IN THE SUPREME COURT OF THE STATE OF NEVADA

SIERRA PACIFIC POWER COMPANY, A NEVADA CORPORATION,
Appellant/Cross-Respondent,
vs.
STEAMBOAT DEVELOPMENT CORPORATION, A NEVADA CORPORATION; AND FAR WEST CAPITAL, INC., A UTAH CORPORATION,
Respondents/Cross-Appellants.

No. 41545

FILED

MAY 17 2005

JANETTE M BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER AFFIRMING IN PART AND REVERSING IN PART

This is an appeal and cross-appeal from a district court order confirming an arbitration award. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant/cross-respondent Sierra Pacific Power Company appeals from a district court order confirming an arbitrator's award in a contract dispute with respondents/cross-appellants Steamboat Development Corporation and Far West Capital, Inc. Sierra argues that the arbitrator manifestly disregarded the law in applying the Uniform Commercial Code (UCC) to the agreement, in requiring Sierra to participate in proving damages, and in awarding prejudgment interest. Sierra further contends that the award to Steamboat and Far West was based on insufficient evidence, rendered in disregard of substantial evidence, and was arbitrary and capricious. Finally, Sierra claims that the arbitrator's decision as to subsequent pricing of electricity under the disputed "reduced energy rate" section of the contract violated public policy and exceeded the arbitrator's power since it unlawfully altered a regulated pricing method. We disagree.

A district court's application of the manifest disregard standard in arbitration cases is a legal determination that this court reviews de novo.[1]

Common law grounds for vacating an arbitration award may exist when the award is arbitrary, capricious, or unsupported by the agreement; or when an arbitrator manifestly disregards the law.[2] The district court's review of an arbitration award "under the manifest disregard standard does not entail plenary judicial review."[3] Findings of manifest disregard of the law to narrow circumstances where an arbitrator recognized a clear governing legal principle, but ignored that principle.[4] "[T]he issue is not whether the arbitrator correctly interpreted the law, but whether the arbitrator, knowing the law and recognizing that the law required a particular result, simply disregarded the law."[5]

Statutory grounds for vacating an arbitration award appear in Nevada's Uniform Arbitration Act.[6] In relevant part, they direct a court to

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[1]Clark County School District v. Rolling Plains Construction, Inc., 117 Nev. 101, 104, 16 P.3d 1079, 1081 (2001) (citing Greenberg v. Bear, Stearns & Co., 220 F.3d 22, 28 (2d Cir. 2000)).

[2]Wichinsky v. Mosa, 109 Nev. 84, 89-90, 847 P.2d 727, 731 (1993).

[3]Graber v. Comstock Bank, 111 Nev. 1421, 1428, 905 P.2d 1112, 1116 (1995).

[4]Bohlmann v. Printz, 120 Nev. ____, ____, 96 P.3d 1155, 1157-58 (2004).

[5]Id. at ____, 96 P.3d at 1158.

[6]NRS 38.241 (formerly NRS 38.145). The newer version of the statute, although effective after the date of the underlying arbitration here, is identical to the previous statute with respect to the issues in this

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vacate an award that was procured by corruption, fraud or other undue means;[7] if there was evident partiality, corruption, or misconduct by the arbitrator;[8] or if the arbitrator exceeded his powers.[9]

No clear principle of Nevada law dictates whether electricity sold between two electricity producers can be considered a "good" for the purpose of applying the UCC.[10] We therefore conclude that the arbitrator did not manifestly disregard the law in applying the UCC to reasonably define the ambiguous contract term at issue here.

Additionally, having reviewed the testimony of experts for both parties as to industry practice and standards for determining incremental costs and economic dispatch, we conclude that the arbitrator's determination of how the reduced energy rate should be calculated was not arbitrary or capricious. Nothing in the record supports Sierra's contention that the pricing method for economic dispatch in the contract

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. . . *continued*
action. Therefore, citation will be made to the newer version; part of the Uniform Arbitration Act of 2000.

[7]NRS 38.241(1)(a).

[8]Id. at (1)(b)(1-3).

[9]Id. at (1)(d).

[10]See, e.g., Norcon Power Partners, L.P. v. Niagara Mohawk Power Corp, 163 F.3d 153, 155 (2d Cir. 1998) (determining that under New York law electricity is considered a service); Helvey v. Wabash County REMC, 278 N.E.2d 608, 609-10 (Ind. Ct. App. 1972) (concluding that electricity was a good); Puget Sound Energy, Inc. v. Pacific Gas and Electric Co., 271 B.R. 626, 638-39 (N.D. Cal. 2002) (finding courts around the nation split on this issue, but declaring that "California courts have consistently found that electricity is a product or good").

with Steamboat is a filed rate that can only be changed with the permission of and under the purview of a regulating agency. The Public Utilities Commission of Nevada (PUCN) approved the agreement that contained both the disputed contract term and the arbitration clause, thereby impliedly approving in advance any determination by an arbitrator as to ambiguous terms. We therefore conclude that the arbitrator did not exceed his powers in reasonably defining an ambiguous contract term. The filed rate doctrine does not apply here, where there is no evidence the rate in question was either defined by, or filed with, the PUCN.

As to damages, the commercial arbitration rules of the American Arbitration Association (AAA), agreed upon by the parties in the contract, give an arbitrator broad power to "grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties."[11] The arbitrator may make "interim, interlocutory, or partial rulings, orders, and awards."[12] Finally, an arbitrator may direct that documents or other evidence be submitted after the hearing.[13] Thus, we conclude that the arbitrator did not exceed his powers in requesting additional data from the parties after the arbitration testimony concluded.

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[11]AAA Rule 45(a).

[12]AAA Rule 45(b).

[13]AAA Rule 34(b).

The burden of establishing damages is on the party claiming such damages.[14] However, those damages need not be proven with precision; rather, the injured party "need only establish a reasonable basis for ascertaining those damages."[15] Also, "[t]here must be an evidentiary basis for determining a reasonably accurate amount of damages."[16] After reviewing the data and testimony presented, we conclude that there was a reasonable basis to support the award of damages based on the pricing of economic dispatch and rounding.

In sum, we conclude that the arbitrator did not exceed his powers under the arbitration agreement, and did not manifestly disregard the law in his award. Further, we conclude that the arbitrator's decision was not arbitrary or capricious.

On cross-appeal, Steamboat and Far West contend that the district court erred in vacating the arbitrator's award of prejudgment interest. We agree.

The district court acknowledged that the arbitrator was permitted by AAA rules to award prejudgment interest, but found that based on "Nevada Supreme Court precedent and policy," he should have used the three-prong test from Paradise Homes v. Central Surety[17] to

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[14]Central Bit Supply v. Waldrop Drilling, 102 Nev. 139, 142, 717 P.2d 35, 37 (1986).

[15]Id.

[16]Mort Wallin v. Commercial Cabinet, 105 Nev. 855, 857, 784 P.2d 954, 955-56 (1989) ("Evidence essential to sustain a damages award must be in the record and available for meaningful appellate review.").

[17]84 Nev. 109, 437 P.2d 78 (1968).

determine if such interest was appropriate here. Although not mentioned by the district court, the record indicates that the arbitrator based his prejudgment interest award on his interpretation of Bobby Berosini, Ltd. v. PETA.[18] The arbitrator cited the Berosini case for the proposition that prejudgment interest should only be disallowed when "a party is unable to substantiate when a particular cost was incurred."[19] It appears that the arbitrator misconstrued Nevada law in determining that prejudgment interest was awardable here; instead of making a determination under Paradise Homes that the amount of the judgment was ascertainable, he instead found that prejudgment interest was awardable since the dates of each underpayment by Sierra could be ascertained from the records provided.

The three prongs of Paradise Homes that must be determined in order to award prejudgment interest are (1) the rate of the interest; (2) the time when it commences to run; and (3) the amount of money to which the rate of interest must be applied.[20] The parties do not dispute the interest rate or the time when it commences, since the interest rate is statutory, and it runs from the time the money becomes due. The parties disagree as to whether the amount of money due here was ascertainable. Sierra contends that the amount was unascertainable, as neither party was able to calculate a new reduced energy rate until the arbitrator made his award. Steamboat argues that the amount due was readily

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[18]114 Nev. 1348, 971 P.2d 383 (1998).

[19]Citing Berosini, 114 Nev. at 1356, 971 P.2d at 388.

[20]Paradise Homes, 84 Nev. at 116, 437 P.2d at 83.

ascertainable by the arbitrator through mathematical calculation, and the arbitrator correctly ruled that prejudgment interest was due here.

In Paradise Homes, this court held that, as here, when the contract does not provide a definite amount of money to which interest will be applied, an award of interest is appropriate if the principle amount maybe ascertained "by mathematical calculation from a standard fixed in the contract or from established market prices of the subject matter[.]"[21] This court went on to reverse the district court's denial of prejudgment interest where the parties signed a contract calling for Paradise Homes to complete any work not completed by a certain subcontractor, with Paradise Homes to be paid "all costs incurred in the completion thereof, including a reasonable cost for a overhead, together will all labor paid for and materials purchased."[22] This court deemed that contract language sufficient to make the amount owed "ascertainable by mathematical calculations from a standard fixed in the contract or from established market prices of the subject matter."[23]

Similarly, in Sierra Pacific Power Company v. Nye,[24] this court reversed a district court's denial of prejudgment interest where the power company had not notified trailer park owners of the option of selecting a power rate more favorable to the trailer park.[25] This court held

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[21]Id.

[22]Id. at 111, 437 P.2d at 79-80.

[23]Id. at 117, 437 P.2d at 84-84.

[24]80 Nev. 88, 389 P.2d 387 (1964).

[25]Id. at 96, 389 P.2d at 391.

that the amount of overpayment by the trailer park owners "was definitely ascertainable by mere mathematical calculation, being the difference between the . . . rates."[26] Consequently, the trailer park owners were "entitled to repayment by the defendant on the date each overpayment was made, and . . . [were] entitled to the statutory rate of interest from each of such dates."[27]

In Chesapeake Industries, Inc. v. Togova Enterprises, Inc.,[28] a case involving a lessee owing damages for a breached lease, the California Court of Appeals held that equity precluded an award of prejudgment interest since the lessee could not calculate the amount owed because of the lessor's negligence in failing to provide accurate data necessary for the calculation.[29] The reasoning from Chesapeake is persuasive here, as Steamboat could not calculate the specific amount of overpayment to Sierra based on "established market prices" due primarily to Sierra's refusal to provide the data necessary for the calculations. Even the arbitrator had to make repeated requests of Sierra to obtain the data necessary to calculate damages.

Here, Steamboat's experts used established industry standards to calculate estimated damages based on regional price indices and average heat rates reported by Sierra to the Federal Energy Regulatory Commission (FERC), but could not calculate damages precisely

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[26]Id.

[27]Id.

[28]197 Cal. Rptr. 348 (Ct. App. 1983).

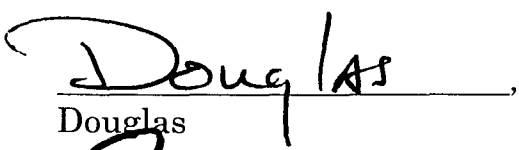
[29]Id. at 355.

without knowing the exact fuel prices, transportation costs, heat rates, and other specific numbers known only to Sierra. Equity precludes a party responsible for failure to provide the data necessary for such calculations from benefiting from the inadequacy of those calculations. We conclude, therefore, that the arbitrator reasonably awarded prejudgment interest to Steamboat.

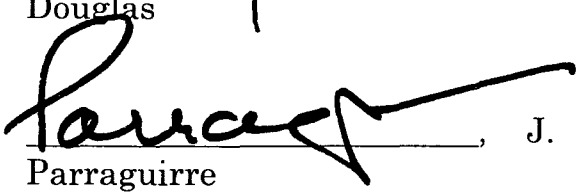
Although the district court failed to identify the specific grounds for vacating the arbitrator's award of prejudgment interest, we conclude that the decision to vacate was incorrect. We therefore reverse that portion of the district court's order vacating prejudgment interest and affirm the remainder of the order.

It is so ORDERED.

_____, J.
Maupin



_____, J.
Douglas



_____, J.
Parraguirre

cc: Hon. Connie J. Steinheimer, District Judge
Morris Pickering & Peterson/Las Vegas
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Washoe District Court Clerk