UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Unison Co., Ltd.,

Plaintiff,

v.

Juhl Energy Development, Inc.; Juhl Energy, Inc.; Winona Wind Holdings, LLC; Winona County Wind, LLC; Daniel Juhl; John Mitola; John Brand; Bartly J. Loethen; Audrey Loethen; and Jeff Bendel;

Defendants.

No. 13-cv-3342 (ADM/JJK)

ORDER

Boyoon Choi, Esq., and Vanessa M. Ish, Esq., Choi Capital Law PLLC; Katherine N Arnold, Esq., and Paul R. Dieseth, Esq., Dorsey & Whitney LLP; counsel for Plaintiff.

J. Mathhew Berner, Esq., and Tim L. Droel, Esq., Droel PLLC, counsel for Defendants.

JEFFREY J. KEYES, United States Magistrate Judge

This matter is before the Court on Defendants' motion to compel plaintiff's compliance with an arbitration panel's discovery orders. (Doc. No. 103). The Court held a hearing on the motion on March 21, 2016, at which the parties were represented by counsel.

BACKGROUND

Plaintiff Unison Co., Ltd., commenced this case in December 2013 alleging that Defendants breached terms of an agreement to purchase wind turbine generators from Unison. The parties' underlying dispute involves Unison's claims that Defendants failed to repay Unison for financing two such generators in breach of the parties' financing agreement and Defendants' counterclaim (asserted in arbitration) that Unison failed to design, manufacture, install, and maintain the generators consistent with the warranties under the parties' supply agreement. After

the lawsuit commenced, Defendants moved to compel arbitration under a clause in the parties' agreement. (Doc. No. 24.) After Defendants prevailed on an appeal from the denial of that motion and the Eighth Circuit Court of Appeals determined that the parties' dispute fell within the arbitration clause (Doc. Nos. 81–82), the District Court stayed this case pending resolution of the arbitration proceeding (Doc. No. 101).

Two relevant issues arose during the course of the ensuing arbitration. First, Defendants sought document discovery from Unison regarding the design, manufacture, installation, and maintenance of the generators. (Doc. No. 108, Berner Aff. ¶ 2, Ex. A.) Unison objected to the discovery on numerous grounds. (Berner Aff. ¶ 6, Ex. E (Doc. No. 113-3 at 22–30).) On October 8, 2015, with limited exceptions, the arbitration panel overruled all of Unison's objections, thereby ordering Unions to produce the other documents requested by Defendants. (Berner Aff. ¶ 7, Ex. F (Doc. No. 113-4 at 1).) On December 10, 2015, the arbitrators explained to the parties during a conference call "that the panel does not want to deal with discovery issues further, but the parties are allowed to bring motions to obtain final decisions if necessary." (Berner Aff. ¶ 14, Ex. M (Doc. No. 115 at 2).)

Second, Defendants lost the ability to remotely control or obtain real-time performance data from the generators through access to the generators' "supervisory control and data acquisition" (SCADA) system. The parties disputed how Defendants lost that control or access to the SCADA system: Defendants accused Unison of intentionally cutting off their access (Berner Aff. ¶ 10, Ex. I (Doc. No. 114-2 at 1); Unison asserted that Defendants lost the access through their own actions (*id.* ¶6, Ex. E (Doc. No. 113-3 at 19)). Defendants asked the arbitrators to order Unison to restore its access to the SCADA system, and the parties went ten rounds with the arbitrators over whether and how Defendants' access to the SCADA system

could be restored. (*See generally* Berner Aff. ¶ 6, Ex. E (Doc. No. 113-3 at 1–22).) On December 10, 2015, the arbitrators held a conference call with the parties regarding the SCADA issue and instructed the parties "to come up with a mutually agreed plan [for restoring Defendants' access,]" to share the costs "50/50," and for each party to track its own costs and submit a claim for its share at the arbitration hearing. (Berner Aff. ¶ 14, Ex. M (Doc. No. 115 at 2.) On December 14, 2015, the arbitrators further clarified: "With respect to the SCADA issue, the parties should include in their plan their estimates of cost. The estimated costs (or the actual costs if they are less tha[n] the estimate) will be split 50/50. If costs exceed the overrun [they] may be claimed at the hearing." (*Id.* ¶ 14, Ex. M (Doc. No. 115 at 1.)

On March 7, 2015, Defendants filed the pending motion to compel compliance with what they characterize as the arbitrators' "discovery orders." (Doc. No. 103.) In the motion Defendants ask this Court to issue an order compelling Unison's compliance with the arbitrators' October 8, 2015 order requiring production of documents. (Doc. No. 104, Defs.' Mem. 3–8.) Defendants also ask the Court to enter an order requiring Unison to comply with the arbitrators' order concerning Defendants' access to the SCADA system. (Defs.' Mem. 8–9.)

DISCUSSION

Defendants bring their motion under a provision of the Federal Arbitration Act that provides a limited function for the district courts to enforce discovery summonses issued in arbitration:

> The arbitrators . . . may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. . . . [I]f any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law

> for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

9 U.S.C. § 7. "Although on its face this section appears only to authorize an arbitration panel to issue a subpoena for testimony and document production at a hearing, the Eighth Circuit has held that implicit in this section is 'the power to order the production of relevant documents for review by a party prior to a hearing.'" *Schlumbergersema, Inc. v. Xcel Energy, Inc.*, No. 02-cv-4304 (PAM/JSM), 2004 WL 67647, at *1 (D. Minn. Jan. 9, 2004) (*In the Matter of Arbitration Between Sec. Life Ins. Co. of Am. & Duncanson & Holt* (*Security*), 228 F.3d 865, 870–71 (8th Cir. 2000). In both *Security* and *Schlumbergersema*, the courts applied section 7 in the following scenario: the arbitrators had issued third-party subpoenas for deposition testimony and the production of documents prior to a hearing, and the non-parties refused to comply. Both courts ordered the non-parties to produce documents subpoenaed by the arbitrators. *Security*, 228 F.3d at 872 ("We affirm the district court with respect to its enforcement of the panel's order for the production of documents."); *Schlumbergersema*, 2004 WL 67647, at *3 ("Accordingly IT IS HEREBY ORDERED that . . . Schlumberger Limited must immediately produce the documents required by the arbitration panel's November 26, 2003, Corrected Subpoena Duces Tecum."). Courts have also enforced arbitration panel discovery orders directed to a party in the arbitration under this provision of the Federal Arbitration Act. *See, e.g.*, *Lubermans Mut. Cas. Co. v. Broadspire Mgmt. Servs. Inc.*, No. 07-cv-0386, 2008 WL 1774565, at *3 (N.D. Ill. Apr. 15, 2008) (noting that the arbitrator had the power to conduct the arbitration as it determined would resolve the dispute before it, but concluding that "since [the defendant] Broadspire has not complied the Court will order buyer [Broadspire] to produce the discovery ordered by [the arbitrator].").

However, the Court will not issue the orders requested by Defendants concerning the document-production issue or the SCADA-access issue. In both instances, the motion seeks relief from this Court that is not appropriate under 9 U.S.C. § 7.

With respect to Defendants' motion on the SCADA-access issue, Defendants ask this Court to go far afield from the text of the statute. When the arbitration panel here instructed the parties to mutually agree to a plan for restoring Defendants' access to the SCADA system it was not ordering a witness to appear to testify at a hearing. Nor was the arbitration panel summoning a party to produce books, records, documents, or papers. Instead, the arbitrators ordered the parties to come up with a mutually agreeable plan to resolve the SCADA issue and established a mechanism for sharing the costs. Nothing in the language of section 7, or in the cases interpreting that language, authorizes the Court to compel a party's compliance with an arbitration panel's instruction to the parties to cooperate in specific manner during the arbitration. The arbitrators are certainly equipped to handle this issue, the parties agreed that they would resolve their dispute through arbitration, and Defendants invoked that agreement specifically so that the arbitrators could give them an efficient adjudication of matters within the arbitration's province. It is consistent with "the strong federal policy favoring arbitration," *see Schlumbergersema*, 2004 WL 67647, at *2, to allow the arbitrators to manage the proceedings before them, and the Court will not interfere with the arbitrator's authority by wading into this dispute.

Turning to the parties' dispute concerning Unison's document production, this is not a situation where a party ordered to provide documents by the arbitrators has clearly flouted the arbitrators' commands, and the party seeking to review those documents prior to the hearing is left with no recourse within the arbitration. All that is needed to illustrate this point is to refer to

the substance of the arbitrators' order. Although the arbitrators clearly had some frustration with the parties' inability to resolve the ongoing dispute concerning Unison's production of documents contemplated by the October 8, 2015 discovery order, the arbitrators specifically informed the parties that they "are allowed to bring motions to obtain final decisions if necessary." (Berner Aff. ¶ 14, Ex. M (Doc. No. 115 at 2.) At best this means that Defendants' motion is premature. The purpose behind 9 U.S.C. § 7 is to ensure that arbitrators have the information they need to make a decision. The courts are empowered by the statute to step in when a party to the arbitration, or a non-party subpoenaed by the arbitrator, is commanded to turn over documents and disobeys that command. We are not at that point in this case.

This discovery dispute is at a point where the parties must engage the procedures applicable to their arbitration for resolution. Defendants say that they are entitled to certain documents consistent with the arbitrators' October 8, 2015 ruling (Defs.' Mem 4–8), and Unison says that it has produced everything it has the power to produce, but is continuing its search of its records (Doc. No. 118, Unison's Mem. 6, 16–23). When a case is pending in federal court, this is precisely the type of discovery dispute magistrate judges are empowered to resolve, and it is appropriate in that context for the Court to dive into the nettles. But this case is stayed so that the parties' agreement to arbitrate can be given effect, and thus, the Court's authority to insert itself in the parties' dispute is limited. Given that the arbitrators plainly informed the parties that they could file motions "to obtain final decisions" concerning discovery, it would be just as inappropriate for the Court to intrude on the arbitrators' domain as it would be for the Court to try and define for the arbitrators the materiality of any particular information to the resolution of the arbitration. *See Schlumbergersema*, 2004 WL 67647, at *3 (citing *Security*, 228 F.3d at 871).

Because the Court denies Defendants' requests for relief, the Court will also deny Defendants' request that Unison be required to pay the attorney's fees and costs incurred in filing their motion to compel under Rules 37(b)(2)(C) and (b)(2)(A)(vii) of the Federal Rules of Civil Procedure.

CONCLUSION

Based on the foregoing, **IT IS HEREBY ORDERED** that Defendants' motion to compel (Doc. No. 103) is **DENIED**.

Date: March 21, 2016

s/ Jeffrey J. Keyes
JEFFREY J. KEYES
United States Magistrate Judge