting data concerning whether there was an SEA by sending belt wrappers to be rebuilt by **[REDACTED]**. The first table she identified was the cost of two previous belt wrapper rebuilds performed in the machine shop:

Shop Hrs	Wages/hr	Overhead /hour	Shop rate	Shop cost	Material cost	Total cost			Year
1262	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**			2004
1731	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**			2006
1496	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**			Average

All of the values except shop hours represent dollar costs. The first line summarizes a 2004 rebuild. The wage and benefit cost per hour, for example, was **[REDACTED]**. The overhead cost per hour subtracted the wage cost from the shop cost, which Mongaraz said was the budgeted shop rate at the time the work was done. The shop cost represents the shop hours spent on the project (1262) times the shop rate **[REDACTED]**. The material cost was added to the shop cost to calculate the total cost of the projects. The second line made the same calculations for a job performed in 2006, and the bottom line is the average of those two jobs.

Mongaraz also calculated the cost of two belt wrapper jobs done by the contractor in 2007 and 2008:

Shop Hrs	Wages/hr	Overhead /hour	Shop rate	Shop cost	Material cost	Total cost			Year
726	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**			2007
687	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**			2008
707	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**	**[REDACTED]**			Average

Mongaraz testified that she obtained the shop hours from **[REDACTED].** These figures show an SEA of **[REDACTED]**. The comparison is misleading, however, because the collective bargaining agreement prohibits the use of a contractor's lower wage rates in the calculation. Thus, Mongaraz recalculated using the same figures, but substituting the bargaining unit wage rate **[REDACTED]** for the contractors wage rate. The result increased the average **[REDACTED]** cost to **[REDACTED]**, and lowered the SEA to **[REDACTED]**.

Mongaraz said she did not have independent knowledge that the comparisons involved comparable jobs, although Bainbridge had told her they were. Mongaraz also compared average costs by using a different shop rate. She testified that she did not know what had been taken into account in the budgeted shop rate of **[REDACTED]**. Her calculations yielded a shop rate of **[REDACTED]**. Had this rate been used in the calculations for an inside job, it would have raised the average cost of the bargaining unit projects to **[REDACTED]**, and resulted in a wage-adjusted SEA of **[REDACTED]**.

The Union quizzed Mongaraz about her calculation of the **[REDACTED]** shop rate. That rate included a budgeted amount of **[REDACTED]** for Supervisory-Exempt wages. This apparently included figures the parties had agreed should not have been included. The same thing was true, she acknowledged, with the cost of supervisory benefits. The **[REDACTED]** shop rate also included cost charged to the machine shop by other departments. Mongaraz agreed that the Union had questioned some of these costs, including a budgeted cost of **[REDACTED]** from Manufacturing Maintenance (field forces). Mongaraz said she knew the Company had given **[REDACTED]** some parts, and the cost of those parts was not included in the calculations shown above.

Mongaraz agreed that the shop hours were especially significant. The total labor cost was determined by multiplying the wage costs by the number of hours worked, which are the shop hours. Bainbridge gave her the Company's shop hours and told her the four jobs were an "apples to apples" comparison She said the contractor's figures included man-hours in the materials cost. In addition, the inside costs included cylinder costs, but she believed the contractor costs did not reflect cylinder costs because **[REDACTED]** contracted out that work. Mongaraz said the SEA comparison would be the same even if the tables were updated with the 2009 wages and costs.

On redirect, Mongaraz identified another calculation made after her discussions with the Union about improper inclusions in the shop rate. In particular, she reduced some supervisory wage and benefit costs, although not all of them. This reduced the budgeted **[REDACTED]** per month to **[REDACTED]** per month. This resulted in a shop rate of **[REDACTED]**. In addition, this calculation added shop hours to the contractor's calculation. Mongaraz said she determined that the contractor had included some work it had contracted out in the material cost. Mongaraz asked how many hours it would take to do the work, and then added 80 shop hours. She deleted the same amount from the contractor's material cost. But the total cost did not change, she said; it was simply transferred from one category to another. The calculation using the amended figures rate resulted in an SEA of **[REDACTED]**, with the change attributable to the decreased Company shop cost. Bainbridge identified an exhibit indicating the kind of work done in each of the four rebuilds used for comparison. It did not detail the work of any rebuild, but showed that each involved work on all of the "big parts."

Neil Kohlberg is Director of Strategic Planning and Analysis for the USA Flat Group. He said his function principally involves financial analysis for strategic or large tactical matters. As I understood his testimony, he was not involved in calculation of the SEA, but had reviewed the results. He said he agreed with the process and thought it was a good way to determine whether the work should be done inside or contracted out. The fact that the comparisons were

based on history was important to determining sustainability, he said. He testified that if the belt wrapper work were to be done inside, other work would have to be contracted out. When there are limited resources, Kohlberg testified, the Company has to make trade-offs. In such circumstances, it is better to do the work the bargaining unit does well, and contract out the work it does not do well. Kohlberg said it would be irresponsible to add overtime in the current economic climate when the Company had reduced overtime to avoid layoffs. He also said the Company could hire more employees, but that would not be cost effective if they sometimes did not have work to do. Finally, Kohlberg said the calculation of SEA cannot focus solely on bargaining unit hourly cost; to be sustainable, the process needed supervisors, maintenance, and other items. On cross examination, Kohlberg agreed that a SEA can only be determined by comparisons over a long period. He also said his testimony about work the bargaining unit is "good at" went to economic aspects of the job. There are, however, other considerations, including the risk of failure because of the lack of a spare.

Union witness Cornell Smith said he was in the SEA discussions between the parties. He said Mongaraz explained that she had included 8 or 9 management employees in the shop rate at varying percentages. One of those was the supervisor in the pugh ladle machine shop who, Smith said, had nothing to do with the machine shop. He also named four other management employees who were included, but had nothing to do with the machine shop. On cross examination, Smith agreed that there is always a back log.

Ruben Valdez testified in some detail about the strip and advise process on a belt wrapper. It is not necessary to record all of that testimony in this opinion. He said he and his coworker disassembled the entire assembly to the frame, and that each part was carefully checked and cleaned. He also discussed the importance of tolerances and the care he uses in measuring them. He also checks and inspects every piece of the unit when it is reassembled. On cross examination, Valdez agreed that there are other ways to do the job. However, he said he thought the contractor's approach was "wrong." He acknowledged that he and his partner have only done one belt wrapper S&A, and that he did not know the contractor had done 2. He agreed that the belt wrapper job he did was the one that took 1731 hours. He said it was a "big job" and that he and his partner had not inflated the time they spent.

Mike Joseph was the Union's principal witness on the merits. He said he was concerned about how **[REDACTED]** was doing the work. He maintained that the bargaining unit does superior work and, when all factors are taken into account, the contractor's work does not show an SEA. Joseph identified Union Exhibit 13, which compared 388 man hours of machining work the contractor said it would do on the belt wrapper. Joseph said he identified comparable work done by the bargaining unit, and estimated that the bargaining unit could do the same work as **[REDACTED]** with 433 man-hours. However, he said that number had to be adjusted because some of it involved the use of 2 man machines, which was not necessary; a one man machine could have done the work. If that adjustment was made, the bargaining unit would require only 344 man-hours. He said this evidence indicated that the cost of making and machining new parts was comparable to **[REDACTED]**. He also discussed exhibits that he said showed the Company had purchased parts for **[REDACTED]**, meaning that the expense did not show up in **[REDACTED]** costs.

Joseph testified that **[REDACTED]** bid did not include the hours spent on the cylinder work because **[REDACTED]** contracted it out. But about 200 hours devoted to cylinder work were included in the job done by the bargaining unit that was used for comparison. He estimated that the Company purchased about **[REDACTED]** worth of parts and gave them to **[REDACTED].** This expense is not shown in the contractor's **[REDACTED]** price, Joseph said, although all material cost is included in the bargaining unit jobs used for comparison. Joseph also identified an exhibit that showed a material cost of **[REDACTED]** for an apron (also called a tuck arm) the bargaining unit fabricated for its belt wrapper rebuild. In both contractor jobs used for the SEA comparison, the contractors contracted out the fabrication of the apron and put the entire cost in the materials expense. Mongaraz testified that she had adjusted this item by adding 80 hours to the contractor's labor cost, but Joseph said 80 hours was much too low.

The Union presented a series of exhibits intended to show that the bargaining unit's belt wrappers operated at a lower cost per ton than the belt wrappers rebuilt by contractors, which the Union argues has to be taken into account when comparing efficiency. Using data from Company records, the Union calculated that the two contractor jobs used for the SEA comparison had a cost per ton of **[REDACTED]** as compared to an internal cost of **[REDACTED]**. Another calculation omitted the cylinder repair cost from the machine shop costs because it had not been included in the contractor's costs. In that calculation the internal cost was reduced to **[REDACTED]** per ton. A reduction to demonstrate the effect of one man versus two man machines yielded an internal cost of **[REDACTED]** per ton. The Union's calculations produced a lower charging rate when adjusted to exclude what the Union says are improper charges. The Union also estimated that the direct labor cost of doing the work on overtime would have been only **[REDACTED]** per ton. Benefits are not included in this cost, Joseph said, because they would have already been paid on the first 40 hours. The Union says the contractor missed the July 31, 2009 delivery date, and that the bargaining unit would have been able to complete the project by then if employees had been permitted to work overtime.

On cross examination, Joseph acknowledged that the purpose of the Union's exhibit was to show a lower cost-per-ton for belt wrapper repairs done by the bargaining unit, which meant the in-house repair jobs lasted longer than those done by contractors. He agreed that belt wrappers are sometimes changed because of circumstances that have nothing to do with wear and tear, and that he did not know why the two contractor rebuilds in the comparison had been taken out of service. Joseph agreed that the machine shop had missed delivery dates, and that he knew the **[REDACTED]** job was late because **[REDACTED]** did not have seals, which had to be ordered. However, he said if bargaining unit employees had been allowed to work overtime, the machine shop would not have missed any deadlines.

Joseph agreed that the Company has asked the Union to allow operation of a two-man machine with only one man, but the Union has refused. However, Joseph said the work at issue in this case could have been done on a one-man machine, even though the Company used two men on a two-man machine. The Union's data – gleaned from Company records – also shows that belt wrappers rebuilt internally lasted longer than those done by contractors. The two internal rebuilds used for comparison, for example, lasted 475 and 476 days respectively. In

comparison, the last **[REDACTED**] rebuild lasted 393 days and another contractor's rebuild lasted 267 days.

Local Union President Tom Hargrove testified that he attends twice weekly meetings with management, and that in a recent meeting the Plant Manager said he was not going to sacrifice quality to get a lower price. He also said management will avoid situations in which a purchase from a contractor increases the unit cost. Floyd Kinsey operates the belt wrapper in the 80" tandem mill, and has been there longer than anyone, he said. He said he did not know of a belt wrapper being taken out of service because of a wreck, and that changes are usually made because the belt wrapper is "wearing out." But on cross examination he agreed that belt wrappers might be changed during an outage.

Donald Skaggs is a mechanic at No. 2 Cold Strip East. He said when the Company replaced the last bargaining unit rebuilt wrapper with a **[REDACTED]** belt wrapper, the bargaining unit belt wrapper did not have to be changed, but the Company wanted a new nose piece **[REDACTED]** had developed. He said there were problems adjusting the first **[REDACTED]** belt wrapper and that it tore up belts and almost destroyed the tuck arm. The first **[REDACTED]** belt wrapper was not taken out of service until it had exhausted its useful life and was "torn up pretty bad." The Company had the same kinds of problems with the second **[REDACTED]** belt wrapper. It kept losing belts and the cylinder came down too hard and broke pipes. There was also a crack in the tuck arm frame. The device has worked better, he said, since the frame cracked. On cross examination Skaggs agreed that he did not know whether the problems were attributable to **[REDACTED]** workmanship.

Larry Rowe works as an 80" temper mill mechanic. He said the machine shop's belt wrapper was "very good" and had only routine maintenance problems. It was changed out, he said, because the Company wanted to try the new nose piece. However, he said the nose piece was designed at the Company and was actually installed by bargaining unit employees, not **[REDACTED]** employees. He characterized **[REDACTED]** first belt wrapper as "lousy." He said it tore up belts and had to be shut down to make adjustments. Like Skaggs, Rowe said **[REDACTED]** belt wrapper was ready to break down when it was taken out of service. On cross examination he said belt wrappers sometimes get changed out regardless of tonnage, and he acknowledged that a **[REDACTED]** belt wrapper has been in service a year. However, he said the mill has not operated much in the last year.

The Company recalled Stahl on rebuttal. He said there were cylinders repaired on all four of the jobs used for SEA. He also said about **[REDACTED]** in parts given to **[REDACTED]** were not shown on the comparison. Stahl said the Union does not see all of the supervisory or management hours spent on the machine shop. Supervisors and managers spend time on such things as design, projects and inspections, which are not directly involved in operations. Stahl criticized the Union's revision of machining hours. Most of the work could be done on a one-man machine, but not all of it; a portion of the work could be done only on a two-man machine, although one employee could operate the machine for that purpose. But the Union would not agree to that. On cross examination, Stahl said he assumed the cost of cylinder work was included in the two **[REDACTED]** projects used in the SEA, but he did not have documentation.

Dale Midkiff evaluated the delays and other problems the Union attributed to belt wrappers procured outside. He said the two **[REDACTED]** belt wrappers accounted for a total of 1134 minutes of delay, and the ones done in the machine shop 1788 minutes. Midkiff said the low tonnage attributed to the **[REDACTED]** belt wrapper was not related to the quality of the repair work. Rather, he testified that the Company had run light gauge steel from INTEK, which is what caused the problem. Although **[REDACTED]** had missed the July 2009 deadline, Midkiff said he told them not to hurry with the work because the emergency was over. He did not want the rebuilt belt wrapper until September because of budget issues. The witness said **[REDACTED]** rebuilds run as well as the ones done in the machine shop.

John Hanrahan, Manager of Purchasing, said the cylinder work was included in **[REDACTED]** cost for previous rebuilds. The Company, he said, did not pay the contractor directly. He also identified an exhibit showing that the Company had given **[REDACTED]** seals and bearings at a cost of **[REDACTED]** . On cross examination, Midkiff said the two contractor prices in the SEA analysis included about **[REDACTED]** for cylinder work **[REDACTED]** had contracted out, meaning that the total cost of the two rebuilds not including cylinders were about **[REDACTED]** and **[REDACTED]** respectively. In the job at issue here, the Company arranged for the cylinder work with another contractor, meaning that about **[REDACTED]** has to be added to **[REDACTED]** bid to get an accurate total cost.

The Company also recalled Neil Kohlberg, who testified that the Union's cost analysis failed to take account of overhead and lost opportunity cost. Although there may not be an immediate impact if the work is done in-house, in the long term there are no fixed costs. In addition, if the Company kept the work in-house but could not afford to do it on overtime, then it would do it on straight time, necessarily pushing other work aside. Citing economic texts, Kohlberg said when making long-term economic decisions the Company needs to consider all costs and factors. It is misleading, he said, to consider only short term costs. All costs have to be considered to have a "sustainable situation." Kohlberg said he took into account the Union's criticism of the Company's SEA analysis by changing some of the variables and recalculating costs. The variables included the Company buying parts for **[REDACTED]** and an increase in the number of hours worked by the contractor. Each calculation showed a continued economic advantage to contracting out the work. His conclusion was that the SEA "is not particularly sensitive to the hours contractor employees actually worked."

Positions of the Parties

Notice Issue

As noted above, on the third day of hearing the Union said it was no longer interested in contesting the Company's use of an electronic form of notification in this case. However, the Union continued to claim that the notice was defective because the Company failed to furnish the information required by the contract as part of the October 16, 2008 notice. The Union also argues that the Company violated the contract when it failed to notify the Union before having **[REDACTED]** resume work on the belt wrapper in March 2009.

The Union says the contract clearly requires that the Company furnish the information with the contracting out notice, and the Company cannot require the Union to "surf" for it. The information requirement was implemented in the mid-1980's the Union says, and was intended to allow the Union to determine whether it wanted to contest the notice. It would be burdensome for the Union to look for the information in Tabware, including the time and training required to use the system and the requirement to search through potentially thousands of entries to locate the information.

The Union also contends that the Company failed to give it proper notification in March 2009, as it says the Company had agreed to do. In late 2008, the Union says, the Company wanted to reduce overtime. The Union voiced concern about the amount of work contracted out and the parties agreed that if the Company reduced overtime and also suspended work on the items already at contractors' shops (including the belt wrapper) , the Union would not contest the overtime reduction. According to the Union, the Company said if it decided to move forward with any of the suspended work, it would re-notify the Union before the work was started.

The Union says it was not aware that the belt wrapper had been sent to **[REDACTED]** until mid December 2008. Subsequently the Union learned that **[REDACTED]** had prepared a strip report on January 12, 2009, that the cold strip mill had prepared a requisition for the work with **[REDACTED]** as the recommended supplier, and that **[REDACTED]** had sent its bid to the Company on February 11. The Union knew none of this, it said, until March 9, 2009, when Livorine told Shattuck that the Company intended to move ahead with the belt wrapper. On March 12, 2009, the Company also gave a verbal notification of its plans to Carrasquillo. The lack of proper notice, the Union says, deprived it of the opportunity to discuss alternatives with the Company prior to the time the final decision was made. The Union says the lack of written notice violated the notification provisions of the contract and also breached the Company's promise to notify the Union before it went ahead with work remaining in contractor shops. The Union characterizes this as a willful violation. It also says there have been numerous instances in which the Company has given improper notice under the Tabware system. Thus, the Union contends that the Company's violation was also repeated and would justify a special remedy under Section F-9.

The Union argues that the Company deliberately withheld information requested by the Union. In the initial meeting on March 13, 2009, the Company gave the Union a copy of the original SEA document. The Union requested more information, and the Company furnished the remaining documents in Union Exhibit 1, which include the January 30, 2009 requisition listing work to be performed, the bid by **[REDACTED]** including job scope, and documents containing some similar information for previous **[REDACTED]** jobs. The Company said the two previous jobs did not include hours for cylinder work and that the information about hours spent on the jobs was obtained from **[REDACTED]**. The Union contends that the Company deliberately hid from the Union the fact that the two previous **[REDACTED]** jobs had included cylinder repair even though it knew the Union believed they had not. This, the Union says, is because the price shown for the belt wrapper at issue does not include cylinder repair, meaning that about **[REDACTED]** has to be added to the price. This makes **[REDACTED]** bid significantly higher than the costs shown for the two previous jobs. The Union also points to the similarities

between certain documents as proof that the Company had the information, but hid it from the Union.

The Company's brief focuses on an early claim by the Union that it was entitled to a separate notice for the strip and advise work. But the Union did not raise that claim in the notification portion of its post-hearing brief, so I need not address it in this opinion. The Company contends that it provided notice to the Union via its Tabware system on October 8, 2008, which was followed by a hard copy of the notice at a meeting on October 16, 2008. The Company says it understood that the Union had not contested the contents of the notice but, rather, the use of the Tabware system as notification. The Company contends that all information required with the notice required under Article II-F-a is included in the original October 8 notice except the price, which had not yet been determined by **[REDACTED].**

The Company also says that if the Union missed information because it was unable or unwilling to use the Tabware service, then "To put it bluntly, that is the Union's problem." The Company provided training and, the Company says, the system is not difficult to navigate. The Union can sort through the items in Tabware by querying for contracting out requisitions. Tabware, the Company says, makes the notification and information system more efficient. The Company also points out that it gave the Union a hard copy of the notice at the October 16 meeting, which was sufficient to meet the notice requirement. Even though this notice differed in form from the one used in the past, the Company argues that the contract does not require a particular form of written notice.

The Company also says it was not required to issue a new contracting out notice in March of 2009, when it decided to go ahead with the **[REDACTED]** contract for the belt wrapper. The Company had already given notice in October 2008 and, at most, the Company said, all the Company did in December of 2008 was promise that it would tell the Union before proceeding with any of the delayed work. And, the Company contends, even if it had promised to give a new contracting out notice, that was not required by the Agreement. Thus, the Company's decision to go ahead without a second formal notice would not have breached the notifications provisions of the contract.

The Company says Livorine told Shattuck that the Company would tell the Union if it decided to go ahead with projects that had been suspended in January, but he did not promise to start the notification process anew. The Company also claims that by March 2009 when the Company decided to proceed with the belt wrapper, the Union had all of the information it needed to decide whether to contest the Company's decision.

The Merits

The Company acknowledges that there are two hurdles to clear in order to contract out work under Article II-F-2-b-1: the Company must establish a bona fide business purpose and a meaningful economic advantage to having the work performed by a contractor. The Company argues that it is a "fundamental management right" for the Company to decide who will perform work and when it will be performed. Typically there are two belt wrappers in operation at any

time, with the third one being rebuilt for use in the event of a failure, or to hold as a spare when one of the active belt wrappers is taken out of service. It is, the Company says, important to do that work soon after the belt wrapper is taken out of service, and not wait until later in the cycle. The machine shop backlog varies between 30,000 and 36,000 man-hours. The backlog is constant, the Company says, and the justification for contracting out the work here was not to decrease the backlog. Bainbridge testified that he decided to contract out the work because the machine shop was "simply not competitive." The work needed to be done, the Company says, and management determined that it should be done by a contractor who was "good" at the work so the machine shop could concentrate on work it was good at, like walking beams. The machine shop, the Company says, was not as efficient on belt wrappers as **[REDACTED].**

The Company says this was an easy business decision because the employees should spend time on the jobs where they excel. The Company's business decision was explained, in part, by Kohlberg's explanation of "lost opportunity cost." If the bargaining unit rebuilds the belt wrappers, the Company will lose the benefit of having them do work they do better.

The Company rejects the Union's claim that there was no bona fide business purpose because there was no crisis, and because the bargaining unit could have done the work with a timely delivery. The Company says this argument misses the point. The contract does not require a crisis and the Company has not claimed that bargaining unit employees could not have done the work on time. But the Company characterizes those arguments as "straw men" created by the Union.

The Company dismisses the Union's attempt to demean the quality of **[REDACTED]** work. The bargaining unit had not seen the work done by **[REDACTED]** on the belt wrapper. Moreover, **[REDACTED]** work has a warranty, which means it will have to fix any problems. In addition, Midkiff testified that there were no differences in **[REDACTED]** and machine shop belt wrappers, and no difference in delays. The Company discounts the testimony of bargaining unit witnesses who disparaged **[REDACTED]** work, pointing out that none of them could attribute the problems to **[REDACTED].** The Company also notes testimony that some of the difficulties were attributable to the Company's decision to run lighter gauge steel. The Company says the bona fide business purpose test does not require the Company to choose the "best" contractor. The Company made the business judgment that **[REDACTED]** was a good service provider, and it did so in good faith and without fraud or deceit, which is the definition of "bona fide."

The Company argues that its comparisons between previous jobs done by **[REDACTED]** and the bargaining unit establish a meaningful, sustainable, economic advantage. **[REDACTED],** the Company says, has done the work more efficiently and economically than the machine shop, and this is true even if adjustments are made in the data used for comparison. The Company points out that **[REDACTED]** quote for the current job was substantially below the machine shop's cost for the two previous jobs done in-house. If the cylinder work is taken out of the four jobs used in the SEA comparison – as it is not included in the **[REDACTED]** bid for the current job – the difference remains more than **[REDACTED]**, which the Company says is also an SEA.

The Company rejects the Union's claim that the **[REDACTED]** job will require more work at greater expense; **[REDACTED]** quote is firm, and covers all work **[REDACTED]** is required to do. The Company also contends that the Union cannot substantiate that there were hidden hours in the material costs for the two **[REDACTED]** jobs. The Union's estimates for in-house work also fail to include any figures representing overhead costs, even though those are surely included in **[REDACTED]** quote. Moreover, nothing in the contract requires the exclusion of such costs from the comparison. The Company rejects the Union's assertion that the SEA attributes too much cost for management activities. Some work is not directly involved with shop supervision or observation, but is still properly included in cost. Finally, the Company says even if it granted the Union's concern and reduced the shop rate, there would still be an SEA of over **[REDACTED]**.

The Company discounts the Union's attempt to prove that the belt wrappers repaired by the bargaining unit operated at a lower cost per ton. There are factors that have little to do with the quality of the work, the Company says, including the demand for steel, and the gauge and width of the steel processed. Moreover, the Company says the Company has the right to determine how it will demonstrate a "meaningful SEA", and the Union cannot "recast the SEA analysis to meet its own preferences."

The Company argues that granting the grievance would effectively nullify the exception created by Article II-F-2-b-1. The Company has shown a meaningful and sustainable economic advantage and a bona fide business purpose for contracting out the work. It does not need to show, it argues, that there are no other alternatives to contracting out. Finally, the Company says if there is a violation, there is no justification for a special remedy.

The Union denies that the Company established a bona fide business purpose for having the work done by **[REDACTED].** The only justification advanced, the Union says, is that it would be cheaper to contract out the work. The Union characterizes as vague the Company's argument that the bargaining unit should be assigned to work they are "good at." There is no proof that **[REDACTED]** is better at repairing belt wrappers than are machine shop employees. In fact, the Union points out, bargaining unit employees testified repeatedly about flaws in **[REDACTED]** work, and about difficulties they had experienced with **[REDACTED]** belt wrappers. The Union also says that even the Company's exhibits demonstrate there were more belt failures on **[REDACTED]** machines than on bargaining unit rebuilds.

The Union argues that the Company improperly confined its analysis to the cost of a **[REDACTED]** project and did not prove that outside vendors in general provide an economic advantage on belt wrapper work. In particular, the Union says the Company ignored a belt wrapper project from another vendor that was more expensive than work done in the machine shop.

The Union contends that there was no proof that the bargaining unit could not have done the work without affecting other projects. The Company allowed the backlog to grow because of economic conditions, which the Union concedes was within the Company's discretion. Even Bainbridge, the Union says, testified that in March 2009 when the Company decided to go ahead with the **[REDACTED**] rebuild the bargaining unit could have done the work without having to

contract out other work. Unlike October, when the project was first considered, in March 2009 machine shop employees were working virtually no overtime. But the Union says a showing that employees are working overtime is not part of the SEA exception. Nor, the Union claims, does it make sense to say the shop employees working 40 hours can be confined to work they are "good at," thus leaving the Company to contract out other work. The Company, the Union says, is contending that work can be sent to a contractor if the bargaining unit would have to perform it on overtime. But there is no such exception, the Union argues. Nor, the Union says, is the cost of doing the work in-house significant. The Union calculates that the work could have been done in about 6 weeks if MTMs worked 12.5 hours of overtime per week. The Unions says it does not question the Company's claim that it had the right to eliminate overtime. But that decision does not create a bona fide business purpose for contracting out the work. The Company is not free to contract out work, the Union says, merely because machine shop employees are working 40 hours a week.

The Union says it is significant that bargaining unit forces would have been able to finish the work in the required time frame. The Company, it says, might have been able to argue a bona fide business purpose in October 2008, when employees were working all the overtime they wanted. In that circumstance the bargaining unit might not have been able to finish the job on time. But that was not the case in March 2009, when bargaining unit employees sometimes had very little work available. The Union accuses the Company of running a "shell game," by discontinuing overtime and then claiming there is more work in the shop than bargaining unit employees can do. But the Guiding Principle, the Union says, does not allow the Company to create an SEA merely by limiting the number of hours the bargaining unit can work. The Union says the Company's only evidence of an SEA is that contractors are cheaper.

Based on developments in the hearing concerning the cost of cylinder work, the Union revised its cost-per-ton analysis. But even with the revisions, the Union says the bargaining unit still produces a significant advantage in cost-per-ton analysis.

Findings and Analysis

Notification Issue

There is some confusion about the Union's position on electronic notification. There was extensive evidence about the Company's use of Tabware to notify the Union. As noted above, on the third day of the hearing the Union announced that it was no longer interested in pursuing the use of an electronic form of notification[1], but it did contest the Company's failure to include required information in its notice. Part of the confusion is the Union's argument in its brief that says there will be several problems if "substitution of access to a work order system as a replacement for written notification is upheld." In the same paragraph, the Union discusses the consequence of "A ruling that the Company is no longer obligated to provide written notification…." This would seem to focus on the form of the notice and not merely its content.

[1] I did not understand this to mean that the Union had abandoned its ability to raise such challenges in other cases.

Nevertheless, I understand the Union's argument to contest the Company's claim that it satisfied the information requirements by making the data available in Tabware.

The Union contends that the notice it received in October 2008 lacked some information required by Article II-F-5-a, including the occupations involved and the utilization of bargaining unit forces. The document also did not have copies of bids, although the Company said credibly that it did not have any bids at that time. Although the information may have been available in a database, the Union says there can be 9000 or more entries a month and that it should not have to surf through them to obtain the information it needs.

My findings about notification are not intended to express any view about using Tabware as a form of notice. However, I do find that the notice itself must contain the information detailed in Article II-F-5-a-1, -2, -3, and -4. The Union should not have to search for the information or extract it from Company records. The Company has the burden of establishing its right to contract out, and part of that responsibility is to insure that the Union has the information it needs to decide whether to challenge the Company's plans. The Agreement itself says that the notice "shall" include certain information. The Company's October 16 notice did not meet that standard in this case.

Although the Company's notices in October were incomplete, I need not dwell on their effect because Carrasquillo testified that the Union was "not pressing" that notice. At the time the Company gave the notice no work had been done and the bargaining unit was still working overtime. The Union seems to take a similar position about its discovery in December 2008 that the belt wrapper was at **[REDACTED].** An audit showed that no work had been done and the Company told the Union, Carrasquillo said, that it would give notice if it decided to proceed with the work.

There is no real dispute that the Company told the Union it would give some kind of notice if it decided to proceed with any of the "capable" work that was already on a contractor's premises, like the belt wrapper. I do not understand this commitment to mean that the notification process would begin anew; however, that does not mean the Company was absolved of its notification requirements. At the time of the October 16, 2008 notice the bargaining unit was working unlimited overtime and the Company understood that the Union was not requesting meetings over most capable work. But that situation changed in late 2008 and early 2009, when the Company told the Union that the tap was off. The Union asked that the capable work be returned, but the Company wanted to preserve cash by leaving the work on contractor premises. It seems clear, however, that the Company had not decided by December 2008 whether to have the contractor proceed with the belt wrapper repair. As of December, when the Company turned off the "tap," it was not clear what kind of exception the Company would use to contract out the belt wrapper repair. The Company had not prepared its SEA analysis at that time, and there was no other exception that justified sending fabrication and repair work to an off-site contractor. In the circumstances, it was fair for the Union to believe that the Company would tell the Union *before* that decision was made, and to support its intent with relevant information.

The lack of SEA information prior to the decision was significant in this case because the Company was relying on an exception that had not been mentioned in the original notice. That

notice said only "justification critical spare / shops are capable." This kind of notice may have satisfied the Union when bargaining unit employees were working unlimited overtime and the Union was not contesting most decisions to send work out. That situation had changed by March 2009, which may be why the Company invoked the SEA exception. But the Company cannot change the basis of its action without giving the Union an opportunity to evaluate the evidence supporting the new claim. In the circumstances of this case, where conditions had changed radically between the original notice and the time the Company decided to proceed, and where the Company opted to change the justification for its decision, the Union was entitled to notice and, importantly, information justifying its claim of an SEA *before* the decision was made. Shattuck said Livorine told him on March 9, 2009, that the Company was going ahead with the belt wrapper project. This was before the Union received SEA documents from the Company. In addition, Company Contracting Out Committee Member Dave Vittettoe testified that he first gave the SEA documents to the Union in a meeting on March 10, which was also when he informed the Union's contracting out committee that the contractor would proceed with the belt wrapper job. The Company's failure to furnish this information prior to the decision violated Section F-5.

The Union also urges that the Company deliberately failed to furnish information, especially information related to the cost of cylinder repair in the two **[REDACTED]** jobs used in the SEA analysis. There was some confusion about this item in the hearing. Mongaraz testified that the **[REDACTED]** figures she used for the SEA analysis did not include the cost of repairing the cylinders, which had been contracted out. The Union says that was its assumption until the third day of the hearing, when Hanrahan testified that the **[REDACTED]** jobs did include the cost of cylinder repair work. This information had been deliberately withheld, the Union says, in order to establish a more favorable SEA analysis. It seems odd that Mongaraz, who prepared the analysis, did not know the cylinder work was included in her analysis. It is also hard to understand why Company contracting out committee members did not know what was included in **[REDACTED]** work, especially since the Company relied on those jobs to justify its decision to contract out in this case. Even so, I cannot find that the Company deliberately withheld information from the Union. The failure to furnish this information indicates that the Company's treatment of the SEA and its obligation to furnish information to the Union was disorganized as, apparently, were its efforts to get information from **[REDACTED].** But I cannot equate that with a deliberate intention to hide relevant information.

The Merits

The Company relies, in part, on my decision in ArcelorMittal Award No. 26 where it invoked the F-2-b-1 exception to justify contracting out chain inspection and proof testing. In that case, as in this one, there was no evidence that the contractor's work was superior to the bargaining unit's. The opinion suggests that such factors as time disparity, quality, inventory reductions, or space could affect a finding of a bona fide business purpose. In discussing the two-step test in Section F-2-b-1, I said the Company could not establish a bona fide business purpose by proving the contractor could perform the work at less cost because, if the Company proved a sustainable economic advantage, "then it would necessarily have a bona fide business

purpose for contracting out the work." I continued with language the Company points to in this case:

> But economic considerations cannot be excluded entirely from the bona fide business purpose test; an economic value can be ascribed to almost every decision a business enterprise makes. To the extent that a bona fide business purpose depends, in part, on economic considerations, the language seems to say that those considerations have to produce a meaningful and sustainable economic advantage.

Although it may have been stated more artfully, the quoted language was intended to mean that the economic cost considered for establishing a bona fide business purpose cannot simply be that the contractor is cheaper. This would undermine the protection given bargaining unit employees by the Guiding Principle. In effect, the two-step test would be reduced to one. But the line between these two tests is hazy.

In the context of a corporate, profit-seeking enterprise, a business purpose necessarily entails economic considerations. Business people act – and are expected to act – in ways that support the economic welfare of the enterprise. That is not to suggest that there cannot be other motives, like safety or altruism. But even those are, to some degree, intended to advance the overall well being of the business. The difficulty with the contract language is that it seemingly separates two elements that are intertwined.

In ArcelorMittal 26, I mentioned several circumstances that might satisfy a business purpose test, including quality of the work. That is not at issue in this case; there is no evidence that the bargaining unit's work is inferior to **[REDACTED].** The Company justifies its decision, in part, on the reduction in overtime, which would necessitate increasing the backlog if the belt wrapper work were kept in-house. In a typical case, one might question whether the Company could eliminate overtime simply to justify a decision to contract out work. But those are not the circumstances at issue here. In a previous ArcelorMittal case a Company witness said it was as though the steel industry had fallen off a cliff in September or October of 2008. The testimony in the instant case about the parties' reactions are consistent with that description. Machine shop employees were working unlimited overtime, which essentially had given the Company considerable discretion about contracting out work the bargaining unit was capable of performing. A Union witness said it gave the Company a "pass" as long as employees were working as much overtime as they wanted. But as the parties approached the end of the year, they recognized that things were about to change.

The Union's case raises questions about whether eliminating overtime in the machine shop was an efficient way of managing the backlog or having work done at the lowest cost. The contract, however, requires only that the Company make a good faith business decision. Given the circumstances that existed in January 2009 – including the suddenness of the Company's change in fortune – it would be difficult to conclude that the Company's decision to reduce overtime was motivated by bad faith, which would include an intention to deprive bargaining unit employees of work.

But even if I were to find that the Company had a bona fide business purpose, I cannot find that its evidence supports the existence of a meaningful and sustainable economic advantage. An economic advantage seemingly goes to cost – having the work done off-site must create an economic advantage for the Company, presumably by establishing a lower cost, albeit one that is not created by comparing wage rates. The word "meaningful" suggests not only that the cost difference has to be more than trivial, as I said in ArcelorMittal No. 26, but that it has to be significant. This interpretation is consistent with the Guiding Principle, which recognizes that the bargaining unit should do work it is capable of doing, absent specific exceptions. Minimizing the exception requirements would trivialize the Guiding Principle, which would be inconsistent with they way it has been viewed for many years. More troubling is the use of the term "sustainable." In ArcelorMittal Award No. 26, I said, "Presumably the word 'sustainable' is intended to require that cost savings in chain repair would endure, and not merely be short-lived." This was a serviceable definition in that case because the case turned on the need for the Company to purchase equipment that would be used over a period of years. It was not merely the fixed cost that mattered, but the fact that the equipment would be used quite sparingly, perhaps as little as 80 man-hours a year. The decision to contract out, then, created an enduring economic advantage.

In the instant case, the Company contends that it has shown that the economic advantage was "sustainable" by comparing relative costs over time, with each comparison showing a significant cost-savings by having a contractor do the work. It may be that the Company seeks a favorable decision as a way of justifying a continuation of its ability to contract out belt wrappers. But despite the situation encountered in ArcelorMittal Award 26, the history of contracting out cases in the industry has focused narrowly on particular projects. This is not to say that there have never been cases where a decision applies to a course of work. Moreover, some decisions may have general application because the evidence supporting the prevailing side's argument is fixed. But most cases have had a limited focus – i.e., whether the Company can contract out the replacement of a hydraulic system (USS-43,842); or the replacement of the lubrication system on trigger cars (USS-44,887); or the repair of 5 electric motors (Ispat Inland Award No. COEX 33).

Similarly, the issue in this arbitration is whether the Company properly contracted out the rebuild of the belt wrapper in March 2009. Although "sustainable" can mean "enduring," dictionary definitions of "sustainable" also include such entries as, "To support, hold or bear up from below" (Dictionary.com) and "Capable of being proven as true or real." (Merriam-Webster on-Line). These definitions seem especially apt in the instant case, where a single project is at issue. Thus, the Company is required to sustain its contention that contracting out produced a meaningful economic advantage. But no matter which definition applies the Company's proof in this case is not sufficient to satisfy the requirements of Article II-F-2-b-1.

Although historical comparisons are useful, I disagree with the Company's apparent claim that a significant disparity in previous repair costs of itself justifies a decision to contract out such work in the future, especially when, as here, there are questions about the sufficiency of the comparison. The Company's data show that **[REDACTED]** has produced two belt wrappers at less cost than the machine shop. The limited sample used for the comparison is curious, especially given the regularity of belt wrapper repairs. But even putting that aside, there are

problems with the analysis. Part of the concern involves cylinder costs. There is no dispute that the **[REDACTED]** bid in the instant case did not include cylinder costs, estimated by both parties to be about **[REDACTED]** . And it became clear at the hearing – for the first time – that the **[REDACTED]** costs used in the SEA analysis *did* include cylinder costs, despite Mongaraz' (who did the analysis) belief that they did not. The Company argues that this fact does not affect its conclusion that the comparison produced a sustainable economic advantage, although it agrees that the difference is somewhat smaller. But it certainly raises questions about the adequacy of the SEA analysis that prevent a finding of any enduring advantage.

The rebuild at issue must also be taken into account. The **[REDACTED]** cylinder repair cost must be added to **[REDACTED]** bid to determine whether there was an economic advantage to contracting out the work. In addition, the Company acknowledged that it furnished **[REDACTED]** with materials worth about **[REDACTED]**, although the Union says the actual amount was much higher. This, too, must be added to the **[REDACTED]** quote. The rebuild at issue, then, would cost about **[REDACTED]**, not counting other adjustments that the Union says should be made. Even with these additions, the difference between the two-job average of the machine shop belt wrappers is about **[REDACTED]** more than **[REDACTED]** cost.[2] But there are additional problems with the Company's case.

The Company did not satisfactorily address the Union's claim that the bargaining unit could have done the job in fewer hours if the employees used the same procedures as **[REDACTED]**. Bargaining unit employees criticized the quality of **[REDACTED]** work and stressed the detail and superiority of bargaining unit work. The Company did not explain how **[REDACTED]** employees could have achieved similar results in half the number of hours. The Company correctly points out that it is free to decide the level of quality it wants in a belt wrapper rebuild; it does not have to order a better rebuild if it decides a less extensive one is serviceable. But the Company cannot avoid the Guiding Principle by identifying a cheaper contractor and then making comparisons to bargaining unit jobs that seemingly were completed under a different standard.

The Company was aware of the amount of time bargaining unit employees spent on the belt wrapper, especially in the S&A and reassembly phases. But there is no evidence in the record that machine shop supervisors ever told bargaining unit employees to shorten the process or, more significantly, ever described shortcuts or other techniques they could use to reduce the man-hours. Although there was testimony at the hearing that **[REDACTED]** produced a serviceable rebuilt belt wrapper in fewer hours, there was no evidence that bargaining unit employees would have been unable to provide comparable work in similar circumstances.[3] It is

[2] The two-job average of machine shop projects includes the one in 2006 that the Union said was significantly larger than other rebuilds, and therefore skewed the comparison. The Company did not counter this with evidence that one of the two **[REDACTED]** rebuilds was comparable in scope to the 2006 in-house rebuild. It submitted a checklist that showed there all four jobs involved work on most of the same components, but that did not indicate the scope of the work. Presumably the Company would have records from all four jobs that would provide a more meaningful comparison.

[3] The Company said any consideration of in-house work must include overhead costs. Charges for supervisory time are included in the Company's charging rate. Union calculations of lower charging rates

worth noting that these are the sorts of issues the parties might have discussed in a contracting out meeting prior to the Company deciding to contract out the work.

In summary, the Company's evidence does not persuade me that there was a meaningful sustainable economic advantage supporting its decision to contract out the rebuild of the belt wrapper to **[REDACTED].** I understand that the work on this project is finished. As a remedy, I will order the Company to pay bargaining unit employees straight time wages for all hours spent on the project by the contractor. An overtime rate is not appropriate because there was no showing that other work in the backlog was so time sensitive that it could not be delayed while employees worked on the belt wrapper. The parties are usually able to agree to the details of such make-whole remedies. If they cannot, they can resubmit the case. I reject the Union's claim that the Company committed a repeated or intentional violation of the notice provisions of the contracting out language. The Company did commit a notice violation, but in view of the remedy on the merits, no remedy for the notice violation is warranted.

AWARD

The grievance is sustained to the extent provided in the Findings. The Company will provide make-whole relief as indicated in the last paragraph of the Findings.

Terry A. Bethel
January 31, 2010

do not include as much supervisory time, and they do not include such things as the use of facilities and equipment wear and tear. Kohlberg testified that there are no fixed costs in the long term, so that overhead costs must be considered even if doing the work in-house seems to create no additional expense. Neither party furnished cases indicating how arbitrators have approached such issues. But some courts have not been persuaded by Kohlberg's argument, even though they do not question the economic analysis. Those courts have followed a pragmatic approach that asks whether an event – typically a breach – produces savings in overhead costs that can be deducted from a damage award. Fixed costs are not allocated between activities if there are no cost savings as a result of a breach. See e.g., Hallmark Ins. Adm'rs v. Colonial Penn Life, 990 F.2d 984 (7th Cir. 1993).