IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

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EMPLOYERS INSURANCE OF
WAUSAU, A MUTUAL COMPANY,

ORDER

Petitioner,

98-C-0521-C

v.

EL BANCO DE SEGUROS DEL ESTADO,

Respondent.

- -

Petitioner Employers Insurance of Wausau has moved for a permanent injunction prohibiting respondent El Banco de Seguros del Estado from initiating arbitration over respondent's obligation to post a letter of credit in petitioner's favor in the amount of $9,000,000. A hearing was held on the motion on April 23, 2003, before United States District Judge Barbara B. Crabb. Petitioner appeared by Timothy Muldowney and Kendall Harrison. Respondent appeared by James Higgins.

FACTS OF RECORD

Respondent has been litigating its obligation to post the letter of credit since 1998,

when petitioner filed this action to enforce an arbitration award issued in September 1995. Petitioner prevailed in this court and in the court of appeals, after respondent appealed the enforcement order. The United States Supreme Court refused to hear the matter. Despite the unanimity of the rulings against it, respondent continued to resist paying the amounts ordered by the arbitrators, refused to post the letter of credit and refused to disclose the existence of any assets upon which petitioner could levy. Petitioner learned of a bank account in New York and attempted to levy on it. Respondent brought a new action in the Southern District of New York in an effort to relitigate its obligation to conform to the arbitration award. This effort was thwarted when the new action was transferred to this court and decided against respondent in September 2001. Sanctions were imposed on respondent for its failure to pay petitioner and to post the letter of credit. Before the sanctions could take effect, respondent appealed the case to the Court of Appeals for the Seventh Circuit; that court dismissed the appeal in February 2003, for lack of jurisdiction.

On March 20, 2003, presumably upon receiving word of the dismissal of the appeal, respondent filed a demand for arbitration on respondent, notifying it that it viewed the 1995 arbitration award as disputed insofar as it ordered the posting of a letter of credit in the amount of $9,000,000. Petitioner then moved in this court for a temporary restraining order, which was granted after a hearing on April 16, 2003, to restrain respondent from proceeding with its arbitration request, pending the holding of a hearing on petitioner's

motion for a permanent injunction.

In the earliest proceedings before this court, respondent argued that the letter of credit and other arbitration sanctions would be "grossly unfair and would work a terrible hardship." Resp.'s Br. in Reply, dkt. #18, at 19. In petitioning the court of appeals for a rehearing en banc after that court had affirmed this court's enforcement of the arbitration award, respondent told the court that a judgment had been entered "in excess of $10 Million Dollars." Kareken Aff., dkt. #44, Exh. 6, at 1. In its petition for a writ of certiorari to the Supreme Court, respondent stated that the arbitration award would be enforceable as a judgment and would require "the posting of a $9,000,000 letter of credit in favor of [petitioner]."

In the hearing on the motion for a permanent injunction, respondent argued that arbitration was the only proper way of proceeding to resolve the parties' dispute over the purpose of posting the letter of credit. In a hearing to show cause why respondent should not be held in contempt for the filing and continued prosecution of its case against Wausau in the Southern District of New York, El Banco de Seguros v. Employers Ins. of Wausau, 01-C-0098-C (W.D. Wis.), respondent told the court that it had been entitled to file in the Southern District of New York because

> [u]nder Wisconsin law a party is entitled to go to a court to get a construction or interpretation of an ambiguous arbitration award, and that is WERC v. Teamsters Local [No.563, 75 Wis. 2d 602, 250 N.W.2d 696, a 1977 case. That case authorizes

> or permits a party to go to court if from the record a court can construe an ambiguous arbitration award. We took the position that all a court would have to do, whether it would be this court or the court in New York, would be to look at the record in the arbitration proceeding and look at the award and construe the award based upon that.

Tr. of Hrg. on Mot. for Sanctions, at 9.

DISCUSSION

Respondent has shown no reason why petitioner's motion for a permanent injunction should not be granted. Respondent has had a full opportunity to arbitrate; it failed to take advantage of that opportunity or of its opportunity to seek clarification or review of the arbitration within three months of the award. It has fought the enforcement of the award in four different courts, without success. Four different courts have devoted time and resources to hearing its defenses; it is time for this misuse of the judicial system to come to an end. Respondent should not be permitted to assert in a new forum the claims it has asserted in this case and in case no. 01-C-0098-C that have been decided against it.

It makes no sense for respondent to argue that any dispute remains with respect to its obligation to post a $9,000,000 bond for purposes other than to ensure its payment of the amount it owes respondent. Not only has this court that the purpose of the obligation to post the letter of credit is not simply to insure the payment of respondent's portion of the arbitration award, respondent has conceded in three courts its obligation to post a letter of

credit that is not limited simply to securing payment of the award. If, as it now argues, it believes that the letter of credit was nothing more than security for its payment of $181,319, why would it think it would be liable for posting a $9,000,000 letter of credit once it had paid petitioner the $181,319 it owed? And, more to the point, why would it have told three courts that its liability would exceed $9,000,000 if it did not acknowledge that the requirement of posting of the letter of credit was in addition to the payment of $181,319?

It is too late for respondent to argue, or attempt to arbitrate, its obligation to post a letter of credit in the amount of $9,000,000. Under the terms of the arbitration award, it assumed this obligation when it failed to pay $181,319 as ordered by the arbitration panel and confirmed by the Circuit Court for Marathon County, Wisconsin in an order entered on October 24, 1995. It missed its opportunity to seek clarification of the award or review of it when it let the three-month period pass without saying anything. The courts have told it repeatedly that its obligation is to post the letter of credit in the amount of $9,000,000.

Petitioner is entitled to a permanent injunction to prevent respondent from prosecuting yet another collateral attack on this court's judgments and orders. The doctrine of res judicata bars respondent from endless litigation of previously litigated matters.

Respondent's remarkable recalcitrance requires the imposition of sanctions, as well as an award of costs and attorney fees for the expenses petitioner has incurred since September 2001, in attempting to enforce its 1995 arbitration award. A federal court may

impose such sanctions to coerce obedience to its orders. Connolly v. J.T. Ventures, 851 F.2d 930, 932 (7th Cir. 1988). Fed. R. Civ. P. 70 authorizes courts to adjudge a party in contempt for failure to perform a specific act required under a judgment. Although respondent characterizes the posting of the letter of credit as equivalent to a money judgment and therefore, not one for which it may be held in contempt for failing to fulfill, respondent is wrong.

ORDER

IT IS ORDERED that

1. Respondent El Banco del Seguros de Estado is ENJOINED PERMANENTLY from proceeding with any arbitration pursuant to its demand of March 20, 2003 and from initiating any future arbitration demand that concerns in any way respondent's obligations under the September 14, 1995 arbitration award or this court's judgments and orders relating to that award;

2. Respondent is to pay to the court sanctions pursuant to Fed. R. Civ. P. 70 in the amount of $2000 a day, running from and including March 11, 2003 (the day after this court received the court of appeals' decision on respondent's appeal), to May 1, 2003 and then in amounts increasing as follows: $3000 a day running from and including May 2, 2003 to May 15, 2003; and $4000 a day running from and including May 16, 2003, until

it has paid petitioner Employers Insurance of Wausau all amounts owed, including attorney fees and costs and has posted a letter of credit in the amount of $9,000,000; once respondent has paid the amounts due petitioner and has posted the required letter of credit, it will be relieved of the obligation to pay future sanctions only; if the sanctions do not result in compliance, petitioner is free to ask the court to increase them.

3. Respondent is to pay reasonable attorney fees and costs to petitioner;

4. No later than April 30, 2003, petitioner is to file an itemized statement of attorney fees and costs incurred in this matter since September 21, 2001.

Entered this 23rd day of April, 2003.

BY THE COURT:

BARBARA B. CRABB
District Judge