IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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INTERNATIONAL UNION OF BRICKLAYERS AND ALLIED CRAFTWORKERS DISTRICT COUNCIL OF WISCONSIN,

Plaintiff,

v.

MIDDLETON CONSTRUCTION, INC.,

Defendant.

OPINION AND ORDER

99-C-0433-C

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This contentious dispute between a union and an employer is before the court on the motion of defendant Middleton Construction, Inc. to reinstate its counterclaim. Suit was begun by plaintiff International Union to enforce an arbitration proceeding in which it had been determined that defendant Middleton had bound itself to pay union wage rates and benefits when it performed jobs in southern Wisconsin. Defendant Middleton counterclaimed, seeking vacation of the arbitration award on the ground that it did not draw its essence from the collective bargaining award. In an order entered on October 13, 1999, I found that defendant was barred from suing on its counterclaim because it had waited too long to

challenge the award. Because "failure to challenge an arbitration award within the applicable limitations period renders the award final," International Union of Operating Engineers, Local 150, AFL-CIO v. Centor Contractors, Inc., 831 F.2d 1309, 1311 (7th Cir. 1987), I ordered that the arbitration be enforced.

Defendant moved promptly for reconsideration pursuant to Fed. R. Civ. P. 59(e), alleging new facts that bore on the earlier decision and arguing that the earlier decision was contrary to law. I granted the motion and held an evidentiary hearing on the matter. From the evidence adduced at that hearing, I make the following findings of fact.

FACTS

On July 24, 1998, defendant agreed to assume and be bound by all the terms of the labor agreement in effect between certain of plaintiff's locals and Associated General Contractors, an employer group, that was to continue in full force and effect until May 31, 1999. By its terms, the agreement covered "new construction and maintenance, repair and renovation" within a 50-county area in northern Wisconsin. Plt.'s Hrg. Exh. #2 at 1. This agreement is referred to by the parties as the Northern Agreement. The Northern Agreement recognized the Wisconsin chapter of Associated General Contractors as the bargaining unit for defendant and other employers subject to the agreement. Id. at 3, § 3.4. The agreement

contained the traveling contractor provision at issue in this suit, which provides as follows:

> When the Employer has any work specified in Article II of this Agreement to be performed outside of the area covered by this Agreement and within the State of Wisconsin covered by an agreement with another affiliate of the International Union of Bricklayers & Allied Craftworkers, the Employer agrees to abide by the full terms and conditions of the Agreement in effect in the jobsite area.

Id. at 10, § 9.1: The agreement provided further that arbitration would be handled by a joint arbitration committee consisting of three union representatives and three representatives of employers. When a grievance was filed in writing and received by the subject of the grievance, a conference for the settlement or adjustment of the matter was to be scheduled within 24 hours, with the conference itself to be held within five working days. If the committee was unable to reach a decision by majority vote, the grievance was to be referred to the Wisconsin Employment Relations Commission for the purpose of appointing an arbitrator immediately. All expenses of such an arbitration were to be shared equally by the union and the contractor involved.

Defendant had a job in Appleton, Wisconsin, in the northern part of Wisconsin, involving construction of a Menard's store. In addition, it had jobs in the southern part of Wisconsin, including Johnson Creek and Beaver Dam, which in plaintiff's view, brought defendant within the terms of the traveling contractor provision in the Northern Agreement

and required it to pay the wages set by the Southern Agreement. On January 5, 1999, Jeffrey Leckwee, plaintiff's field staff representative in southern Wisconsin, wrote a letter to both plaintiff at its business address in Middleton, Wisconsin, and to Associated General Contractors, which he intended would serve as notice of a written grievance pursuant to Article VII of the Northern Agreement. See Dft.'s Hrg. Exh. #1. In the letter, Leckwee advised defendant of a grievance concerning defendant's "failure to pay wages and benefits as required by the Agreement." Id. He asked that defendant furnish plaintiff with verification of payments of welfare contributions and he added that plaintiff would be exercising its right to audit defendant's payroll records. In addition, he asked that the "Joint Arbitration Committee" hold a conference for the settlement or adjustment of the matter. Id. Leckwee did not identify a particular job site at which defendant was allegedly failing to pay required wage rates and benefits.

Associated General Contractors' general counsel, David McLean, informed plaintiff's field staff representative Leckwee that a meeting would be held on January 28, 1999. Leckwee telephoned defendant's owner, Kenneth Endres, to relay this information. Endres appeared for the joint arbitration committee meeting, together with three other representatives of defendant: Ron Pulver, Russell Pulver and Craig Endres. Also present was Leo Elliott, owner of Monona Masonry, and David McLean. Representing plaintiff were Leckwee and Wisconsin Bricklayers

District Council Director Timothy Ihlenfeld. At the meeting, defendant's representatives were informed that McLean, Elliott, Ihlenfeld and Leckwee were to constitute an arbitration panel authorized to decide the grievance. Defendant was not given an opportunity to appoint a representative to the panel.

The meeting lasted approximately one hour. The panel did not call any witnesses or take any testimony. McLean started out the meeting by asking defendant's representatives whether defendant had signed the Northern Agreement. They admitted it had. Defendant argued that it should be allowed to pay lower wage rates on projects in the southern part of Wisconsin than it would have to pay if, as plaintiff contended, the Southern Agreement governed by virtue of the traveling contractor provision in the Northern Agreement.

At the conclusion of the hearing, McLean announced that the committee had decided unanimously to sustain the grievance because defendant had signed the Northern Agreement and was bound by its traveling contractor provision to pay Southern Agreement wage rates when working in southern Wisconsin. McLean added that the panel would draft an order. He told defendant it would have to open up its books to plaintiff's auditors. Kenneth Endres reacted angrily to the decision and began to yell before he left the room.

Before the January 28 hearing, plaintiff had retained an employee of the Combined Crafts Statewide Audit Program to audit defendant's books. An audit was scheduled for

January 25, 1999, before the hearing, but postponed until February 22, 1999, on defendant's request. When the employee sought to undertake the audit, defendant refused to allow him access to its books.

Shortly after the January 28 meeting, defendant retained Thomas Godar, a Madison lawyer, to represent it with respect to the grievance. In early February 1999, Godar called McLean, who told Godar he had a draft of the proposed decision and that the award had not yet been signed. Later, on February 11, 1999, Godar wrote McLean and the other members of the panel, raising various procedural and jurisdictional objections to the decision and asking that it be reconsidered. In the letter, he stated, "I understand that there has been a meeting, purportedly under Article VII of the Collective Bargaining Agreement, that resulted in a decision finding merit to the grievance. We wish a reconsideration of that decision . . . ." Plt.'s Hrg. Exh. #5 at 1.

On February 12, 1999, McLean sent a draft of an award to Ihlenfeld that contained signature lines for each of the four members of the arbitration panel. McLean understood that the award related only to a single project and drafted the award accordingly. His understanding was that the dispute arose out of the Menard's project in Appleton. When Ihlenfeld received the draft, he had it changed to refer to "the projects that *are* the subject of this Grievance," rather than to one project only. Also, he had the draft revised to show that

he and Elliott were designated as the union and employers' chairpersons respectively. McLean was unaware of Ihlenfeld's changes until this litigation began. Leckwee delivered the award to Elliott, who signed it without discussing it with any of the other panel members.

In late February 1999, Godar withdrew as counsel for defendant because of a potential conflict in his representation. James Pease, a member of another law firm, took over as counsel for defendant. Pease spoke to McLean on March 1, 1999. McLean said that he had a draft decision of the award on his desk but was very busy and would be out of town for about a week. He did not tell Pease the contents of the draft decision, but he suggested that Pease talk with Matt Robbins, counsel for plaintiff, to see whether the parties could resolve the dispute informally.

On March 3, 1999, Pease talked with Robbins and inquired about the nature of the dispute and whether it might be resolved. Pease discussed the traveling contractor clause with Robbins because Pease did not understand how signing the Northern Agreement could bind a contractor to the Southern Agreement. Pease tried to work out a lower wage rate for jobs in southern Wisconsin. Robbins did not tell Pease that an award had been issued or that he had seen the award. On the same day, Pease wrote each of the four arbitration panel members, objecting to the jurisdiction of the joint arbitration panel to decide the grievance. He sent a copy of his letter to Robbins. Pease never received a reply from any of the recipients.

On March 9, 1999, Pease left a voice mail message with Robbins, inquiring again about settlement. He received no reply and called again on March 19, 1999. At that time, Robbins told Pease he had been unable to reach Leckwee but would continue trying to do so and would report back to Pease during the following week. Pease left a message for McLean to the effect that he was trying to work out a settlement with Robbins. Robbins did not report back to Pease.

Pease did not call Robbins again. It was his assumption that the passage of time would be beneficial: the parties' emotions might be damped down to a point at which settlement could be achieved.

Associated General Contractors received a copy of the February 25, 1999 award on March 1, 1999. It was not accompanied by a cover letter indicating that it was being sent only to Associated General Contractors and not to defendant as well. At no time before the beginning of this suit did Ihlenfeld or any other representative of plaintiff inform defendant that an award had been issued. Defendant became aware of the issuance of the award for the first time when it received a copy of the complaint in this case in July 1999. Defendant filed its counterclaim on August 9, 1999.

When defendant's representatives left the January 28, 1999 meeting, they knew the scope and nature of the arbitration panel's decision. They knew that the panel had voted

unanimously that defendant was bound by the traveling contractor provision of the Northern Agreement to which it was signatory and that this provision required it to pay the wage rates in effect in southern Wisconsin pursuant to the Southern Agreement, despite the fact that defendant was not a party to the Southern Agreement.

OPINION

In the first opinion entered in this case on October 13, 1999, I held that the operative decision was the written award issued by the arbitration panel on February 25, 1999, and I found that defendant Middleton had lost its chance to seek vacation of this award when it failed to challenge it in court within 90 days of its issuance. Although there is no federal statute of limitations for challenging labor arbitration awards, I used state law for the appropriate statute of limitations, as directed by the Court of Appeals for the Seventh Circuit. See Teamsters Local No. 579 v. B&M Transit, Inc., 882 F.2d 274, 276 (7th Cir. 1989). Wis. Stat. § 788.13 is the appropriate statute, see id.; it provides that a motion to vacate an arbitration award must be served on the opposing party "within three months after the notice is *filed or delivered*." (Emphasis added.)

The overriding question in this case has been the date on which the notice of the award

was filed or delivered. In reliance on the facts then before the court, I ruled in the October 13 order that plaintiff had shown that the award had been issued in February and that defendant had not taken steps to obtain a copy of the award despite its knowledge that a written decision was to be entered promptly after the meeting on January 28, 1999. Defendant persuaded me that reconsideration of this point was necessary, alleging that a more complete development of the facts would show that it did take reasonable steps to obtain a copy of the award and that plaintiff had affirmatively misled it about the existence of the award. Defendant argued also that it was plaintiff's burden to show that it had delivered notice of the award to defendant and that plaintiff had failed to make that showing.

Now that the facts have been developed at a lengthy evidentiary hearing, the picture takes on a different cast. As I have found in this opinion, it is clear that defendant did know the scope and nature of the ruling made against it before its representatives left the January 28, 1999 meeting. McLean announced in the presence of defendant's representatives that the panel had determined unanimously that defendant was bound by the provisions of the Northern Agreement; perforce, defendant was bound by the terms of the traveling contractor provision to pay the wage rates in effect at the job site area, that is, the rates set by the Southern Agreement, which applied to southern Wisconsin. Defendant argues that it believed that McLean's announcement applied to one job only, but its argument is illogical and without

support in the record. First, a holding that the traveling contractor provision applied to defendant at one job was the exact equivalent of a holding that it applied to all jobs performed in those areas of southern Wisconsin to which the Southern Agreement applied. Even if defendant viewed Leckwee's grievance notice as a one-job site grievance, the panel's decision was the handwriting on the wall: defendant would have to pay Southern Agreement wage rates and benefits on any other job in southern Wisconsin. Had defendant interpreted the decision as limited to one job only, why would Ken Endres have erupted in anger? In arguing the significance of the change in the draft order from project singular to projects plural (and its alleged surprise when the final award referred to plural projects) defendants says that it would not have objected to a one-job ruling because the cost of compliance might be less than the cost of a legal challenge. If defendant views a one-job ruling as nothing much, one would expect its owner to react with more equanimity to the decision.

Second, it makes no sense for defendant to argue that it thought the whole dispute was over wage rates at the Menard's job in Appleton. The Menard's job was covered specifically by the Northern Agreement; if it was the only job in dispute, there would have been no reference to the Southern Agreement or to the traveling contractor provision in the Northern Agreement. As Pease's comments to Robbins confirm, the parties' dispute was the application of the terms of the Northern Agreement to require defendant to pay Southern Agreement wage rates for jobs

in southern Wisconsin, which became pertinent once defendant began work at job sites in Johnson Creek and Beaver Dam.

Third, Godar's letter makes it plain that defendant believed it had received a definitive adverse decision at the meeting. Had defendant thought otherwise, Godar would not have written to plaintiff that the January meeting had resulted in a decision finding merit to the grievance and he would not have asked for a reconsideration of the decision.

(Plaintiff argues that the audit requests would have served as additional indications to defendant that a decision had been reached, but I am not convinced. The first request came before the January 28 meeting had been held; it would not have conveyed to defendant any idea that a decision had been reached on its obligation to make welfare contributions for jobs in southern Wisconsin.)

Although I do not accept defendant's argument that it lacked adequate notice of the scope and content of the arbitration panel decision until it received a copy of the written award, I am not prepared to hold that its time for suing to vacate the award began to run as of January 28, 1999. In other circumstances, I would be inclined to do so, particularly because it is apparent that many collective bargaining agreements make no provision for written arbitration awards. It would be contrary to actual practice to hold that the oral announcement of a decision in the presence of the parties did not constitute adequate notice of the decision. If, in

this case, the arbitration panel had stopped with the announcement of its decision in this case, I would reconfirm my earlier holding that defendant had lost its chance to challenge the decision by not filing a timely motion to vacate (although the untimeliness would consist of not filing within 90 days of the January 1999 meeting at which the oral decision was announced rather than in not filing within 90 days of the issuance of the written decision). However, McLean announced that the panel would issue its decision in writing. Once he said that, the written decision became the operative one, thereby staying the time for moving to vacate until issuance of the written decision.

The next question is whether in the particular circumstances of this case, the actual issuance of the arbitration decision started the running of the statute of limitations. I conclude that it did not because plaintiff did not take adequate steps to notify defendant that the decision had issued and because plaintiff did not sleep on its rights or attempt to avoid knowledge of the decision. It was not adequate notice for plaintiff to send a copy of the written decision to Associated General Contractors only and not to send a copy to defendant directly. Previously, plaintiff had sent correspondence such as the notice of the grievance directly to defendant. Even if plaintiff had believed notice to the organization was sufficient notice to defendant, plaintiff did not alert Associated General Contractors to the fact that it was relying on the organization to notify defendant of the award. Compounding plaintiff's inadequate

effort at mailing was the failure of any of its representatives to advise defendant or its counsel that a written decision had been issued.

Accordingly, I conclude that when defendant filed its counterclaim in this suit on August 9, 1999, that counterclaim was timely because it was filed within 90 days of July 19, 1999, the date on which plaintiff filed this law suit giving defendant its first actual notice of the issuance of a written decision by the arbitration panel.

ORDER

IT IS ORDERED that the motion of defendant Middleton Construction, Inc. to reinstate its counterclaim is GRANTED. This ruling brings up for consideration the enforceability of the arbitration award. The parties are to brief this issue on the following schedule: Defendant's brief in support of its counterclaim is to be served and filed no later than June 13, 2000; plaintiff's brief in opposition is to be served and filed no later than July 5, 2000; defendant's reply brief is to be served and filed no later than July 14, 2000. If the parties believe that any additional evidence must be presented, they should explain why in their briefs.

Entered this _____ day of May, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge