Nos. 19-2109 & 19-2191

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TECNOCAP, LLC

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

and

UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC

Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

SUPPLEMENTAL APPENDIX

JULIE BROCK BROIDO
Supervisory Attorney

MILAKSHMI V. RAJAPAKSE
Attorney

National Labor Relations Board
1015 Half Street, SE
Washington, DC 20570
(202) 273-2996
(202) 273-4231

PETER B. ROBB
General Counsel
ALICE B. STOCK
Deputy General Counsel
MEREDITH JASON
Acting Deputy Associate General Counsel
DAVID HABENSTREIT
Assistant General Counsel

National Labor Relations Board

Tecnocap, LLC v. National Labor Relations Board
U.S. Court of Appeals for the Fourth Circuit
Case Nos. 19-2109 & 19-2191

Supplemental Appendix Table of Contents

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Exhibits from the Hearing Before Administrative Law Judge Michael A. Rosas in *Tecnocap, LLC* (Board Case No. 06-CA-216499)

(1) General Counsel's Exhibit 2 ..... SA 1

(2) General Counsel's Exhibit 3 ..... SA 3

(3) Joint Exhibit 5 ..... SA 8

Three job classifications: The third job classification which the Company is insisting upon in bargaining consists exclusively of work that is not in the GMP Council/USW bargaining unit and does not belong to the GMP Council/USW. All of the work in this "third job classification" belongs to the IAM. The GMP Council/USW has repeatedly advised the Company that there is no basis for the parties to bargain over this third job classification which does not belong to the GMP Council/USW. This is an improper subject for bargaining. To the extent that the Company considers this a permissive subject of bargaining you are advised that the GMP Council/USW does not wish to bargain on this issue. You appear to believe that the Company can bargain to impasse over this issue. You are incorrect.

EXHIBIT
GCX- 2

EXHIBIT NO. GC 2 RECEIVED ✓ REJECTED ____

CASE NO. 08-CA-216499 CASE NAME Tecnocap v. United Steel

NO. OF PAGES 1 DATE 2/12/19 REPORTER JMC

GMP Local 152/Tecnocap 2015 CBA Negotiations

Union's #1 Economic Proposal February 12, 2018

Company Counter to Union #1

All Articles and Sections not addressed in the Union's proposals the Union proposes CCL

Article 11 Shift Differential
**** Section 1**
UP #1:
(A) $.~~45~~ to $.**55**
(B) $.~~55~~ to $.**65**
Counter: CCL

Article 12 Wage
****Section 1**

UP #2:	Year-2	Year-3
Classification 1 - $23.00	**$24.00**	**$25.00**
Press Operator		
Shears		
Janitor/Hustler		
Waxer		
Classification 2 - $23.22	**$24.22**	**$25.22**
Warehouse		
Clerk		
Plate Supplier/Hustler		
Liner Supplier/Hustler		
Batch Operator		
Utility		
Classification 3 – $24.31	**$25.31**	**$26.31**
High Speed LL Operator		
Adjuster		
Lid Line Operator		
QA Auditor		

(Employees holding bids grandfathered to current bids)
Counter:
We do not agree that these jobs fall under these classes. See job descriptions previously provided.

	Year 1	Year 2	Year 3
Press Operator 1-	**Current wages+ red circled**	**$.02**	**$.02**
Press Operator II-	**Current wages + red circled**	**$.02**	**$.02**
Press Operator III-	**Current wages + red circled**	**$.02**	**$.02**

EXHIBIT
GCX- 3

Article 16 Life and Health Care Benefits

****Section 1**

UP #4:

Short Term Disability $~~310.00~~ to **$375.00**

Counter: $320

****Section 2.**

Healthcare

UP #5:

Discuss & Defer

****Dental Plan**

UP #6:

Discuss and Defer

****Vision Plan**

UP #7:

Discuss and Defer

Article 17 Pension Plan

**** Section 1**

UP #8:

Increases

~~$1.55~~ to **$1.70 YEAR 1**

$1.90 Year 2

$2.10 Year 3

Counter: Year 1- $1.55
Year 2- $1.55
Year 3- $1.55

UP #9:

**Appropriate Date Changes

Article 29 Health and Safety

**Section 3

UP #10:

~~$95.00~~ to **$150.00**

Counter: CCL with agreement to ULP#10. (Missing stools will not be replaced)

2

Company Economic Proposals:
#1

ARTICLE 9

Work Hours and Overtime Premium Pay

Section 1. Eight (8) hours shall constitute a normal workday. The normal workweek shall be forty (40) hours per week. First shift will run from 7:00 A.M. to 3:00 P.M. Second shift will run from ~~2:50~~ ***3:00*** P.M. to ~~10:50~~ ***11:00*** **PM.** Third shift will run from 11:00 P.M. to 7:00 A.M. Hours worked on the third shift commenced at 11:00 P.M. and ending at 7:00 a.m. shall be considered as hours worked the previous day. However, time and one-half (1 1/2) shall be paid after ~~eight (8) hours in any one (1) day or~~ forty (40) hours in any one (1) week, ~~or, in the event more than eight (8) hours are worked consecutively, for all hours worked after the first eight (8).~~ Management may request with reasonable notification from time to time the working hour schedule be adjusted due to production requirements or facility conditions. The third shift (i.e. 11:00 P.M. - 700 A.M.) will commence the workweek on Sunday night. However, if at any time after the initial ninety (90) calendar day period of such schedule/operation, the Company, in its sole discretion, determines for any reason the shift should commence on Monday at 7:00 A.M., it may effectuate the change upon seven (7) day notice to the Union.

Section 7. Employees transferred to a higher rated job shall receive the higher rate of pay for ~~a four (4) hour period or~~ actual hours worked ~~whichever is greater~~. Any employee temporarily placed on a lower rated job, at the request of the Company, shall receive his regular rate. The Company may temporarily assign employees across classifications, based on business needs.

#2

ARTICLE 16

Life and Health Care Benefits

Section 2. The Company shall provide for eligible employees and their dependents health care benefits, as prescribed by the Company's insurance, through a health care provider of the Company's choice. The Company may from time to time, at its discretion, change providers of such coverage. Should there be premium increases ~~after 12/31/09 12 and~~ during the term of this agreement, the cost of the increase will be ~~paid two thirds (2/3) by the Company and one third (1/3) by the employee.~~ negotiated yearly. The employee will be obligated to authorize in writing the payroll deduction for the employee's share of any such increase or increases. ~~The enactment of a national health care program will provide just cause for opening negotiations on this issue.~~ All other articles in the contract shall remain in full force and effect.

~~If the company would receive a reduction in insurance rates as they apply to health insurance the reduction will be applied using the same procedure as above.~~

3

~~Change in the current plan is only in the deductible which will be fully funded by the Company. The new deductible will be $3000/$6000 and will be covered by a Health Reimbursement Account (HRA). Employees will not be responsible for the deductible (Company will pay).~~ Health Insurance Option 3 will only be offered.

The Company reserves the right to add to, subtract from and/or modify its proposals throughout these negotiations.

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EXHIBIT NO. GC-3 RECEIVED ✓ REJECTED

CASE NO. 06-CA-216499 CASE NAME Technicap v. United Steel

NO. OF PAGES 4 DATE 2/12/19 REPORTER GMF

MARC A. WINTERS
ARBITRATOR

In The Matter of Arbitration

Between

Tecnocap, LLC,

Employer

And

IAM Lodge 818,

Union

OPINION & AWARD

Arbitrator Case No.:	FMCS Case #160524-55416-A
Employer Advocate:	Bradley K. Shaffer, Esquire
Union Advocate:	Donald L. Riffee, Jr., Business Rep.
Subject:	Contract Language / Assignment of Work
Grievant:	Class Grievance
Grievance No.	040116
Date of Hearing(s):	September 28, 2016
Location of Hearing:	Wheeling, West Virginia
Record Closed:	November 3, 2016
Opinion and Award Issued:	December 10, 2016

EXHIBIT
JX- 5

APPEARANCES

For the Union:
Don Riffee, Jr., Business Representative

Also Present:
Harlan Smith, Committee Chairman

For the Employer:
Bradley Shaffer, Counsel for Tecnocap

Also Present:
Darrick Doty, Director of H. R.

PRELIMINARY STATEMENT

The parties, Tecnocap, ("Employer") and IAM Local 818, ("Union"), having failed to resolve a dispute involving assignment of work, proceeded to final and binding arbitration pursuant to the terms of their collective bargaining agreement, ("Agreement"). Marc A. Winters was appointed to serve as impartial arbitrator from a panel supplied by the Federal Mediation and Conciliation Service. The Arbitrator assigned Case Number to the Grievance is FMCS Case #160524-55416-A .The Grievance was filed on April 6, 2016. An oral hearing was held on September 28, 2016. Both parties were given full opportunity to present evidence, to cross-examine the witnesses and to argue their respective positions. A stenographic record of the hearing was not made. The Arbitrator has full authority to resolve any arbitral challenges or procedural issues and to decide the case on its merits. Post-hearing briefs were filed by the parties and exchanged on November 3, 2016.

BACKGROUND

For a period of time, March 31, 2016 through May 11, 2016, the Employer assigned IAM represented employees in the Die Setter classification to perform production work. That production work had historically been performed by the GMP Union represented employees

The issue arose because the Employer had struggled with is how to man the production lines to keep them operational during the thirty minute GMP lunch break. The Employer attempted to negotiate this issue with both the IAM and GMP unions with little success. Finally, on May 11, 2016 the GMP identified 7 people that could be used during day shift and 3 people that could be used on night shift to relieve the production workers during the break. Since that time, Die Setters have not been needed.

The following documents were entered into the Record:

Union Ex. Tab 1, Collective Bargaining Agreement dated April 6, 2015 through April 8, 2018.

Union Ex. Tab 2,	Consisting of.	Grievance 040116 dated April 6, 2016. Grievance Remedy Requested. Company Response dated April 6, 2016. Union Response dated April 7, 2016. Company Response dated May 12, 2016.
Union Ex. Tab 3,	Company Contract Proposals dated March 12, 2015.	
Employer. Ex. 1,	Collective Bargaining Agreement dated November 29, 2015 through November 18, 2017 between Tecnocap & the GMP Local 152.	

PERTINENT PROVISIONS OF THE AGREEMENT

(THIS MEMORANDUM OF AGREEMENT SHALL ONLY BECOME EFFECTIVE UPON GMP LOCAL 152 APPROVAL)

Memorandum of Understanding Die Setter Production Continuation

The following memorandum of understanding has been reached between Tecnocap , LLC and the International Association of Machinists and Aerospace Workers, District Lodge 54, Local Lodge 818 regarding the Die Setter Production Continuation:

- Should the Glass, Molders, Pottery, Plastics and Allied Workers International Union Local 152 agrees to allow continuous production through lunch and breaks. The parties hereby agree to negotiate all aspects of the Die Setter Production Continuation during lunch periods and breaks. Furthermore the parties agree to the following:

- To have the limited right and opportunity to make demands and propo. sals with respect to all proper subjects relating to the Die Setter Production Continuation matter only.

- That the I.A .M . &, A.W . District Lodge 54 , Local Lodge 818 membership have the exclusive right to vote , (Accept/Reject), prior to any implementation of any type of Die Setter Production Continuation .

- It is further agreed that if the parties bargain to impasse over the Die Setter Production Continuation there will be no implementation of the Die Setter Production Continuation.

ISSUE

Whether the Employer violated the parties Collective Bargaining Agreement, from March 31, 2016 through May 11, 2016, by assigning IAM represented employees in the Die Setter classification to perform production work? If so, what shall be the remedy?

DISCUSSION AND FINDINGS

Here, the essential underlying facts of this case are not in dispute. This Arbitrator has been asked to interpret language of the parties Collective Bargaining Agreement, as it relates to the Employers use of IAM represented employees to perform production work coverage covered under a different collective bargaining agreement and represented by a different bargaining representative, GMP Union.

The issues here is a straightforward matter of contract interpretation. The normal rule to be observed in the construction of contract language is that the interpreter, or arbitrator for this matter, must, if possible, ascertain and give effect to the mutual intent of the parties while interpreting such language as would a reasonable person in reading such language.

The facts in this case present a particular issue. There are two unions whose members are in two different collective bargaining units covered by two different and distinct collective bargaining agreements. The issue is whether the IAM represented collective bargaining agreement permits those employees to cross over and perform work covered by a different Union and different collective bargaining agreement.

The Union, here, IAM Local 818 and the Employer entered into a new Collective Bargaining Agreement signed and dated April 6, 2015. This Collective Bargaining Agreement is effective and in full force until April 8, 2018. Part and parcel of that Agreement was a memorandum of understanding that was negotiated during the party's negotiations leading up to the April 6, 2015 contract.

That memorandum entitled "Die Setter Production Continuation" set certain terms and conditions with respect to the use of IAM represented employees in the Die Setter classification providing coverage during lunch periods and breaks for the production employees covered under a separate collective bargaining agreement represented by the GMP Union.

Between March 31, 2016 and May 11, 2016 the Employer assigned the Die Setters to perform production work for lunch periods and breaks which prompted the grievance at hand. Stating that the use of the Die Setters to perform the production work coverage violated their Collective Bargaining Agreement, in particular the memorandum of understanding. The Union also argues that assigning the IAM represented Die Setters to do GMP represented work has caused a hostile work environment.

On or about May 11, 2016, the GMP Union, in an attempt to use their own members, and the Employer were able to resolve the coverage issue by using GMP represented production workers to fill in. Since that time the IAM represented Die Setters have not been assigned by the Employer

for the production coverage.

However, the issues still remains as to whether the Employer had violated the IAM represented Collective Bargaining Agreement by assigning the Die Setters to production for coverage.

The Employer has proffered three basic arguments opposing the Union's grievance.

First, the Union is bargaining in bad faith:

The Employer has argued that since the signing of the April 6, 2015 Collective Bargaining Agreement they have attempted to bargain over this coverage issue. However, the Union has failed to negotiate or bargain over the issue. So now they are at impasse allowing the Employer to implement its proposal.

Second, the assignment of such work as adopted by the Employer has been done in the past without objection and therefore the Union has waived its right to now grieve as a past practice now exists.

Third, The Employer's proposal, on the affected assignments, was implemented in accord with the terms of the Collective Bargaining Agreement. Citing Article 2, Section 2, temporary transfers and Article 2, Section 6, transfers out of the bargaining unit. And, Article 13, Sections 1 and 2 of their Management Rights clause to control production.

This Arbitrator, however, is not convinced by the Employer's arguments and their denial of the grievance.

Testimony and the evidence presented clearly establishes that the parties negotiated and reached an agreement on April 6, 2015, which resulted in the memorandum of understanding for Die Setters performing the production coverage work. The Employer had proposed, on March 12, 2015, an addendum for the Die Setter Production Continuation which stated:

"We are looking to add an addendum to the contract stating we can utilize die setters to run production through the lunch time, breaks, and shift changes. This will require negotiations with the GMP as well, so we are looking to add language prior to negotiations in November with the GMP."

That proposal-above was rejected by the IAM Local 818 and the Memorandum of Understanding dated April 6, 2015, was the final negotiated product and language agreed to by the parties. Which in part first calls for an approval by the GMP Union, then further negotiations by Local 818.

A party's only obligation is to bargain in good faith with an intent to reach an agreement. The law does not require either party to be fair or to compromise its position to reach an agreement.

The Employer's position on implementing their proposal because of impasse is in error and misplaced. An Employer during bargaining can unilaterally implement their position if bargaining ceases and the parties are at impasse. The Employer, once the Agreement has been approved and

signed, cannot unilaterally implement or change any term of condition embodied in that collective bargaining agreement without first obtaining the Union's consent.

The proposition, here, that is the manifested intent of the parties during the negotiations is to be considered. That intent clearly is that during the term of this Collective Bargaining Agreement absent a negotiated agreement agreed to by Local 818 and its members over the implementation of any type of Die Setter production continuation there would be no implementation of such work.

The Employers arguments with respect to past practice, Article 2 and Article 13 are now superseded and restricted by the terms of the new agreement dated April 6, 2015 for purposes of IAM represented Die Setters performing GMP Union represented production work.

Additionally, when work is transferred from one bargaining unit to another bargaining unit, arbitrators generally balance the rights of the Union and its members against the Employers right to operate efficiently. Normally there needs to be a compelling reason. Here, on May 11, 2016, the GMP Union and the Employer were able to work out the coverage issue, under the terms of the GMP and the Employer's Collective Bargaining Agreement, without transferring Local 818 members and violating the IAM Agreement as it should had been done prior to March 31, 2016.

The Union has requested the following remedy: That the Company follow the provisions of the Agreement and to make all affected employees whole for any and all losses incurred.

The Union in their brief further clarifies to make whole for any and all losses incurred as requiring the Employer to compensate Ten (10) Die Setters, one thousand dollars ($1000.00) each.

In any arbitration case, the evidence must support the charges. The Employer, in this case, based on the reasoning and discussion above, has violated the parties Collective Bargaining Agreement by assigning Die Setters to perform the production coverage work between March 31, 2016 and May 11, 2016. A cease and desist order is appropriate and hereby so ordered.

As to the make whole remedy, The testimony produced at the Hearing was that no Die Setter had suffered any monetary damages. There is no evidence to support otherwise.

Likewise there was no evidence to prove or suggest that a hostile work environment was created by the Employer's actions.

The evidence presented, the weight associated and the credibility of the witnesses supports the above rulings and decisions.

AWARD

Based on the discussion above, this Grievance is granted. The Employer did violate the parties Collective Bargaining Agreement with respect to the Memorandum of Understanding, Die Setter Production Continuation. The Employer is given a cease and desist order for that above violation.

It is hereby so Ordered, this Day of 10th day of December 2016.

Marc A Winters

Marc A. Winters
Arbitrator
Seven Fields, Pennsylvania

EXHIBIT NO. JX 5 RECEIVED ✓ REJECTED ____

CASE NO. 06CA-2164499 CASE NAME Technocap v. United Steel

NO. OF PAGES 7 DATE 2/12/19 REPORTER JMC

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

TECNOCAP, LLC Petitioner/Cross-Respondent	)	Nos. 19-2109 19-2191
v.	)	
NATIONAL LABOR RELATIONS BOARD Respondent/Cross-Petitioner	)	Board Case No. 06-CA-216499
and	)	
UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO, CLC Intervenor	)	

CERTIFICATE OF SERVICE

I hereby certify that on February 27, 2020, I electronically filed the foregoing Supplemental Appendix with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the appellate CM/ECF system.

I further certify that all parties or their counsel of record are CM/ECF users and will be served through the CM/ECF system.

/s/ David Habenstreit

David Habenstreit
Assistant General Counsel
NATIONAL LABOR RELATIONS BOARD
1015 Half Street, SE
Washington, DC 20570
(202) 273-2960

Dated at Washington, DC
this 27th day of February 2020