IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA

Case No. SCIH-10-001
And South Chicago RR – PEP Case
Case 42

UNITED STEELWORKERS
INTERNATIONAL UNION AND
LOCAL UNION 1011, USW

OPINION AND AWARD

Introduction

This case concerns the Union's claim that the Company improperly denied a pension enhancement to Grievant Carl Dutko when he retired from the South Chicago Indiana Harbor Railroad on September 1, 2009. The case was tried in the Company's offices in East Chicago, Indiana on October 26, 2010. Robert Casey represented the Company and Bill Carey 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 November 30, 2010.

Background

As the Company's brief notes, ArcelorMittal Case No. 37, decided on April 6, 2010, and the instant case grew out of the same term sheet the parties initialed as part of their 2008 Basic

Labor Agreement. The background to those negotiations was adequately summarized in ArcelorMittal Case No. 37:

> 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.
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> Although ArcelorMittal and USS bargained separately for their 2008 Basic Labor Agreements, the Union chose USS to establish the pattern. ArcelorMittal and the 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.

In ArcelorMittal Case No. 37, the issue was whether a $6,000 signing bonus should be used in calculating an employee's vacation pay. The signing bonus was part of the pattern set by the USS-USW Agreement. That contract provided for a $6,000 signing bonus and also said, "This Signing Bonus shall not be used in the calculation of any other pay, allowance or benefit." This sentence excluded using the signing bonus in vacation pay calculation. But the language in the ArcelorMittal-USW Agreement did not include that sentence. Rather, the vacation pay article said employees were to receive a percentage "of their W-2 excluding profit sharing during the preceding year…." The Union argued that the only exception from W-2 earnings was for "profit sharing," and that, the signing bonus not having been excluded, it should count in calculating vacation pay.

The Union buttressed its argument by pointing to the term sheet the parties initialed on August 30, which said, in relevant part:

> 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. (Italics added)

In ArcelorMittal No. 37, the Union focused on the italicized words and argued that they modified "S&A, Workers Compensation and Probationary", but not "A signing bonus of $6,000." Thus, the Union argued that the parties agreed the ArcelorMittal signing bonus would not follow the pattern set by the USS-USW negotiations, at least for purposes of calculating vacation pay. The Union also pointed to a signing bonus side letter which covered certain details about the bonus, but did not say the bonus would be excluded from vacation pay calculation.

Although the opinion in ArcelorMittal Case No. 37 acknowledged the strength of the Union's arguments under basic principles of contract law, I found more compelling the fact that the parties' intent was essentially to adopt the pattern bargain set by the USS-USW Agreement. This did not mean there were no differences in the two contracts. There were, in fact, already differences, even though the previous agreements had been based on pattern bargaining as well. I found it significant that amidst the Union's demand to follow the pattern, the parties did not discuss the impact the signing bonus would have on vacation pay. In particular, the Union did not say it intended a different treatment for vacation pay calculation than the USS-USW contract allowed. The Opinion says:

> 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 were not identified to the Company, or could not otherwise have reasonably been identified by the Company, which was the case here.* (Italics added)

In the instant case, the Company relies, in particular, on the italicized language. Although the Company agrees that in ArcelorMittal Case No. 37 it argued that the words "as set by the pattern" modified the signing bonus as well as the other listed benefits, the Company contends that the real basis for the decision in Case No. 37 was the italicized language just above. And it says the reasoning reflected there applies equally in the instant case.

In the 2008 USS-USW negotiations, the parties agreed to a supplemental payment to former National Steel employees who began work for USS after it purchased the assets of bankrupt National. As a result of the bankruptcy, the National Steel pension plan had been taken over by the Pension Benefit Guaranty Corporation (PBGC), which would pay retirees a reduced pension. In the USS-USW 2008 Agreement, USS agreed to make a $7500 supplemental payment to former National employees who qualified under certain criteria. The language agreed to by those parties says:

> 3. **Retirement Payments – Former National Steel Employees**
> Effective January 1, 2009, the Company will provide a one-time $7500 cash payment to employees following retirement if:
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> a. They are at least age 56 as of September 1, 2008,
> b. They retire after attaining age 60, and

c. They retire on or after January 1, 2009 and before the end of the term of the 2008 Basic Labor Agreement.

The payment will be made no later than the end of the month following the month in which they retire. Such payment will not be considered covered compensation for any other benefit purpose and will be subject to employment taxes.

The language agreed to by ArcelorMittal and the Union tracks the USS-USW language. The ArcelorMittal-USW term sheet says:

> Pension dated 08-29-08 as attached including a Pension Enhancement Payment (PEP) to participants of the SPT. The PEP is a one-time lump sum cash payment of $10,000 to Employees following retirement if:
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> - They are at least 56 years old on 09/1/08,
> - They retire after attaining age 60 and
> - They retire on or after 01/01/09 and before the end of the term of the 2008 BLA.

SPT is the Steelworkers Pension Trust, a multi-employer pension plan that covers new hires and employees who formerly worked for legacy steel companies. As noted above, Bethlehem was one of those companies. In addition, ArcelorMittal purchased assets of other bankrupt steel companies, including LTV, Acme, Weirton, and Georgetown. Like National, those companies' pension plans were taken over by PBGC, and employees who were covered by those plans would receive less from PBGC than they would have gotten had the companies not gone bankrupt. When the parties initialed the term sheet, they apparently believed Weirton, another legacy company, would participate in the SPT. But a Company witness said the demographics were "wrong" and SPT would not accept them. Thus, the term sheet language the parties initialed was changed to say that employees covered by the Weirton 401K were eligible for PEP, assuming they met the other requirements. Former employees of Ispat-Inland Steel, which is now part of ArcelorMittal, are covered by a defined benefit pension plan and do not participate in the SPT. Thus, they are not eligible for PEP. The same was true of USS employees covered under the Carnegie Plan.

Grievant had worked for the Chicago Short Line Railroad, which was owned by LTV. During that relationship Grievant was covered by the Railroad Retirement System, and not by the LTV plan. In addition, Grievant was represented by the United Transportation Union, not USW. The Short Line RR was shut down after LTV went bankrupt. The railroad's assets were purchased by ISG, which also purchased LTV assets in bankruptcy. Subsequently, ISG became part of what is now ArcelorMittalUSA. Grievant was never covered by the LTV pension plan and, therefore, was not affected when PBGC took over that plan. When ISG took over the railroad in 2005 and began operating it as the South Chicago Indiana Harbor Railroad, Grievant and the other railroad employees were represented by USW and were covered by the SPT. The Company made contributions to SPT on Grievant's behalf, but they were reduced by the amount of the pension contribution the Company made for Grievant under the Railroad Retirement System.

The Company claims that the ArcelorMittal PEP had the same purpose as the USS-USW plan, that is, to provide a supplement to employees of legacy companies now working under the ArcelorMittal umbrella, whose pensions had been reduced because of their former employers' bankruptcy. Under the Company's interpretation, this would include former LTV employees, including railroad employees, but only if they were covered by a pension plan that was taken over by PBGC. There were some LTV railroad employees in Cleveland who, unlike Grievant, had been covered by the LTV pension plan. They were subject to a reduced benefit under PBGC and, the Company says, qualified for the $10,000 cash payment. But even though Grievant worked for LTV, he did not receive a reduced pension from PBGC and, therefore, the Company says, does not qualify for PEP.

The Union points out that Grievant meets all of the criteria spelled out in the PEP language: he is covered by SPT; he was 56 as of September 1, 2008; he retired after age 60; and he retired after January 1, 2009 and before the termination of the September 1, 2008 agreement. Nothing in the eligibility criteria says Grievant had to be covered by a legacy company pension plan or that he had to have his pension benefit reduced by PBGC. The language is not ambiguous, the Union says, and should be interpreted as written without reference to other factors. The Union also says the reasoning in ArcelorMittal No. 37 does not apply to the instant case. In ArcelorMittal No. 37 the Company argued that the words "as set by the pattern" in the signing bonus agreement meant that the parties had simply agreed to the USS-USW pattern, which did not include the signing bonus in the calculation of vacation pay. But the Union points out there are no such words in the PEP language. Moreover, had the parties intended to exclude railroad employees from coverage under PEP, the Union says, they could have done so in a letter agreement the parties executed that said railroad employees were covered by the Basic Labor Agreement, with six exceptions; none of those exceptions mentioned PEP.

The Union also argues that its proposal for a pension bridge provision supports its position in this case:

a. An actively employed participant who retires during the term of this Agreement and who was employed at a former ISG facility, and would otherwise be eligible for:

    1. An unreduced pension under the Steelworkers Pension Trust, and

    2. Retiree healthcare benefits from ArcelorMittal

        a. Shall, upon retirement from ArcelorMittal, receive a one-time lump sum Special Retirement benefit of $20,000;

        or

        b. An actively employed participant who was employed by a former ISG facility but who at time of retirement is not eligible to receive an unreduced PBGC

pension under the LTV Steel, Bethlehem Steel, Acme Steel, Weirton Steel or Georgetown Steel Plans, and who, retires from ArcelorMittal and would otherwise be eligible for:

1. An unreduced pension under the Steelworkers Pension Trust, and

2. Retiree healthcare from ArcelorMittal

Shall, upon retirement from ArcelorMittal, elect to receive the Pension Bridge Benefit. A Participant's Pension Bridge Benefit shall be a monthly amount equal to the present value of his monthly unreduced PBGC pension, and shall be payable from the first full calendar month following the month in which retirement occurs until the earlier of: (a) month in which the participant reaches age 65, or (b) the month in which the participant elects to commence his PBGC pension.

The Union notes that the proposal was in two parts. Employees who were to receive a reduced PBGC pension – like those in the USS-USW Agreement for former National employees – would receive a monthly benefit. But the proposal also called for a $20,000 cash payment to employees who received an unreduced pension from SPT. There was, the Union points out, no mention of a PBGC pension in that part of the proposal.

Dave McCall, the Union's District 1 Director, testified that discussions about PBGC and pension supplements occurred only in the context of the pension bridge proposal. They were not mentioned when discussing the PEP. McCall acknowledged that the pension bridge proposal was not exchanged for the PEP proposal, although he said the Union withdrew the bridge proposal after USS and USW reached agreement. The Union says, however, that the pension bridge proposal demonstrates that the Union knew how to mention the PBGC in pension supplement proposals when it intended to and, furthermore, that the Company knew the Union had made pension supplement proposals that were not contingent on a PBGC reduced pension. The Union also says what the parties actually agreed to in PEP looked very much like the first alternative under the pension bridge proposal.

The Union also contends that the PEP was not based on the pattern for pension enhancements set by the USS-USW negotiations. McCall testified that the employees covered by the Inland or Carnegie plans were not eligible for PEP, but they received a special payment of 13 weeks vacation pay when they retired. McCall said he mentioned this to Jim Michaud, the Company's Vice President of Human Resources and its pension negotiator, and that he may have mentioned it to Vice President of Labor Relations Dennis Arouca, which Arouca denied. Christine Phelps, the Company's Director of Pensions, testified that she did not recall any such conversation between McCall and Michaud, although she acknowledged that she did not attend all of the meetings. Dave Millsap, the Union's Sub-District Director for Northwest Indiana, was involved in the USS-USW negotiations, and he testified that the same motive was mentioned in those negotiations. The Company argues that the Union did not raise this contention during the grievance procedure and did not try to amend the minutes of the third step meeting to reflect that it was discussed until 8 days before the arbitration hearing. The Union says it is not uncommon for these parties to amend grievance minutes shortly before a hearing. The Union also says its position has always been that the Company improperly denied PEP to Grievant. Grievant met all of the written requirements and, the Union says, there were no other conditions.

The Company argues that the parties' intent when they agreed to PEP was to follow the USS-USW pattern of providing a retirement enhancement to employees whose pensions had been reduced by PBGC. The only change between the two agreements, the Company says, was that the ArcelorMittal-USW enhancement was $10,000, versus $7500 for former National employees. The Company describes this as "pattern plus," meaning that the intent and language were similar, but the Union was able to bargain a higher payment from ArcelorMittal. The Company points to Vice President Arouca's signed declaration that the final term sheet language

on PEP was drafted by the Union, and that the Union had told the Company it would have to agree to the USS-USW pattern to get an agreement. Arouca said he was aware of the $7500 payment for former National employees in the USS-USW agreement and that he believed PEP was to accomplish the same thing for the former employees of other legacy companies, that is, to provide a supplement to employees with PBGC pensions. Arouca said no one ever told him the payment was intended to apply to anyone else and that no one had told him – or to his knowledge anyone else from the Company – that the Union's intent with PEP was to provide employees covered by the PST the same kind of special payments made under the Inland defined benefit plan. Patrick Parker, Corporate Manager of Labor Relations, said he did not recall any mention of PEP at the bargaining table, and that he understood it to simply mirror the USS-USW agreement for employees with reduced PBGC pensions. He did not recall McCall talking about equity between PBGC and Inland pension plan employees.

The key to the case, the Company says, is found in the italicized language from ArcelorMittal Case No. 37, quoted above at page 4. Just as in that case, here the Union never told the Company that it intended the PEP agreement to be anything other than what it appeared to be, which was a commitment to provide the same benefit for former employees of legacy companies as the USS-USW agreement had done for the former National employees. The two agreements are almost identical in language, the Company says. The Company also says the Union never broached its argument about providing a special payment to match the one under the defined benefit plan until after issuance of the award in ArcelorMittal No. 37. At that point, the Company says, the Union understood that it could not merely rely on language differences, so it created its claim that the PEP was not part of the pattern. The Company estimates that if the Union prevails in this case, it could cost the Company as much as $500,000, which will be paid

by the Company and not by the pension plan. This additional expense, the Company says, also undermines McCall's claim that the purpose of the pattern was to insure that the companies had uniform labor costs. There is no comparable payment for USS employees who were not formerly employed by National.

The Company points out that the Company was unable to tender any notes or other writings indicating that its PEP proposal was not based on the pattern. It also says the Union cannot rely on its bridge proposal to show that it intended to secure an enhancement for employees who did not work for a legacy steel company and thus, would not have been eligible for an unreduced PBGC pension. The Company says it proposed changes to the Union's bridge proposal that made it look more like the USS-USW agreement for National employees. The Company also introduced an e-mail between the Union's pension negotiator and a Company pension consultant. The consultant referenced sections 1.a and 1.b of the pension bridge proposal, quoted above at page 8, in which the consultant asked who qualified as having been employed by ISG and whether these were closed groups.[1] The Union representative's response said ISG employees were those ArcelorMittal employees who did not work for Inland, and that 1.b specifically listed the affected PBGC plans. She also said, "These are closed groups in the sense that the Inland employees nor any new employees that don't also participate in one of the PBGC plans are not included." This and other answers, the Company says, convinced its negotiators that an employee was eligible for the bridge benefit only if he had worked for a legacy company whose pension plan had been taken over by PBGC.

The Company says its position is supported by the Union's Summary Booklet describing the agreements. The summary from the USS-USW Booklet says the payments are for Former

[1] The copy of the pension bridge proposal introduced at the hearing suggests that the consultant was actually asking about sections 2.a and 2.b. But although the numbers may be confusing, it seems clear that he was asking about the alternate proposals for $20,000 cash or a monthly supplement.

National employees, who were 56 on September 1, 2008; retired at 60 or older; and retired after January 1, 2009 and before the expiration of the 2008 contract. The language describing the Union's agreement with ArcelorMittal says:

> The proposed new agreement provides a $10,000 lump sum Pension Enhancement Payment for certain employees who retire between January 1, 2009 and the end of the contract. To be eligible for the PEP, an employee must be at least 56 years old as of Sept. 1, 2008 and at least 60 years old on their retirement.

The Company points out that even though the form of the descriptions differ, both include the age and time requirements spelled out in the respective agreements. The USS-USW version says the payments go to former National Steel employees, but the ArcelorMittal version says the lump sum payment goes to "certain employees." The Company says the words "certain employees" are shorthand for all of the legacy companies under the ArcelorMittal umbrella – Acme, Weirton, Georgetown, LTV and Bethlehem. Otherwise it would make no sense the Company says, because all of the other criteria are already listed and the word "certain" is redundant if it merely restates the obvious. Finally, the Company says the significant differences between PEP and the payments to retirees under the defined benefit plans show that the Union's proposal was not intended to bring equity to the PST employees through PEP. And the Company says the Union's position in this case is inconsistent with the Railroad Side Letter.[2]

[2] Both parties' briefs refer to a proposed PEP side letter between Arouca and McCall. The Union apparently drafted the side letter. However, the letter was never signed and Company witness Parker said there was some "back and forth" on the content of the letter. I cannot give any weight to an unsigned draft of a letter that may have been changed in the review process, especially when I don't know what the letter said before it was changed or who proposed the changes. And, in any event, the Company's principal argument about the letter is that it is almost identical to the USS letter. But the USS-USW letter retains mention of National employees and, like the term sheet version of PEP, the ArcelorMittal letter says nothing about PBGC pensions. However, the Company says the side letter draft's express inclusion of Weirton IRA-covered employees – who had not been mentioned in the term sheet – shows that PEP was intended to apply to employees with reduced PBGC pensions. However, Weirton had not been mentioned in the term sheet agreement because the parties believed that, like other ArcelorMittal employees, Weirton employees would be covered by the SPT. When SPT rejected them it was necessary to mention them expressly to insure coverage under PEP. But that doesn't show an intent to cover only employees with reduced PBGC pensions. No one doubts that PEP covers such employees. The contest

Findings and Discussion

I agree with the Company's claim that ArcelorMittal Case No. 37 was decided on the circumstances rather than the language. I also agree that the same analysis applies in this case. As I said in ArcelorMittal Case No. 37:

> 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.

I am satisfied from the record that Company negotiators Arouca and Parker understood the Union's PEP proposal to track the agreement at USS, where the pension supplement would be available only to former National employees. At USS, the $7500 pension enhancement payment was intended to supplement the retirement income of employees whose pension benefit had been reduced – which the Company calls a "haircut" – because National's plan was taken over by PBGC. The Union points out that the USS-USW contract does not mention a reduced pension from PBGC among the eligibility criteria. Instead, it simply required that employees be at least age 56 as of September 1, 2008; that they retire after reaching age 60; and that they retire before the 2008 contract expired. But by its terms, the $7500 payment was limited to former National Steel employees, almost of all of whom would have been affected by the PBGC takeover of the National Plan. At the arbitration hearing, the Union offered hypothetical examples of National employees who might not be eligible for the pension enhancement under the USS-USW terms even though they were covered by the plan taken over by PBGC. In addition, there was an example of employees who might be eligible for the payment even though they had never been covered by the PBGC plan. Still, it seems fair to conclude that the principal purpose of the

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here is whether its coverage also includes employees who were not subject to a reduced PBGC pension. Insuring that Weirton employees were covered – as they were intended to be – does not narrow the focus of the PEP agreement.

$7500 payment in the USS-USW Agreement was to make up at least some of what those employees lost from their pensions because of the National bankruptcy.

The issue in this case is whether ArcelorMittal reasonably could have understood that the PEP language had a broader application than the USS-USW language. There were such reasons in this case. Although ArcelorMittal No. 37 did not turn on the language the parties initialed on the term sheet, that does not mean the language is irrelevant in the instant case, or that the language should not have aroused interest in its meaning. The USS-USW agreement referred specifically to National employees, which everyone understood to mean employees whose employer had gone bankrupt and whose pension plan had been taken over by PBGC. But the ArcelorMittal PEP language says nothing about the PBGC and it does not mention any bankrupt companies. The Company says, however, that it was reasonable for the Company to believe the Union's proposal was limited to PBGC pensions, and it points to the Union Summary used in ratification meetings as evidence of the Union's intent. As quoted above at page 12, the Union told its members that the PEP would be available to "certain employees," a phrase the Company claims the Union used to avoid having to spell out Acme, Weirton, Georgetown, LTV and Bethlehem.

This is not a persuasive argument. The employees reading the summary could hardly be expected to know what was meant by "certain employees." Moreover, if the Union had wanted to avoid the toil of spelling out all five bankrupt companies in its summary, it could easily have said "legacy" companies. That term has been used in the steel industry since at least the mid-1990's to refer to the pension costs of bankrupt companies. The better reading – and the one actually suggested by the sentence structure – is that the Union used its first sentence to say that only "certain employees" could qualify, and in the second sentence described who those "certain

employees" were. Obviously the sentences could have been written differently or compressed into one. But it makes no sense to think that the Union would have told its members that "certain employees" would get a pension enhancement and then hide important criteria behind the term "certain employees." The point is that while the USS-USW agreement clearly referred to employees of a bankrupt steel company, the ArcelorMittal version did not, on its face, limit participation in the same way.

The Union's Pension Bridge proposal might also have suggested to Company negotiators that they needed to clarify the scope of the PEP. The pension bridge language, quoted above at pages 7-8, is difficult to understand, partly because of its formatting. But it is not hard to see that there were two options for former ISG employees: one for employees who qualified for an unreduced pension from the SPT -- **or** -- one for employees who were not eligible to receive an unreduced PBGC pension under the "LTV Steel, Bethlehem Steel, Acme Steel, Weirton Steel or Georgetown Steel Plans."[3] One of the options, then, refers to the PBGC pension and one does not. Moreover, the employees for whom PBGC was a factor were not, under the proposal, to receive a lump sum; that was reserved for the employees for whom no mention of the PBGC was made. McCall testified that the PEP was not exchanged for the pension bridge proposal. Nevertheless, the structure of the pension bridge proposal, with its apparent distinction between groups with or without reduced PBGC pensions, should have alerted the Company to clarify the scope of the PEP, especially given the fact that, unlike its counterpart in the USS-USW contract, the PEP was not on its face restricted to employees who received reduced pensions from PBGC.[4]

[3] It is worth noting that the Union did not avoid naming the legacy companies when it intended a proposal to bring them into play, and it did not refer to them as "certain" companies.

[4] The Company relies, in part, on an e-mail from the Union's pension negotiator that said Inland employees and new hires "that don't participate in one of the PBGC plans are excluded." This can be read to say that the pension bridge proposal applies only to employees who were covered by PBGC plans.

As the Union points out, the formula in 1.a of the pension bridge proposal looks similar to what the parties actually agreed to in the PEP.

I have not given significant weight to the Union's claim that it mentioned to Company negotiators its interest in providing equity for SPT retirees who were not eligible for the 13 weeks pay under the Inland defined benefit plan.[5] I believed the Company witnesses who said they had not heard this claim until a week or so before the arbitration hearing, and that they did not remember it being raised in negotiations. But I also do not question McCall's credibility or Millsap's. McCall said he mentioned the Union's interest at least to Michaud, and Millsap said the equity argument had also been made in the USS-USW negotiations. Michaud did not testify. I recognize that Michaud no longer works for the Company, but unless he left under unfavorable circumstances, his departure does not mean he would be unable to testify, either in person or by telephone. Arouca, in fact, submitted a written statement and was cross examined about it by telephone during the hearing. It may be, as the Company says, that the Union placed more emphasis on this issue following the award in ArcelorMittal No. 37, and that prior to the award they were prepared to rely on the language, especially since the phrase "as set by the pattern" did not even appear in the PEP agreement, as it had in the term sheet description of the signing bonus, which was the subject of ArcelorMittal Case No. 37.

But she also said "1.a applies to those employees covered by the SPT who meet the listed requirements," and those requirements do not say anything about a reduced PBGC pension.

[5] [5] The Company objects to evidence or argument about this issue, arguing that it was not raised in the grievance procedure and the Union's attempt to change the third step minutes came too late. The Union responds that last minute changes to grievance minutes are common between these parties. Over the years I have encountered such late additions to the minutes by these parties on several occasions, which were typically made without objection as long as the change was made in time to give the other side a chance to formulate a response. The claim that the matter was not discussed in the grievance procedure is a disputed fact, as is the Company's claim that the theory was not mentioned in negotiations. It seems likely that the Union did not say much about the equity argument in negotiations. However, the Company was given notice that the Union intended to raise the issue in the arbitration hearing, and the Company obviously had an opportunity to marshal evidence in support of its claim that the equity rationale was not made in negotiations.

But I do not understand the Union to have abandoned all of its other arguments in favor of the equity claim. The equity argument, in fact, is only a small part of the Union's brief. There is more emphasis on the language differences between PEP and the USS-USW agreement, and on the fact that Grievant met all of the requirements set out in the term letter. The equity argument seemingly was advanced as a way of denying that the only motivation for the PEP was to follow the USS-USW pattern. Still, it seems clear that most of the language in the PEP came from the USS-USW agreement, which justifies an inference that the USS-USW pattern of paying a retirement enhancement was part of the motivation for PEP. But that doesn't mean it was the sole motivation. Part of the pension bridge proposal, for example, asked for a $20,000 pension enhancement without mention of a PBGC pension. Moreover, the Union tendered the pension bridge proposal before USS and USW had agreed to a payment to former National employees, when there was no "pattern." These circumstances in addition to the absence of any PBGC reference in PEP were sufficient to give the Company reason to question PEP's scope, even without a Union motive to provide equity between SPT and the Inland pension plan.

This is not to say that the Union had Grievant or other railroad employees in mind when it withdrew the pension bridge proposal and proposed PEP. But it also did not propose or agree to language that contained the USS-USW restriction, and it is entitled to that bargain even if it applies more broadly than the similar agreement did at USS. I discussed this possibility in ArcelorMittal Case No. 37:

> 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.

I did not apply this reasoning in ArcelorMittal Case No. 37 for reasons I discussed in the next paragraph of that opinion, which is the language quoted above at page 3-4. That passage says in the circumstances of pattern bargaining, a Union that demands the pattern cannot extend its reach "when the deviations from the pattern were not identified to the Company, *or could not otherwise have reasonably been identified by the Company…."* (Italics added) Unlike ArcelorMittal Case No. 37, in the instant case there were reasons to question the scope of PEP. The Company did not do so and the eligibility criteria the parties agreed to do not limit PEP to employees who receive a reduced PBGC pension. I find, then, that Grievant qualified for PEP and that the Company must pay him in accordance with that agreement.

AWARD

The grievance is sustained. The Company is ordered to pay the $10,000 pension enhancement to Grievant in accordance with the PEP.

s/Terry A. Bethel
Terry A. Bethel
January 31, 2011