IN THE MATTER OF THE ARBITRATION BETWEEN

ARCELORMITTAL USA
BURNS HARBOR PLANT

And

ArcelorMittal Case No. 45
Contracting Out Agreement

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 failed to give notice of its intent to contract out vacuum truck work, water-blasting and refractory work on the vacuum degasser following termination of an agreement on December 31, 2010. The case was tried in Chesterton, Indiana on April 19, 2011. Robert Casey represented the Company and Rick Bucher presented the Union's case. The parties agreed that there were no procedural arbitrability issues. The parties submitted the case on final argument.

Background

Under the parties' Basic Labor Agreement (BLA) – and consistent with other basic steel agreements – the Guiding Principle (sometimes referred to as the Basic Presumption) in contracting out decisions "is that the Company will use Employees to perform any and all work which they are or could be capable ... of performing...", subject to certain exceptions. Because the presumption is that bargaining unit employees will do the work, the Company has the burden

of proving an exception applies. In this case, however, the issue does not involve capability or any of the exceptions. Rather, the Company claims it has the right to contract out certain work because the parties agreed it could.

The work at issue includes the operation of a vacuum truck; water-blasting, which apparently is performed in conjunction with the vacuum truck work; and refractory brick work in the vacuum degasser. The Company says it has never owned a vacuum truck, so bargaining unit employees have never done that work. Nor does it employ masons to perform the refractory work at issue, and bargaining unit employees have never done that work. There is no question that the parties entered into an agreement that allowed the Company to contract out at least part of the work at issue. On April 1, 2010, the parties agreed in writing that the Company could "contract out without Notice to the Union all vacuum work (truck operators, manning of hoses and safety watch) from May 2, 2010 through December 31, 2010." The agreement also said that either party could cancel the agreement with 30 day notice given after November 1, 2010. The Union contends it terminated this agreement effective December 31, 2010, but the Company claims that the April 1 agreement was superseded by another agreement reached on April 28, 2010.

The Burns Harbor Plant was affected by the severe recession that began in the fall of 2008. Before the recession ArcelorMittal USA was operating 9 blast furnaces across its properties, including one at Burns Harbor. Burns Harbor blast furnace D was down for repairs and was scheduled to resume operations in November 2008, but it remained idle because of the recession. Madhu Ranade, Vice President of Administration and General Manager of the Burns Harbor Plant, said in late 2008 the Company was faced with the prospect of involuntary layoffs and, in fact, had already given a WARN notice potentially affecting over 2400 employees. But

the parties were able to avoid involuntary layoffs by reaching a Layoff Minimization Plan (LOMP) pursuant to Article 8-A-2 of the BLA. The LOMP included numerous cost-cutting measures, including voluntary layoffs and moving some employees to 32 hour work weeks.

Business began to improve by the second half of 2009, prompting the Company to restart some blast furnaces. Ranade said he told Local Union President Paul Gipson that Burns Harbor would have to compete with other plants to restart blast furnace D, and that meant there needed to be more cost-savings. In particular, Ranade testified that he told Gipson the Company needed relief on the incentive plans and the red circle rates. Indiana Harbor Works started blast furnace #5 in July 2009, followed by Cleveland, which started two blast furnaces in September and October 2009. Subsequently, Indiana Harbor Works started two more blast furnaces by April 2010. Ranade said Burns Harbor was not chosen to restart blast furnace D because the Union had not shown any interest in addressing the cost of the incentive plan and the red circle rates. Ranade said he learned sometime in March 2010 that the Company was planning to restart another blast furnace at one of its plants, and he met with Union representatives about cost-savings measures so the Company could compete for the restart. A presentation prepared for the meeting included a discussion of contracting out, including vacuum truck work and water-blasting. In addition, the parties discussed what could be done for employees of the West Plate Mill.

The parties met again on March 11, 2010 and agreed to a Memorandum of Understanding. The MOU provided, in part, that some employees from the idled West Plate Mill could be moved to vacant jobs at Indiana Harbor West. At the same time they agreed to the MOU, the parties also initialed a document titled "March 11, 2010 Meeting Minutes." That

document recited that the parties had discussed a proposed MOU concerning West Plate Mill employees, and the Burns Harbor Process Document. The minutes continue:

> The two (2) documents were reviewed by the group, and a few modifications were made. The original Process Department Document included a section stating that the LMP [Layoff Minimization Plan] remained unaffected. There was agreement by the group that neither the MOU nor the Process Document had an effect on the LMP. Accordingly the reference to the LMP was not applicable and was removed from the Process Document.

Ranade said in previous drafts the MOU included language that said the MOU and the Process Document did not affect the LOMP. The Union did not want that language to be in either the MOU or the Process Document, so the parties agreed to put it in a minutes document. Ranade said the Union has never claimed the minutes agreement had no binding effect. On April 1, 2010, the parties entered into the vacuum truck contracting out agreement referenced above.

Ranade said there was general agreement that the parties did not want Burns Harbor to be considered a "swing plant," meaning the first one to be closed and the last one to reopen. This led to the appointment in early April of a Union-Management committee to discuss cost-savings ideas that could allow the Company to compete for the next blast furnace that came on-line. The first draft of another MOU was circulated on April 7, in advance of an April 8 meeting. Paragraph 14 of that draft read as follows:

> The Company and the Union agree to contract out industrial cleaning and refractory work for the vacuum degasser in order to enhance sustainable plant reliability and safety.

This language was revised in the April 9 draft by adding the parenthetical phrase "(vacuuming work and water-blasting)" to follow "industrial cleaning." That language was included without change in the April 23 draft, but it was deleted from the final draft the parties signed on April 28.

Ranade testified that during discussions of the final MOU draft Local Union President Gipson asked that the contracting out language be removed from the MOU. Ranade said he was willing to remove the language from the MOU, but was not willing to give up on its substance. Thus, he said the agreement to contract out the work at issue would have to be in writing and signed by the parties. Ranade suggested that the parties put the language in an addendum to the MOU, or use a separate MOU. The Union did not like either option, Ranade said, so he proposed putting the agreement into a document headed "Minutes," as they had done with the March 11, 2010 West Plate Mill MOU. The Union agreed to that proposal.

The first draft of the Minutes document said the parties agreed that the Company could "contract out industrial cleaning and refractory work for the vacuum degasser in order to enhance sustainable plant reliability and safety." This was almost identical to the language the parties removed from the April 23 draft of the MOU. The Union wanted the words "contract out" removed from the draft, and, Ranade said, Union Vice President Pete Trinidad suggested saying the work was "non-core," meaning that it could be contracted out without notice to the Union. Ranade responded that the change was acceptable providing it did not affect the Company's right to contract out the work; all of the Union representatives in attendance assured him it would not. The parties then agreed to the following language:

Minutes of April 26, 2010 Meeting
Between
Burns Harbor and USW Local 6787

> During the April 26, 2010 meeting between Burns Harbor and USW Local 6787 leadership, the parties agreed that going forward industrial cleaning (vacuuming work and water blasting) and refractory work for vacuum degasser will be included in the non-core work provisions of the Basic Labor Agreement.

On April 28, 2010, Ranade, Gipson and Grievance Committee Chairman Kenny Dillon signed the document. The MOU concerning the restart of blast furnace D was signed on the same day and in the same meeting. Ranade said he considered the Minutes document to be part of the MOU and that he would not have signed the MOU without a written agreement allowing the Company to contract out the work in question.

On or about November 2, 2010, Gipson sent Ranade a letter informing him that the Union was exercising its option to terminate the April 1 contracting out agreement on December 31, 2010. This was the agreement that allowed the Company to contract out the vacuum truck work. Ranade wrote to Gipson asking how the Union could terminate the April 26, 2010 Minutes Agreement, but received no reply. On January 7, 2011, James Bellamy, Manager of Labor Relations at the Burns Harbor Plant, wrote to the Union Chairman of the Bargaining Unit Work Committee and Dillon, Grievance Committee Chairman, concerning nine cases that had been appealed to arbitration. All of the cases involved industrial cleaning and refractory work at the vacuum degasser. Bellamy asked why the Union believed the April 28 Minutes Agreement was not controlling in those cases, and asked what remedy the Union wanted.

The Union responded by letter of January 13, 2011 saying it disagreed with the Company's claim that there was an agreement to contract out the work at issue beyond December 31, 2010. The letter also said the Union wanted the Company to stop contracting out bargaining unit work, to follow the contracting out procedures in the Agreement, and to provide make-whole relief for the work done by the contractors. Bellamy said this was an inadequate response because the Union did not address why the cases were not controlled by the Minutes document. He replied to the Union's letter on January 20, 2011, again contending that the Minutes Agreement allowed the Company to contract out the contested work. The Union did not

reply to Bellamy's January 20 letter. Bellamy testified that no one from the Local Union had told him the Minutes document was not a valid contract until the day of the arbitration hearing. However, he acknowledged having a telephone conversation with Union Staff Representative Bucher, who said he thought the Minutes document was an invalid agreement. John Steely, Division Manager of Labor Relations, said he met with the Union on April 28 and reviewed the MOU and the Minutes document line-by-line; the Union did not claim the Minutes document was invalid or non-binding, he said.

Union Vice President Trinidad testified that he helped draft the final version of the April 28 MOU, but did not help draft the Minutes document. Although Bellamy testified that he included the Minutes document in the MOU package he sent to the Union prior to signatures, Trinidad said it was not included in the final MOU documents he saw. Trinidad also discussed Ranade's testimony that it was Trinidad who suggested substituting "non-core" for "contract out" in the final version of the Minutes document. Trinidad said during discussions of the Minutes document, he commented that there was already a non-core list and the Company should have included the work at issue on that list, or try to get it included in the list to be negotiated in 2012 bargaining. However, he denied having recommended calling the work at issue non-core because he did not believe the Local Union had the authority to do that. Trinidad said he did not consider the Minutes document to be part of the MOU; rather, he thought its only effect was to add water-blasting and refractory work to the April 1, 2010 letter covering vacuum truck operation.

On cross examination, Trinidad agreed that the Local Union could agree in writing to allow work to be contracted out on an on-going basis, although he thought an International representative had to sign an agreement that extended beyond the expiration date of the BLA.

Trinidad said he did not see the Company's first draft of the Minutes document, and that he did not see the final draft until the parties signed it on April 28. The Company representative asked Trinidad why the parties changed the April 26 language from "contract out" to "non-core" work if the Union had not seen the document before April 28. Trinidad responded that he did not remember any discussion about changing the document and did not know why the Company changed it.

Grievance Committee Chairman Dillon said the Minutes document records what the parties said in the April 26 meeting. During that meeting the Company wanted the Union to put the contracting out language into the MOU, but the Union would not agree, pointing out that there was already the April 1 agreement. The witness said he understood that the agreement summarized by the Minutes document simply added water-blasting and refractory work to the April 1 agreement, and he said he would not have signed it if he understood it had a broader effect. Dillon also identified a document from Ranade dated September 9, 2010, which said:

> This is to confirm our Understanding that going forward the Company may, at its discretion, contract out without Notice to the Union all industrial cleaning work (vacuuming and water blasting) and refractory work for the vacuum degasser. Vacuuming work includes truck operators, manning of hoses and safety watch. In addition, the parties agree that this Understanding will not be a subject of bargaining during the Basic Labor Agreement local issue negotiations.

The Union questions why the Company would have made this proposal if it believed the Minutes document had already given the Company the right to contract out the work beyond December 31, 2010. Dillon said this proposal was one of three the Company gave the Union on September 9. One of the proposals concerned lost time pay and another one dealt with contracting out work on the Iron and Steel Ramp-Up. Apparently, the Company wanted the Union to agree to all three proposals in order to settle the lost time issue. The Union refused to agree to any of the

proposals, although no one testified about any meetings with management over the proposals. I admitted the documents over the Company's objection that they were settlement proposals, and said I would take the objection under advisement.

On cross examination, Dillon said the Minutes document used the word "agreement" because the parties *did* agree to something during their April 26 agreement – they agreed to let the Company contract out refractory and water-blasting work until December 31, 2010. The witness also acknowledged that he was not in any meeting when the September 9 proposals were discussed.[1] He also agreed that the last sentence of the September 9 proposal is not included in the Minutes document.

Positions of the Parties

The Company argues that this is a simple case that does not include any of the issues typically present in contracting out disputes. The only issue here, the Company says, is whether there was an agreement allowing the Company to contract out the work at issue. If there was, then the Company can contract out the work without notifying the Union; if there was no agreement that extended past December 31, 2010, then the Company was obligated to give notice for the work contracted out from January 1, 2011 and beyond. The Company says the language at issue is not ambiguous and it questions how the Union can deny the effect of a document it signed at the same time it signed the April 28, 2010 MOU. The Company discounts the Union's claim that the Minutes document merely reflects what happened in the April 26 meeting. And it notes that even Union Grievance Chairman Dillon recognized that the Minutes document represented an agreement, although he disputed the Company's interpretation of what

[1] Any discussions were apparently between Ranade and Union President Gipson. Dillon testified that Gipson was seriously ill and could not attend the arbitration hearing.

the parties agreed to. The Company also says the Union did not rebut Ranade's testimony that he asked the Union if calling the work "non-core" would affect the Company's ability to contract out the work, and all of the Union representatives in the meeting said it would not.

The Company also points out that the parties had used the same device to memorialize an agreement concerning the West Plate Mill employees in March 2010. Moreover, in the March 11, 2010 minutes agreement, the parties directly referenced the documents the agreement was intended to affect; but in the instant case the Minutes document does not mention the April 1, 2010 agreement, which undercuts the Union's claim that the Minutes document amended the April 1 agreement. Had the parties intended to amend the April 1 agreement, the Company argues, they would have said so expressly.

The Company contests the admissibility of the Company's September 9, 2009 settlement proposal that was part of a multi-document package. But even if it were to be considered, the Company says it proposes a significant addition to the Minutes Agreement because it adds a sentence that says the work it covered could not be part of the 2012 local issue negotiations. The Company also says it has lived up to the commitments it made in the April 28, 2010 MOU, including making capital investments and restarting blast furnace D, and it says it has the right to expect the Union to live up to its commitments, too. Finally, the Company argues that if the grievance is sustained, the award's effect should be prospective only; otherwise the Union would be rewarded for "hoodwinking" the Company.

The Union says the Company is trying to turn a set of minutes into a binding agreement. But the answer to this dispute is clear – the Company had the right to contract out vacuum truck work under the April 1, 2010 agreement, and in their negotiations for the April 28, 2010 MOU, the parties agreed to add water-blasting and refractory work to the April 1 agreement. That

agreement terminated on December 31, 2010, yet the Company has continued to contract out the work without notice to the Union. The Union acknowledges that the Company wanted to include language in the MOU giving it the right to contract out the work at issue, but the Union refused, pointing to the already-existing April 1 agreement. The Union agreed to add some work to the April 1 agreement, but it did not agree to include that language in the MOU.

The Union also says its interpretation of events is supported by the Company's attempt to get the Union to agree to extend its right to contract out the work at issue by its September 9, 2010 proposal. Although Gipson was unavailable to testify about the parties' discussion of that document, Ranade was present at the hearing and testified during the Company's case-in-chief. But he did not testify in rebuttal to explain the September 9 proposal. It makes no sense, the Union says, to believe the Company would have made the September 9 proposal if it believed the Minutes document already gave it the right to contract out the work after December 31, 2010. The Union also points out that the Company made the September 9 proposal before the Union sent notice that it intended to terminate the April 1 agreement on December 31, 2010. The Union contends that the Company has nothing but a set of minutes, and minutes are not contracts.

The Union argues that the Company's breach of contract was willful and repeated and it asks for a cease and desist order and make-whole relief for affected employees. The Union acknowledges that the bargaining unit would not have done all of the work contracted out following December 31, 2010, but it says the parties can determine the proper amount of back pay. The issue at this time, the Union says, is whether there was an agreement that allowed the Company to contract out the work.

Findings and Discussion

The Union's attempt to distinguish meeting minutes from agreements is not persuasive in this case. It is true, as the Union claims, that minutes typically are seen as a summary of meeting events. They are sometimes of no legal or practical effect, especially when compiled by only one party. There is no evidence in this case that the parties typically write formal minutes of non-grievance meetings between management and the Union, or that they routinely sign meeting minutes. The parties met numerous times about the MOU and the Minutes document, but there is no evidence that they complied or agreed to minutes of any of those meetings, except the April 28 Minutes document. And even that document does not include anything about the parties' discussion of the MOU draft that occurred in the same meeting. This indicates that the purpose of the Minutes document in this case was not merely to record the events of the April 26 meeting; rather, it is clear that the document was intended to memorialize the parties' agreement about contracting out the work at issue. This is the same procedure the parties had used during the West Plate Mill negotiations. The Union cannot sign a writing like the Minutes document and then claim after-the-fact that it did not constitute an agreement simply because it was headed with the word "Minutes."

The real issue in this case is not whether there was an agreement but, rather, what the parties agreed to. I recognize that removing language from a proposed agreement often signals that the provision was withdrawn and will be excluded from the final agreement. But that principle of interpretation does not apply in this case. The contracting out language was in the initial MOU draft, as well as two subsequent versions. The language was modified after the initial draft, strongly suggesting that there had been discussion of the provision and modifications stemming from that discussion. There is no evidence that the Union raised any

objection to or reservations about the inclusion of the contracting out language until discussions on April 26, when it said it did not want the clause in the MOU. But even though the language was taken out of the MOU, the record supports a finding that the Union did not back away from allowing the Company to contract out the work.

Ranade testified credibly that he asked for and received assurances that memorializing the contracting out agreement in another document would not impair the Company's right to contract out the work. The contracting out language was still part of the MOU when the parties met on April 26, having survived two previous drafts. Clearly, the agreement to contract out the work at issue would not have expired on December 31, 2010 had it been retained as part of the MOU. The MOU did not have an expiration date. More important, Paragraph 8 of the MOU addressed contracting out in connection with the ramp-up of steel producing, and it allowed subcontracting "until December 31, 2010." Thus, when the parties intended to limit subcontracting, they did so expressly, and there was no such limitation in the provision allowing the Company to contract out the work at issue. Ultimately, that provision was taken out of the MOU. But when he agreed to remove the language to the Minutes Agreement, Ranade asked for an assurance that removing the language from the MOU would not affect the Company's right to contract out the work. In context, Ranade was not asking if the April 1 agreement remained in effect; rather, he was telling the Union he wanted an assurance that the language would have the same effect in a separate document that it would have had in the MOU; the Union agreed. In these circumstances, the Union's contention that the only effect of the Minutes Agreement was to add water-blasting and degasser refractory work to the April 1, 2010 letter is not persuasive.

There is also another reason to doubt that the parties intended the Minutes Agreement to simply amend the April 1 agreement. Had that been the intent, it is hard to understand why the

parties would not have said so directly; but there is no mention of the April 1 agreement in any of the MOU drafts or in the Minutes Agreement. The only time limitation mentioned in either version – MOU or Minutes – was "going forward", which is in the Minutes Agreement. It seems unlikely that the parties would have agreed to such general terminology if they believed the Company's right to contract out the work would expire on December 31, 2010.[2] Given its understandable concern about having work contracted out while employees were on reduced work weeks or voluntary layoffs, the Union surely would have insisted that the December 31 expiration date be included in the Minutes Agreement, had that been the parties' agreement.[3]

The record supports a finding that the import of the Minutes Agreement allowed the Company to contract out the work at issue beyond December 31, 2010. The Company was able to supersede the April 1 document by effectively voiding the December 31, 2010 expiration date, and by securing the Union's agreement to contract out two other categories of work (water-blasting and refractory). It is significant that the April 1 agreement was made before the parties decided to assemble a committee to explore cost savings that could lead to restarting blast furnace D. Once the parties began negotiations over the MOU, it is not surprising that the

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[2] Although the Union sent notice of termination in November 2010, the April agreement seems to say it would terminate by its own terms on December 31, 2010. The understanding that the Company could contract out vacuum truck work, the document says, is "from May 2, 2010 through December 31, 2010." The document also says either party could cancel the agreement after November 1, 2010, which seemingly allows a termination any time in December 2010, depending on when notice is given. The Agreement does not say the Union had to give notice to invoke the December 31 termination date.

[3] There was some discussion during the hearing about whether the Local Union had the right to amend the September 1, 2008 Non-Core Letter Agreement on page 134 the BLA, by adding to the work the Letter Agreement identifies as "non-core." Some of the language in the Letter Agreement is general and the parties may have wanted to include the work at issue into one of the categories of non-core work. But I need not resolve that issue in this case. The Union did not argue that the Minutes Agreement was invalid because it violated the September 1, 2008 Letter Agreement. Moreover, the evidence suggests that the parties agreed to the word "non-core" as a way of eliminating the words "contract out" from the Minutes Agreement. In effect, the word "non-core" was used merely to signal that the Company had the right to contract out the work, and not as a formal amendment to the September 1, 2008 Letter Agreement. Also, using "non-core" would have indicated a continuing right to contract out the work, as opposed to a short term commitment like the one in the April 1 letter.

Company sought to replace the deal it had made on April 1 with a better one, which is what it accomplished with the Minutes Agreement. It is also worth noting that the Minutes Agreement became effective on April 28, 2010, three days before the Company could have begun contracting out under the April 1, 2010 agreement, which had a May 2 start date. Thus, the Minutes Agreement went into effect before anything had been contracted out pursuant to the April 1 agreement.

The Union's other argument concerns Ranade's September 9, 2010 proposal to allow the Company to contract out the work at issue. Although I admitted the evidence at the hearing, I also said I would take its value or weight under advisement. The proposal was apparently part of a package the Company advanced because of the Union's concern about lost time pay. No one from the Union testified about any discussions over the proposal, and the Company elected not to call Ranade to explain it, probably because the Union was not able to put it into any context and, as the exhibit's proponent, the Union was required to establish its admissibility. The proposal does not appear to be directed at a pending grievance. Nonetheless, it was part of a settlement proposal intended to resolve a dispute between the parties over lost time pay and, as such, should be excluded from consideration. But even if I were to consider it, the contracting out part of the proposal includes a sentence restricting the Union from raising the issue as part of the 2012 local issues negotiation. That sentence was not included in the April 1 agreement or the Minutes Agreement. Presumably, this proposed addition meant the right to contract out the work covered by the Minutes Agreement would be carried forward into the next local issues agreement instead of terminating at the expiration of the 2008 Agreement on September 1, 2012. The proposal, then, would have extended the Company's right to contract out the work beyond the period covered by the Minutes Agreement. Seen in this light, the September 9, 2010 proposal would

have added to the rights the Company secured under the Minutes Agreement and cannot be seen as evidence that the Company knew its right to contract out the work expired on December 31, 2010.

In summary, I find that the parties used the April 28, 2010 Minutes Agreement to memorialize their agreement that the Company could contract out vacuum truck work, water-blasting and refractory work at the degasser. The agreement effectively superseded the April 1 agreement, and was unaffected by the December 31, 2010 expiration date. Thus, the grievance will be denied.

AWARD

The grievance is denied.

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