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 is an action to enforce an arbitration award brought pursuant to Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185, and 28 U.S.C. §§ 1331 and 1337. Suit was begun by plaintiff International Union to enforce an arbitration proceeding in which it had been determined that defendant Middleton Construction, Inc. had bound itself to pay union wage rates and benefits when it performed jobs in southern Wisconsin. Defendant Middleton counterclaimed under the Labor Management Relations Act and the Federal Arbitration Act, 9 U.S.C. §§ 1-16, seeking vacation of the arbitration award on the ground that it was procured by corruption, fraud and undue means and did not draw its essence from the collective bargaining agreement.

The parties' familiarity with the procedural history of this case is assumed. On February 3, 2000, this court held an evidentiary hearing for the purpose of deciding whether defendant's counterclaim was filed outside the applicable statute of limitations. In an opinion and order dated May 22, 2000, I concluded from the evidence adduced at that hearing that defendant's counterclaim was timely and ordered briefing on the issue of the enforceability of the award. That issue is presently before the court. Having reviewed the parties' submissions and the evidence adduced at the evidentiary hearing, I conclude that the arbitration award must be vacated because defendant did not know that the meeting on January 28, 1999 was to be an arbitration hearing and plaintiff did not provide it with information sufficient to notify it of the meeting's purpose.

From the evidence adduced at the evidentiary hearing and the affidavits in the record, I make the following findings of fact. (Many of these findings were set out in the opinion and order of May 22, 2000).

FACTS

Plaintiff, on behalf of certain local unions, and the Associated General Contractors of Wisconsin, an employer group, were parties to a collective bargaining agreement known formally as Bricklayers and Allied Craftworkers District Council of Wisconsin Local #7, #13,

#21 and #34-Wisconsin 1996-1999 Labor Agreement. This agreement is referred to by the parties as the Southern Agreement. It covered cement finishing work in Sauk, Dodge, Jefferson, Walworth and Columbia counties. Defendant is not a member of Associated General Contractors.

Since the early 1990's, Jeffrey Leckwee, plaintiff's field staff representative in southern Wisconsin, sought to convince defendant to become a signatory to the Southern Agreement. There were several meetings between Leckwee and defendant's president, Ken Endres, in which the parties discussed the Southern Agreement and attempted to negotiate a compromise. At least two such meetings occurred between 1996-1998, but defendant never signed the Southern Agreement.

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 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; it did not include the counties covered by the Southern Agreement. The Northern Agreement provided that by signing the agreement, defendant was joining the multi-employer bargaining unit, the Wisconsin chapter of Associated General

Contractors, and was authorizing the bargaining unit to negotiate successor Master Agreements on its behalf. 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 employer representatives. 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, Leckwee 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.

Normally, after Associated General Contractors receives a grievance from the union, it will notify the employer of the hearing date. However, this procedure was not followed in this case. Instead, Associated General Contractors' general counsel, David McLean, informed plaintiff's field staff representative Leckwee that a hearing would be held on January 28, 1999, and Leckwee telephoned Endres to relay this information. Leckwee told Endres that the purpose of the meeting was "to talk about the grievance," or something to that effect. Leckwee

did not tell Endres that the January 28, 1999, meeting would be a meeting of the joint arbitration committee under Article VII of the agreement and he did not tell Endres that the meeting was set so that the parties could negotiate defendant's signing of the Southern Agreement. Defendant did not receive any other notice of the meeting.

Endres appeared for the 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. Before this point, defendant's representatives did not understand that the purpose of the meeting was to arbitrate 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. During

the course of the meeting, Ken Endres stated that defendant was being "railroaded." Endres also complained that Middleton had never been told about the purpose of the meeting and that its representatives thought they were coming to negotiate for the southern area.

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. (Although the specific basis for this conclusion has never been explained, I presume that the committee concluded that, by signing the Northern Agreement, defendant had agreed to recognize Associated General Contractors as its bargaining representative and therefore became a party to any agreements in place in Wisconsin between Associated General Contractors and the union.) 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.

Shortly after the January 28 meeting, defendant retained Thomas Godar, a Madison lawyer, to represent it with respect to the grievance. On February 11, 1999, Godar wrote McLean and the other members of the panel asking them to reconsider the decision reached at the meeting. Among other things, Godar asserted that defendant had not received adequate notice of the nature of the proceeding and its representatives were unaware that the meeting

would be a grievance procedure under Article VII of the Collective Bargaining Agreement.

OPINION

I. Legal Standard

Judicial review of arbitration awards is tightly limited. Baravati v. Josephthal, Lyon & Ross, Inc., 28 F.3d 704, 706 (7th Cir. 1994); Chicago Cartage Co. v. International Brotherhood of Teamsters, 659 F.2d 825, 827 (7th Cir. 1981). Federal courts must uphold an arbitrator's decision when it draws its essence from the collective bargaining agreement. ANR Advance Transportation Company v. International Brotherhood of Teamsters, Local 710, 153 F.3d 774, 778 (7th Cir. 1998). The Seventh Circuit has explained that "'[i]t is only when the arbitrator must have based his award on some body of thought, or feeling, or policy, or law that is outside the contract' that the award can be said not to draw its essence from the [CBA]." Id., 153 F.3d at 777 (quoting Jasper Cabinet Co. v. United Steelworkers of Am., AFL-CIO-CLC, Upholstery & Allied Div., 77 F.3d 1025, 1026 (7th Cir. 1996)).

Although arbitrators are not bound by formal rules of procedure and evidence, a party to arbitration has a right to a fundamentally fair hearing. National Post Office v. U.S. Postal Service, 751 F.2d 834, 841 (6th Cir. 1985); see also Yasuda Fire & Marine Ins. Co. of Europe, Ltd. v. Continental Casualty Co., 37 F.3d 345, 353 (7th Cir. 1994). A fundamentally fair

hearing is one that "meets 'the minimal requirements of fairness'-- adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator." Generica Ltd. v. Pharmaceutical Basics, Inc., 125 F.3d 1123, 1130 (7th Cir. 1997) (quoting Sunshine Mining Co. v. United Steelworkers, 823 F.2d 1289, 1295 (9th Cir. 1987) (internal citation omitted)); see also 9 U.S.C. § 10(a)(1)-(4) (providing that award may be vacated if obtained through fraud or other misconduct).

II. Notice

Defendant contends the arbitration award must be vacated because it was procured by undue means and misbehavior of the arbitrators, namely, their failure to notify defendant that the January 28, 1999 meeting was to be a hearing before a joint arbitration committee for the purpose of deciding Leckwee's grievance of January 5, 1999. Defendant says it thought the purpose of the meeting was to continue to negotiate for a competitive agreement in the southern area and that had it known that the meeting was a formal arbitration hearing, it would have prepared for the meeting by consulting with a lawyer and developing a settlement strategy.

Speaking to the issue of notice, the Supreme Court announced the following standard in Mullane v. Central Hanover Bank & Trust, Co., 339 U.S. 306, 314, 70 S. Ct. 652 (1950):

"An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." In Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 14, 98 S. Ct. 1554, 1562-63 (1978), the Supreme Court instructed that the notice must give the affected person or entity sufficient information to permit adequate preparation for an impending hearing.

Due process does not require actual notice, but only reasonable efforts at notice. See Krecioch v. U.S. Drug Enforcement Agency, 221 F.3d 976, ___, 2000 WL 994932, *3-*4 (7th Cir. July 20, 2000); Schluga v. City of Milwaukee, 101 F.3d 60, 62 (7th Cir. 1996). Thus, where an arbitrator serves notice on an affected party in the manner prescribed by the parties' collective bargaining agreement, the notice requirement will be satisfied even if the party does not receive actual notice of the arbitration hearing. See Gingiss International, Inc. v. Bormet, 58 F.3d 328, 332 (7th Cir. 1995) (arbitration award not vacated despite defendants' claim that they did not receive actual notice of arbitration hearing where arbitrator complied with agreement's notice provision by sending four letters by regular mail to defendants' last known address and letters were not returned as undelivered). Conversely, where a party has actual notice of an arbitration hearing, due process is satisfied even if the arbitrator did not comply

technically with the notice procedures set forth in the agreement. See, e.g., Bernstein Seawell & Kove v. Bosarge, 813 F.2d 726, 729-30 (5th Cir. 1987) (affirming district court's conclusion that defendant had actual notice of arbitration where notice was sent to address he was currently using but different from one specified in partnership agreement); Merrill Lynch, Pierce, Fenner & Smith v. Lecopulos, 553 F.2d 842, 845 (2d Cir. 1977) ("[N]o unfairness results from giving effect to the notice they actually received"); Shamah v. Schweiger, 21 F. Supp. 2d 208, 215 (E.D.N.Y. 1998) ("Shamah received actual notice and was not prejudiced by lack of notice via registered or certified mail.").

The collective bargaining agreement in the instant case does not specify how the parties are to be notified of a pending meeting of the joint arbitration committee. It is undisputed that defendant received no written notice of the meeting on January 28, 1999, but that it knew of the date, time and location of the meeting. The issue before the court is whether Leckwee's telephone call to Endres, viewed in light of all the circumstances, notified defendant adequately that it should prepare for an arbitration hearing.

As I have found earlier in this opinion, defendant did not have actual notice that the meeting on January 28, 1999 was a meeting of the joint arbitration committee for the purpose of deciding Leckwee's grievance. In making this finding, I have considered plaintiff's claim that there is no reasonable foundation for defendant's stated belief that it thought the meeting was

for the purpose of negotiating a competitive agreement in the southern area. Specifically, plaintiff argues that, if defendant didn't know from signing the Northern Agreement that it would also have to pay union wages and benefits in the southern area, then it had to have known from Leckwee's grievance and his phone calls to Ron Pulver that preceded the grievance that the union believed this to be the case and was no longer interested in negotiating. Having achieved its purpose when defendant signed the Northern Agreement, plaintiff lacked any incentive to persuade defendant to sign the Southern Agreement.

Although I agree that this evidence tends to undermine the reasonableness of defendant's alleged belief as to the nature of the January 28, 1999 meeting, it does not persuade me that defendant's belief was not genuine. Neither Leckwee's phone calls to Pulver nor his grievance provide sufficiently strong evidence to establish that defendant knew that the meeting on January 28, 1999 was an arbitration hearing. Without more, Pulver's statement that he would "check into" whether defendant was paying the proper rates in the southern area does not equate to an admission that negotiations with the union about wage rates in the southern area were no longer of any significance. As for Leckwee's January 5, 1999 grievance, its evidentiary weight is lessened by Leckwee's failure to specify therein that it was directed towards defendant's projects in the southern area.

Although plaintiff has submitted an affidavit from Leckwee in which he avers that he

"made it clear" to Ken Endres that the purpose of the meeting was to decide the merits of his January 5, 1999 grievance, I find Ken Endres and Russ Pulver credible to the extent they testified at the evidentiary hearing that they did not know the true purpose of the January 28 meeting until they arrived. Plaintiff has not disputed defendant's contention that, upon learning that the meeting was an arbitration hearing, Ken Endres complained that defendant had never been told about the purpose of the meeting and that its representatives thought they were coming to negotiate for the southern area. Endres's objection at the hearing once he discovered what was going on corroborates defendant's assertion that it lacked actual notice of the nature of the proceeding. Having observed Endres testify at the evidentiary hearing, I do not believe he is so conniving as to have contrived a phony objection for the purpose of creating an issue for a possible appeal.

Moreover, it was not totally unreasonable for defendant to fail to understand that, because of the traveling contractor clause of the Northern Agreement, it was bound to pay union wages and benefits in the southern counties even though it had not signed the Southern Agreement. There is no mention in the Northern Agreement that it would apply specifically to the five counties covered by the Southern Agreement by virtue of the traveling contractor clause. Also, defendant never signed the Southern Agreement and it did not have any other labor agreement with any of plaintiff's affiliates in the five southern counties.

Apparently, defendant became obligated to pay plaintiff's wages and benefits in the area covered by the Southern Agreement by virtue of the fact that by signing the Northern Agreement, defendant had agreed for collective bargaining purposes to join the multi-employer bargaining unit, Associated General Contractors, and therefore became a party to any labor agreements in effect between the union and Associated General Contractors. Plaintiff argues that defendant must be found to have known this because it signed the agreement, but I do not find this effect of the agreement to be manifestly clear from its language. Moreover, even though defendant was a signatory to an identical predecessor agreement (the 1993-1996 Northern Agreement) that contained the same traveling contractor clause, apparently plaintiff did not seek to enforce the agreement with respect to defendant's projects in the southern area during the time period covered by that agreement but worked instead to convince defendant to sign the Southern Agreement. Thus, even if defendant did understand the potential ramifications of signing the 1996-1999 Northern Agreement, it may have thought—naively—that the union would continue to acquiesce in its conduct in the southern area.

In sum, I do not find defendant's claim that it thought the purpose of the January 28, 1999 meeting was to negotiate with plaintiff about the Southern Agreement to be so unreasonable as to render incredible its claim that it lacked actual notice of the hearing's

purpose. That said, defendant's lack of actual notice is not dispositive if the arbitration committee took reasonable steps (typically, written notice sent via U.S. mail will suffice) to provide defendant with notice. I conclude that Leckwee's phone call to Endres was insufficient under the circumstances to alert defendant that the January 28, 1999 meeting was for the purpose of arbitrating the grievance pursuant to the agreement's grievance procedures. As I have found in this opinion, Leckwee did not specify that the meeting would be a meeting of the joint arbitration committee; in fact, there is no evidence that Leckwee used the term "arbitration" at all when he spoke with Endres. Moreover, Leckwee testified at the evidentiary hearing that he told Endres that "there was a meeting set up to talk about the grievance." Tr. Evid. Hearing, dkt. #41 at 87. This comports with Endres's testimony wherein he stated that Leckwee told him that the meeting was being convened to "try to hash things out." Id. at 7.

I disagree with plaintiff's assertion that Leckwee's phone call was sufficient in light of the fact that defendant had already received a copy of Leckwee's January 5, 1999 grievance in which he requested a meeting of the joint arbitration committee. Defendant's awareness that the joint arbitration committee was going to meet in the future does not establish that it knew from Leckwee's general notice of a meeting "to talk about the grievance" that the meeting to which Leckwee was referring was to be the arbitration hearing requested in his letter. Also, one would not reasonably expect notice of an arbitration hearing to come from Leckwee, who was

the person who filed the grievance. While I recognize that grievance hearings before joint arbitration committees are informal proceedings that contemplate discussion and negotiation free from the constraints of formalized procedures, see, e.g., Chicago Cartage Co., 659 F.2d at 829, such proceedings nonetheless have an adjudicatory aspect and can result in legally binding awards of great consequence to the parties involved. For that reason, Leckwee or the Associated General Contractors had a duty to make it clear to defendant that the January 28, 1999 meeting was a meeting of the joint arbitration committee convened for the purpose of deciding the grievance. Because Leckwee failed to present defendant with sufficient information to allow it to prepare for an arbitration hearing, the notice was inadequate.

As a fallback position, plaintiff contends that defendant waived any claim of defective notice when it failed to request that the January 28, 1999 hearing be postponed. It is true that a party who fails to present an issue before an arbitrator waives the issue in an enforcement proceeding. See, e.g., Nat'l Wrecking Co. v. International Brotherhood of Teamsters, Local 731, 990 F.2d 957, 960 (7th Cir. 1993); Walters Sheet Metal Corp. v. Sheet Metal Workers Local No. 18, 910 F.2d 1565, 1567 (7th Cir. 1990). However, it is undisputed that Ken Endres was visibly angry and complained at the hearing that Middleton had never been told about the purpose of the meeting and that its representatives thought they were coming to negotiate for the southern area. This was sufficient to alert the arbitration committee to the

issue and preserve defendant's right to assert lack of notice as a reason for vacating the award. Endres is not a lawyer and defendant was not represented by a lawyer at the hearing. After the hearing, defendant contacted a lawyer who formally reiterated defendant's notice objection. Under the circumstances and in light of the informal nature of arbitration proceedings, defendant's failure to ask that the hearing be postponed cannot be construed reasonably as an intentional relinquishment of its right to object to notice.

Because I have found that defendant was deprived of a fundamentally fair hearing when it was not provided with notice reasonably calculated to inform it of the nature of the meeting on January 28, 1999, the arbitration award must be vacated. Accordingly, it is unnecessary to address the other grounds of error alleged by defendant.

III. Attorney Fees

Defendant's counterclaim includes a request for an award of attorney fees incurred in prosecuting the instant motion to vacate the arbitration award, although it has not presented any arguments in support of such an award in its brief. Neither Section 301 of the Labor Management Relations Act nor the Federal Arbitration Act expressly authorizes an award of attorney fees. Absent such statutory authorization or contractual agreement between the parties, each party pays its own attorney fees incurred in the litigation unless the court

determines that plaintiff's action was frivolous, that is, brought in bad faith or "to harass rather than to win," or "so devoid of arguable merit as to warrant sanctions under Rule 11." See Local 879, Allied Industrial Workers of America v. Chrysler Marine Corp., 819 F.2d 786, 791 (7th Cir. 1987).

I find no indication that plaintiff's action to enforce the arbitration award was undertaken in bad faith or to harass defendant. Moreover, although I have determined that the arbitration award must be vacated, plaintiff's position in this litigation was not without merit. In fact, this was a very close case. As a result, defendant's request for an award of attorney fees is denied.

ORDER

IT IS ORDERED that defendant Middleton Construction, Inc.'s counterclaim for vacatur of the arbitration award is GRANTED. Defendant's request for an award of attorney fees is DENIED. The claim of plaintiff International Union of Bricklayers and Allied Craftworkers District Council of Wisconsin for enforcement of the arbitration award is DISMISSED. The clerk of court is directed to enter judgment in favor of defendant and close this case.

Dated this 20th day of September, 2000.

BY THE COURT:

BARBARA B. CRABB
District Judge