IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

And

ArcelorMittal Case No. 37
Vacation Pay Calculation

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 6787, USW

OPINION AND AWARD

Introduction

This case from the Burns Harbor Plant concerns the Union's claim that the Company improperly calculated vacation pay for 2009 vacations. In particular, the Union contends that the Company had no right to exclude from the calculations the $6,000 signing bonus paid upon ratification of the 2008 Basic Agreement. The case was tried in Cleveland, Ohio on January 11, 2010. Robert Casey represented the Company and Rick Bucher presented the Union's case. There were no procedural arbitrability issues. The parties did not stipulate to an issue on the merits, but agreed that I could frame the issue based on the evidence and arguments they presented. The parties filed post-hearing briefs which I had received by February 10, 2010.

Background

There is no significant factual dispute. Following the end of multi employer bargaining in basic steel in 1986, the USW and the companies negotiated separately, although they often

used pattern bargaining in which one company was chosen to bargain first, thus establishing a pattern the other companies were expected to follow. There had not been complete uniformity between the companies even under multi-employer bargaining, and more differences were created after its demise. But David McCall, the Union's District 1 Director and a member of the International Executive Board said the Union's focus in pattern bargaining was "bottom line labor costs," which he said had been "very close by 2002." That was the year the Union bargained a contract with ISG that significantly changed basic steel language. But, McCall said, the Union was able to obtain "almost the same language" from USS in 2003. Since that time, he said, USS and ArcelorMittal (a successor to ISG that also operates plants previously owned by Bethlehem and Ispat-Inland) agreements have been "very similar in terms of language," although he acknowledged that there were some significant differences. But, McCall said, the total labor costs were "about equal," which was the Union's principal interest. He said the Union wants the bottom line labor costs to be the same so that no company has an advantage based on labor cost.

Although ArcelorMittal and USS bargained separately for their 2008 Basic Labor Agreements, the Union chose USS to establish the pattern. The Company and Union recessed negotiations in early July 2008 while the Union continued to pursue an agreement with USS. Those parties completed negotiations in late July, and the ArcelorMittal-USW negotiations resumed in Pittsburgh on August 8, 2008. Among other things the economic package agreed to between USS and the Union included a $6,000 signing bonus. Dennis Arouca, then the Company's Vice President of Labor Relations, testified that the Company thought the USS package was too expensive. The Company sought wage and benefit changes, including a reduction in the signing bonus, but was not successful. Arouca said the Union was not willing to move off the pattern.

On August 26, 2008 the parties initialed their agreement to Article 10- B, which covers vacations. Article 10-B-5-a-(2) is a principal issue in this case. Section 5-a reads as follows:

> a. Employees will be paid for each week of vacation the greater of:
>
> (1) Forty (40) multiplied by the Regular Rate of Pay of the Employer's permanent job as of January 1 of the vacation year, or
>
> (2) Two percent (2%) of their W-2 earnings excluding profit sharing during the preceding year (such amount Vacation Rate of Pay).

Section a-(1) of the 2008 Agreement represented an improvement over the 2005 contract, which had used the term "Base Rate" rather than "Regular Rate." The Regular Rate adds the average hourly incentive payment to the calculation; the Base Rate does not include any incentive payments. Otherwise, the language was unchanged from the parties' 2005 Agreement (or the 2002 ISG-USW Agreement.)

The issue in this case is whether the $6,000 signing bonus should be included in the calculation made pursuant to Subsection a-(2), above. The Union argues that the language mentions only one exception – profit sharing earnings. Nothing else, it says, was to be excluded from the amount shown on an employee's W-2 form, which would include the signing bonus as ordinary income. The Union buttresses its position by pointing to an agreement with USS which does not have a corollary in the USS-ArcelorMittal Agreement. Appendix A-2 of the USS-USW 2008 Agreement reads as follows:

> (1) Each employee who is actively at work on September 1, 2008 shall receive a cash payment of $6,000 on or before October 1, 2008. This Signing Bonus shall not be used in the calculation of any other pay, allowance or benefit.
>
> (2) This signing bonus shall be subject to all required tax withholdings and Union dues.

This language makes it clear, the Union says, that the signing bonus would not be used in the vacation pay calculation for USS employees. The Union also says it gave notice of this

provision to Arouca when negotiations resumed on August 8. Arouca did not deny receiving agreement documents from the USS-USW negotiations, but he said the packet included several hundred pages and the Union did not call the vacation pay issue to his attention. He did not remember whether he saw Appendix A-2 in the group of documents.

The Union also points to a term sheet initialed August 30, 2008. It includes the following language:

> A signing bonus of $6,000 to be paid on or before November 1, 2008 to all employees accruing seniority on the Effective Date with criteria regarding S&A, Workers Compensation and Probationary as set by the Pattern. Side letter on Signing Bonus and change in paydays.

The Union points out that the language says nothing about any exclusion of the signing bonus from W-2 earnings. It also argues that the words "as set by the pattern" modify only S&A, workers compensation, and probationary employees, meaning that these matters will be handled as they were in the pattern agreement with USS. But the provision is silent, the Union says, about use of the signing bonus in vacation pay calculation, even though the Company should have understood that USS and the Union had agreed to exclude it.

Finally, the Union points to the signing bonus side letter referenced in the term sheet. That document, too, was initialed on August 30, 2008. It is from Arouca to McCall, and reads as follows:

> This confirms our understanding in connection with the payment of 2008 Signing Bonus:
>
> 1. Employees who are off work receiving Sickness and Accident payments or Workers Compensation payments will receive their 2008 Signing Bonus when and if they return to work within one (1) year of the Effective Date of the 2008 Basic Labor Agreement.
>
> 2. Probationary Employees will receive their 2008 Signing Bonus upon completion of their probationary period. Employees who do not complete their probationary period will not be entitled to a 2008 Signing Bonus.

3. [Establishes a pay schedule to reconcile locations with staggered pay periods]
4. Except as described above, Employees from Indiana Harbor East and Minorca Mines will receive their signing bonus no later than October 2, 2008.

The Union notes that this letter covers the subjects enumerated in the term sheet provision covering the signing bonus – probationary employees and employees on S&A or workers compensation. The letter does not mention whether the signing bonus was to be included in vacation pay calculations.

The Company stresses its agreement to the pattern, which included the $6,000 signing bonus that the Company says it understood would not be used to help calculate vacation pay. The Company points out that it resisted the pattern financial package the Union negotiated with USS, believing it was too expensive. But the Union insisted and ultimately the Company agreed. It did so, the Company argues, because it understood the implications of pattern bargaining and knew that what USS had negotiated with the Union would be passed through to ArcelorMittal. Taking the pattern, the Company argues, means that it should get the same deal the Union negotiated with USS. The very survival of pattern bargaining would be threatened, the Company claims, if the Union wins this case. Despite the Union's insistence on the pattern financial package, the Company would end up paying $7 million more that it would have had it gotten the same deal as USS. The Company also notes that the Union says its interest in pattern bargaining is less to insure identical language at different workplaces than it is to insure that the bottom line financial costs are the same. However, the Company says the Union did not explain in this case how the $7 million in increased vacation costs for ArcelorMittal created similar bottom line costs for USS which did not have to include the singing bonus in vacation pay calculation.

The Company also says there was no discussion about the use of the signing bonus in vacation pay calculation in the negotiations, or about the Union's letter agreement with USS. All the Union wanted, the Company says, was the pattern it had received from USS, and that, the Company says, is all it should get. The Company also finds support in the documents. As quoted above, the parties agreed to the words "set by the pattern" in their term sheet. The Company contends that those words modify the entire sentence, including the payment of the bonus. The Union argues that the words "set by the pattern" apply only to S&A, Workers Compensation and Probationary" which immediately precede the pattern language. The Company, however, argues that this reading makes sense only if there had been a comma after the words "effective date." Thus, the language would say

> A signing bonus of $6,000 to be paid on or before November 1, 2008 to all employees accruing seniority on the Effective Date **[,]** with criteria regarding S&A, Workers Compensation and Probationary as set by the Pattern. Side letter on Signing Bonus and change in paydays.

This would make it clear, the Company says, that the phrase "regarding S&A" and other benefits was set off from the first part of the sentence, which says there will be a signing bonus of $6,000.

The Company also argues that once negotiations were completed, the Union itself understood that the signing bonus was not to be included in the calculation of vacation pay. The Union prepared two summary documents to present to its membership for ratification. The summary prepared for the USS contract describes the signing bonus and then says,

> The signing bonus will not be used in the calculation of any other pay, allowance or benefit, but can be deferred to your 401(k) account and will be subject to all required tax withholding and Union dues.

The ArcelorMittal summary prepared by the Union contains identical language. On cross examination, McCall said he overlooked this language in the ArcelorMittal summary, which obviously had been copied from what the Union and USS had agreed to. But the Company says

if McCall overlooked the sentence, it was because it said exactly what he thought the parties had agreed to – the vacation bonus would not figure into the vacation pay calculation.

Findings and Discussion

If this were an ordinary contract – even an ordinary labor contract – the Union's logic would seem unassailable. It is a basic principle of contract construction that the omission of language from the contract creates an inference that the terms covered by that language are not part of the contract. In addition, the term sheet language can comfortably accommodate the Union's interpretation even without the comma the Company lobbies for, although it might be clearer if the comma were there. And, of course, Article 10-B-5-a-(2) is not ambiguous. But the point to remember in this case is the context in which the Company and Union agreed to the bonus. The typical contract – at least when the negotiations are between parties of some bargaining strength – does not involve having an unrelated party negotiate the deal and then signing on to what they did. But that is what happens, more or less, in pattern bargaining for labor contracts. For reasons no one questions, the Union found it advantageous to bargain a pattern agreement with one company rather than carrying on nearly simultaneous negotiations, which might have strengthened the hand of the employers. However, pursuit of that interest cannot be divorced from an analysis of what the parties agreed to.

It seems likely that whoever published the contract summaries for bargaining unit employees simply copied the limiting language for the signing bonus from the USS summary into the ArcelorMittal summary because he or she believed the Union had cut the same deal with both companies. As McCall said, the focus of pattern bargaining was on insuring equality in labor costs between the two companies. This was the justification advanced by the Union when

ArcelorMittal resisted the USS financial package – including the signing bonus – because it thought the deal was too expensive. Ultimately the Company agreed to the Union's proposal. Company witnesses testified credibly that when they did so, they understood they were getting the same package USS negotiated. But the Union's position in this case comes with a $7 million price tag that was not charged to USS, and which presumably frustrated the Union's goal of financial parity.

When the Union resumed negotiations with ArcelorMittal and insisted on the pattern set by USS, it understood that the USS package restricted the use of the signing bonus for vacation pay calculation. Indeed, the Union had a member of the USW-USS bargaining team in the ArcelorMittal negotiations to help insure uniformity. Nothing in the USW-ArcelorMittal negotiations suggested that the Union was trying to modify the pattern bargain over the use of the signing bonus. Indeed, the parties did not discuss the matter at all; rather, their discussions were focused on the amount of the bonus. When the Company agreed to take the pattern, it was reasonable for it to believe that it got what USS had agreed to. It seems equally likely that the Union thought the same.

This is not to suggest that negotiating parties cannot take advantage of opportunities created in collective bargaining. If an employer accepts a deal that turns out to cost more than it had believed initially, it typically cannot escape those consequences simply because the union knew the true cost would be higher – at least, that is the ordinary result absent some form of misrepresentation. Similarly, parties sometimes take advantage of language that neither side paid much attention to in negotiations or that neither side recognized created a windfall for one party. There are exceptions, of course, but by and large the parties to a collective bargaining

agreement are expected to take care of their own interests in negotiations. And that is especially true when the parties use experienced, capable negotiators, as was the case here.

But these negotiations were different. The Union negotiated a pattern agreement with USS that apparently encompassed several hundred pages of documents, and then gave all the documents to ArcelorMittal when the parties resumed negotiations in August. Although the signing bonus may have been a significant part of the parties' settlement, its effect on vacation pay was not. Neither side claims there was any discussion of that issue in the negotiations. Moreover, the W-2 vacation pay formula in Article 10-B-5-a-2 was not new. The same language appeared in previous contracts and, as far as the record shows, there was no attempt to modify it during negotiations. Although the Company had the documents from the USS-USW negotiations, there was nothing to call its attention to the fact that the deal the Union sought over the signing bonus was sweeter than the one it had negotiated with USS. Nor is there any real evidence that during the negotiations the Union actually sought a better bonus deal than it had gotten from USS. Given the circumstances the parties faced, if the Union demanded the pattern but intended to change it for ArcelorMittal, then there should have been something to alert the Company to that fact. But the Union did not allude to the vacation pay issue because, as the agreement summary makes clear, it was not trying to make that change. Rather, it seems likely that the possibility of including the bonus in vacation pay calculation occurred to the Union after negotiations were completed. In any event, I find that the Union cannot demand the pattern and then, when the Company agrees, claim that the agreement differs significantly from the pattern. At least that is true when the deviations from the pattern that were not identified to the Company, or could not otherwise have reasonably been identified by the Company, which was the case here.

I also note that the Union's position in this case would seem to create a larger signing bonus than the parties agreed to. The signing bonus was a one-shot deal; employees received it the first year of the contract. Any effect on vacation pay, then, would be confined to that year. The obvious effect of the Union's position would be a one-time increase in vacation pay that had no real relationship to the employees' typical earnings under the Agreement. In effect, then, the Union's interpretation would simply guarantee an enhanced signing bonus, something the parties had not agreed to.

Because of the circumstances outlined above, I find that the Company was not required to use the signing bonus in the calculation of vacation pay.

AWARD

The grievance is denied.

s/ Terry A. Bethel
Terry A. Bethel
April 6, 2010