February 28, 2018

**ADR Case Update 2018 - 5**

## Federal Circuit Courts

- **AWARD NOT "FINAL"**

  *Norfolk Southern Railway Company v. Sprint Communications Company*
  2018 WL 1004805
  United States Court of Appeals, Fourth Circuit
  February 22, 2018

  Sprint had a 25-year licensing agreement (Agreement) with NSR, allowing it to use NSR's railroad rights of way for its fiber optics telecommunications system. In renewing the agreement, the parties disagreed about Sprint's payment for the right of way. Pursuant to Agreement Section 2.2.2., each side brought in an appraiser to determine a payment amount. When they could not agree, the parties appointed a third appraiser (Argianas) and advised him to seek a compromise with one (or both) of the appraisers and, if unsuccessful, to perform his own appraisal. Argianas reached a compromise with NSR's appraiser, and issued a Majority Decision (decision), providing that Sprint would pay $6.1 million to NSR. In the decision, Argianas reserved the right to withdraw his assent if his assumptions – that NSR had marketable title of the corridor and that the NSR's appraiser's ATF value was reasonable – proved incorrect. Sprint filed a demand for arbitration and AAA issued a decision favorable to NSR. NSR moved to confirm the decision and Sprint moved to vacate. The court confirmed and Sprint appealed. On appeal, neither side contested that the decision issued by Argianas was an FAA arbitration award.

  The United States Court of Appeals for the Fourth Circuit reversed and remanded. Sprint argued that the court erred in confirming the award because it was not final. Under the FAA, an award is not final if it fails to resolve an issue presented by the parties to the arbitrators. That happened here. Argianas made clear in his decision that if his assumptions were incorrect, he might withdraw his assent at some future point and dissolve the award. NSR asserted that the two assumptions did not fall within the scope of what the parties asked the appraisers to decide and had no bearing on finality. With nothing in 2.2.2 or communication from the parties regarding scope, the interpretation of Argianas deserved deference.

  Sprint argued that the decision was ambiguous, never making clear that the $6.1 million payment was annual. A court may vacate an award if it is so unclear or ambiguous that the court cannot engage in meaningful review. Here, though the decision did not clarify this issue, context made

clear that the $6.1 million payment was annual. The Agreement referenced annual payments and only if the $6.1 million were annual would it fall between the proposals of the other two appraisers.

Third, Sprint argued that the decision should be vacated because Argianas believed the payment offered by the Sprint appraiser was more accurate but would not withstand judicial scrutiny – so he compromised with NSR. A court may vacate an award if an arbitrator acts outside the scope of his contractually delegated authority by issuing an award that "simply reflects his own notions of economic justice." That did not happen here. The decision addressed the rental renewal rate and based its conclusions on an interpretation of Section 2.2.2.

- **NO MEETING OF THE MINDS ON AGREEMENT TO ARBITRATE**

  *Dasher v. RBC Bank*
  2018 WL 832855
  United States Court of Appeals, Eleventh Circuit
  February 13, 2018

  Dasher's checking account with RBC was governed by a 2008 customer account agreement containing an arbitration provision. Dasher sued RBC for failing to warn him of overdraft charges and processing card transactions to maximize overdraft charges. RBC's motion to compel arbitration was denied and RBC appealed. While the appeal was pending, *Concepcion* was decided. In light of this, the parties moved to vacate and remand for reconsideration, which was granted. Back in district court, limited discovery revealed that PNC had acquired RBC and had issued a 2012 customer agreement that did not include an arbitration provision. PNC renewed the motion to compel arbitration, arguing that the 2008 agreement governed. The court denied the motion. PNC appealed, and subsequently sent account holders an amended agreement including an arbitration clause, which cardholders were deemed to accept if they failed to opt out and continued to use the account. Dasher did not opt out. The Eleventh Circuit affirmed the denial of the motion to compel and PNC filed a motion for reconsideration, which was denied. PNC unsuccessfully sought review in the Supreme Court. When Dasher filed an amended consolidated complaint, PNC moved to compel arbitration based on the February 2013 amendment. The court denied the motion and PNC appealed.

  The United States Court of Appeals for the Eleventh Circuit affirmed, but for a more "fundamental reason": PNC failed to demonstrate the requisite meeting of the minds to support a finding that the parties agreed through the February 2013 amendment to arbitrate their then pending litigation. First, PNC distributed the amendment directly to Dasher, even though Dasher was an adverse litigant represented by counsel as to the very issue in the amendment. Second, at the time Dasher failed to opt out of the proposed amendment, he was forcefully and consistently resisting the arbitration of the pending litigation. In the absence of an integrated agreement, state contract law looks to parties' words and actions. Here, Dasher's uncounseled response to PNC's proposed amendment – silence – suggested he would be bound. Yet his counseled action demonstrated resistance to arbitration. PNC cannot show that Dasher accepted the arbitration provision or that it could apply retroactively to his pending court claim.

  PNC argued it was unfair to hold it to the 2012 agreement while not holding Dasher to the 2013 amendment. Dasher's acceptance of the 2012 agreement was an action wholly consistent with his action in the pending litigation. PNC also argued that Dasher's filing of his amended complaint in November 2014 revived PNC's arbitration rights; however, the changes in the amended complaint were not sufficient to revive a waived right.

## Pennsylvania

- **ARBITRATION AWARD OUTSIDE SCOPE OF CBA**

  *Millcreek Township School District v. Millcreek Township Educational Support Personnel Association*
  2018 WL 828108

Commonwealth Court of Pennsylvania
February 13, 2018

The School District (District) and the Association (Union) were parties to a collective bargaining agreement (CBA) providing that "no work of the bargaining unit could be subcontracted for the life of the CBA." During labor negotiations, the District issued a Request for Proposals (RFP) for custodial services, but never contracted with the successful bidder. The Union filed a grievance, asserting that the District violated the CBA when it accepted bids for custodial services. The grievance was submitted to arbitration and the arbitrator issued an award in favor of the Union. The District filed a petition to vacate the award. The court denied the petition and affirmed the award. The District appealed.

The Commonwealth Court of Pennsylvania reversed. First, the issue before the Arbitrator did not fall within the CBA's terms. An arbitrator's award is legitimate only so long as it draws its essence from the CBA. The matter before this Arbitrator was whether issuance of the RFP violated the CBA. But the CBA was silent on RFPs. Even if it were not silent, the Award, which provided that RFPs cannot be used in bargaining with the Union to secure advantage, was not rationally derived from the CBA. The CBA did not refer to RFPs or the subcontracting process, yet the Arbitrator "took it upon himself to fashion an award, going outside the CBA to make his determination." The District also argued that the award contravened the established public policy of good faith bargaining. The Supreme Court has held that as part of its duty to bargain in good faith, an employer must provide the union with information necessary to bargaining (*H&R Indus Servs., Inc*.). Here, during labor negotiations, the District issued an RFP and then presented the successful bidder's information to the Union to match or counter. The Award, providing that RFPs could not be used in bargaining with the Union, violated the public policy of good faith bargaining and would cause the District to breach its obligation to bargain in good faith.

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