UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

NORFOLK SOUTHERN RAILWAY COMPANY,

Plaintiff,

v. Civil Action No. 2:15cv16

SPRINT COMMUNICATIONS COMPANY, L.P.,

Defendant.

ORDER

Before the Court is a Motion to Dismiss or to Stay and an Alternative Request to Vacate (ECF No. 4) filed by Defendant Sprint Communication Company, L.P. ("Defendant" or "Sprint"), and a Motion to Confirm Arbitration Award (ECF No. 26) filed by Norfolk Southern Railway Company ("Plaintiff" or "NSR"). For the following reasons, the Court **DENIES** Defendant's Motion to Vacate the Arbitration Award, and **GRANTS** Plaintiff's Motion for Confirmation of Arbitration Award.

FACTS

This dispute involves a rental renewal rate pursuant to a license agreement (the "Agreement") between Sprint and NSR. Under the Agreement, NSR granted Sprint the right to install, operate, and maintain a fiber optic telecommunications system along certain rights of way in Illinois, North Carolina, South Carolina, Tennessee, and Virginia. The initial term of the lease was for twenty-five years, and expired on June 30, 2012. Sprint exercised its option to renew the Agreement for an additional twenty-five year period.

In Section 2.2.2 (the "Arbitration Provision"), the Agreement included a provision detailing that the parties would resolve disputes over the renewal term rental rate by submitting the dispute to arbitration.[1]

Section 2.2.2 requires appointing MAI appraisers to conduct a formal valuation of the fair rental value. If the appraisers failed to agree on the fair rental value, the Arbitration Provision requires the appointment of a third appraiser to determine a majority decision.

Because Sprint and NSR disagreed about the rental renewal rate, the dispute was submitted to arbitration pursuant to Section 2.2.2. To perform the initial valuations of the rental renewal rate, Sprint appointed appraiser Laird Goldsborough, and NSR appointed appraiser Charles W. Rex, III. Mr. Goldsborough and Mr. Rex conducted their independent formal valuations and submitted their findings to the parties. Mr. Goldsborough and Mr. Rex failed to agree on the fair rental value, which triggered the appointment of a third appraiser.

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[1] Section 2.2.2 provides, in relevant part:

> The payment for the additional term shall reflect the fair market value of the License in effect immediately prior to the inception of the additional term. Railroad shall determine the payment it is to receive and notify US Sprint thereof during the last six (6) months of the initial term. If within thirty (30) days of the giving of such notice, US Sprint does not advise Railroad in writing of its objection to the payment so specified by Railroad, the payment so specified by the Railroad shall apply. If US Sprint objects to the adjusted rental, which must be done within thirty (30) days of said notice by Railroad, of the fair rental as determined by an MAI appraiser. US Sprint shall continue to pay the rental which was in effect during the initial term, and upon final determination of the rental for the additional term, US Sprint shall promptly pay any excesses then due, or Railroad shall refund any excess paid by US Sprint. The expression of "fair rental" shall mean the fair rental value of the property occupied hereunder as a corridor for the uses permitted herein. If Railroad disagrees with the appraisal submitted by US Sprint, Railroad, at its sole cost, will obtain an appraisal by [a "Member of the Appraisal Institute" ("MAI")]. If the two appraisers so selected cannot reach agreement within a reasonable period of time, as determined by Railroad's Director Real Estate Management or his designee, they will select a third appraiser similarly qualified; which appraisers shall determine by majority decision the existing fair market value of the property occupied hereunder as a corridor for utilities, and apply a rate of return comparable to current rental for similar property and uses to ascertain the payment for the additional term; and the decision of the appraisers shall be binding upon the parties hereto.

Sprint submitted a list of candidates to Mr. Goldsborough and Mr. Rex for choosing the third appraiser. Mr. Goldsborough and Mr. Rex selected Mr. Charles Argianas as the third appraiser. NSR and Sprint consented to his appointment.

Mr. Argianas' role differed from that of Mr. Goldsborough and Mr. Rex, as he was charged with: (1) finding agreement with one of the other appraisers regarding the fair market value of the license; and (2) conducting an independent appraisal *only* if he failed to agree with the other appraisers on the fair market value of the license. ECF No. 27-4.

On December 11, 2014, Mr. Argianas emailed the appraisers' decision ("Majority Decision") to the parties:

> Gentlemen,
> Today we (Rex, Goldsborough and myself) came to a majority opinion under 2.2.2., attached is a copy. Thank you for allowing me to serve.
> Charles G. Argianas, MAI
> President

ECF No. 27-6.

The decision attached to Mr. Argianas' email read, in pertinent part:

> MAJORITY DECISION FOR SETTLEMENT PURPOSES SUBJECT TO EXTRAORDINARY APPRAISAL ASSUMPTIONS—ASSENT DECISION (2 OF 3 APPRAISERS) BASED UPON LICENSE AGREEMENT ORIGINATED JULY 1, 1987, PROVISION 2.2.2 OF ..... (SPRINT COMMUNICATIONS COMPANY AND NORFOLK AND WESTERN RAILWAY COMPANY ET. AL. --- SPRINT FIBER OPTIC LICENSE RENEWAL PAYMENT)
>
> **$6,100,000**
>
> Assent by Argianas and Rex------but with Argianas reserving his assent without prejudice or time limitation subject to the following extraordinary appraisal assumptions: 1) Norfolk Southern in fact has marketable title of the occupancy corridor; and 2) REX's ATF value is reasonable, which it appears to be. The bottom of the decision indicated that Mr. Rex signed in agreeance, Mr. Argianas signed in agreeance, and Mr. Goldsborough dissented.

ECF No. 27-5.

Following the issuance of the appraisers' decision, Sprint and NSR exchanged a series of emails with Mr. Argianas.

Emmett Logan, counsel for Sprint, wrote:

> Thanks, Chuck. I understand that you do not intend to perform an independent appraisal or to take any additional steps in the resolution process. Is my understanding correct?

ECF 27-9 at 3.

Mr. Argianas responded:

> I intentionally drafted the settlement with two extraordinary assumptions because they are contentious and haven't been decided upon, the first is the title issue, the second is that I wasn't able to attest to Rex's ATF value except that he appears to have followed the standards.
>
> If you wish, I can either perform an ATF valuation, or alternatively, I can conduct research and a random sampling on say 25% of the data utilized in Rex's AFT [sic] analysis to determine whether our own efforts would support or refute his conclusions. I don't know what the outcome would be, this is why the agreement was drafted as stated.
>
> Please advise as the agreement clearly provides an opportunity for follow-up as it was prepared "subject to."

ECF No. 27-9 at 2.

Thomas Ambler, counsel for NSR, wrote in reply:

> NSR considers the Third Appraiser assignment to have been completed as contemplated in the Sprint/NSR/Argianas March 14, 2014 agreement as well as Section 2.2.2 of the Sprint/NSR July 1, 1987 agreement. Sprint and Argianas may choose to have direct dialogue, independently, for further appraiser work as long as it is unrelated to the Sprint/NSR matter, as covered in the Sprint/NSR/Argianas agreement. To be clear, NSR is not engaging Argianas for additional work beyond what has been completed with the conclusion of the three appraiser meeting. NSR already has an extensive appraisal of ATF value, and we are comfortable that it is indeed reasonable. The majority decision for Section 2.2.2 purposes has been reached and is now binding.
>
> I will now turn over handling of this matter to the NSR business partner as this is no longer a legal issue.

ECF No. 27-9 at 1.

On January 7, 2015, following the issuance of the appraisers' Majority Decision, Sprint commenced arbitration by filing a Demand for Arbitration with the American Arbitration Association (the "AAA"), in accordance with Section 20.5 of the License Agreement.[2] ECF No. 5-8. The Demand sought resolution of the parties' dispute concerning whether the Majority Decision established the payment for the renewal term of the License Agreement; whether NSR has marketable title to the rights of way for telecommunications purposes; whether Mr. Rex's ATF Value is reasonable; what the fair market value of the License in effect as of June 30, 2012 is; and what the payment should be for the renewal term of the License Agreement. The AAA appointed an arbitration panel (the "Second Arbitration Panel") to address these questions.

On January 15, 2015, NSR commenced the instant action before this Court seeking resolution of the same issues Sprint had presented to the Second Arbitration Panel. Shortly thereafter, on February 19, 2015, Sprint filed its Motion to Dismiss or to Stay and an Alternative Request to Vacate in this Court. This Court granted Sprint's motion in part, staying the matter pending the outcome of the proceedings before the Second Arbitration Panel.

On January 11, 2016, the Second Arbitration Panel issued a decision finding that the "appraisers' Majority Decision is a 'final and binding' arbitration award and therefore only subject to challenge by Sprint for 'misconduct' (or other grounds for vacature under the Federal Arbitration Act) but only in a court of competent jurisdiction, not in another arbitration." ECF

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[2] Section 20.5 of the License Agreement states:

> Any other claims and disputes relating to this Agreement will be subject to arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. Each party shall name an arbitrator to resolve such disputes. Should the two arbitrators not be able to agree, they shall name a third arbitrator whos determination shall be binding on both parties. The arbitration shall take place within sixty (60) days from the date of written notice of the demand for arbitration shall be received by the other party. The costs of arbitration shall be shared equally.

No. 29-7. The Panel concluded that it lacked jurisdiction to review the Sprint's challenges to the appraisers' Majority Decision, and that the proper forum provided by the FAA for such challenges is a court. ECF No. 29-7.

On January 22, 2016, the parties filed a status report notifying this Court of the Second Arbitration Panel's decision. ECF No. 24. The parties requested that this Court lift the stay and allow further briefing on the pending motion to vacate and NSR's request to seek confirmation of the arbitrator's decision.

## APPLICABLE LEGAL PRINCIPLES

The powers of a federal court to review an arbitration award are "severely circumscribed." *Wachovia Sec., LLC v. Brand,* 671 F.3d 472, 478 (4th Cir. 2012) (quoting *Apex Plumbing Supply, Inc. v. U.S. Supply Co.,* 142 F.3d 188, 193 (4th Cir. 1998)). A district court's review of an arbitration award "is extremely limited, and is, in fact, among the narrowest known to the law." *Long John Silver's Rests., Inc. v. Cole,* 514 F.3d 345, 349 (4th Cir. 2008) (quotations omitted).

"The analysis begins with the presumption that the Court should confirm the arbitration award." *Wichard v. Suggs*, 95 F. Supp. 3d 935, 944 (E.D. Va. 2015) (citing *Apex Plumbing*, 142 F.3d at 193). "Every presumption is in favor of the validity of the award," *Richmond, Fredericksburg & Potomac R.R. Co. v. Transportation Communications Int'l Union,* 973 F.2d 276, 278 (4th Cir. 1992), and the court cannot reconsider the merits of an award. *United Paperworkers Int'l Union, AFL-CIO, v. Misco,* 484 U.S. 29, 45 (1987). The court "sits to 'determine only whether the arbitrator did his job—not whether he did it well, correctly, or reasonably, but simply whether he did it.'" *Wachovia Sec.*, 671 F.3d at 478 (quoting *U.S. Postal Serv. v. Am. Postal Workers Union,* 204 F.3d 523, 527 (4th Cir. 2000)).

A court has no jurisdiction to vacate an arbitration award simply because the court may have reached a different conclusion on these facts. *Long John Silver's Rests., Inc.*, 514 F.3d at 349. *United Steelworkers of Am. v. Am. Mfg. Co.,* 363 U.S. 564, 567–68, 80 (1960). Such "[j]udicial second-guessing . . . would transform a binding process into a purely advisory one, and ultimately impair . . . arbitration." *Octagon, Inc. v. Richards*, No. 01:10-CV-652, 2010 WL 3932272, at *6 (E.D. Va. Oct. 5, 2010) (quoting *Westvaco Corp. v. United Paperworkers Int'l Union,* 171 F.3d 971, 974 (4th Cir. 1999)).

Nevertheless, a federal court may vacate an arbitration award if the moving party "sustain[s] the heavy burden of showing one of the grounds specified in the Federal Arbitration Act (the 'FAA')." *MCI Constructors, LLC v. City of Greensboro,* 610 F.3d 849, 857 (4th Cir. 2010).

> Under the FAA, a court may vacate an arbitration award:
>
> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

## ANALYSIS

The question before the Court is whether there are grounds under the FAA for vacating the arbitrator's award. The Court determines that no grounds are presented.

A. THE MAJORITY DECISION IS A FINAL AND BINDING ARBITRATION AWARD

Section 10 of the FAA permits confirmation of an arbitration award only if the award is final. 9 U.S.C. § 10. The Fourth Circuit has held that "[a]n award is final in nature when the arbitrators intend to include in the award their complete determination of all claims submitted for arbitration." *AO Techsnabexport v. Globe Nuclear Services and Supply GNSS, Ltd.*, 404 Fed. Appx. 793, 799 (4th Cir. 2010).

The Second Arbitration Panel determined that the Majority Decision is a final and binding arbitration award. Sprint challenges this determination, claiming that the Panel construed the Majority Decision as "subject to challenge by Sprint for 'misconduct' (or other grounds for vacature under the Federal Arbitration Act) but only in a court of competent jurisdiction." ECF No. 32 at 2. Sprint contends that this decision has no bearing on whether the Majority Decision is a mutual, final, and binding arbitration award. This Court disagrees.

The Second Arbitration Panel concluded that it lacked jurisdiction to review the arbitration award because "arbitration awards are subject to review by courts of competent jurisdiction on a motion to vacate or enforce and not by arbitration panels." ECF No. 23-1 at 3-4. The Panel's predicate analysis before that conclusion examined whether the Majority Decision was a mutual, final, and binding arbitration award. If the award was not final and binding, then the Second Arbitration Panel may have had jurisdiction to hear Sprint's challenges. But instead, the Panel concluded that the Majority Decision was a mutual, final, and binding arbitration award, and that there was no jurisdiction to hear further challenges to the award.

This Court finds no error in the Second Arbitration Panel's decision. The Court concludes that the Majority Decision is a mutual, final, and binding arbitration award. The award is subject to challenge only under the narrow bases provided by the FAA.

B. THERE EXISTS NO VALID BASES UNDER THE FAA FOR OVERTURNING THE MAJORITY DECISION

The FAA's prescribed bases upon which a court may vacate an arbitration award constitute the exclusive grounds for vacature. *Hall Street Assocs., L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584 (2008). Parties cannot expand those grounds by contract. *Id.* at 586-87.

Here, Sprint does not challenge the Majority Decision based on corruption, fraud, undue means, or that there was evident partiality or corruptions on behalf of the arbitrators. Nor does Sprint challenge the Majority Decision on misconduct. Instead, Sprint argues that the Majority Decision was neither final nor definite, and that the arbitrators failed to do what they were supposed to. This challenge is brought under 9 U.S.C. § 10(a)(4), which provides that vacature is appropriate "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

1. THE ARBITRATORS FOLLOWED THE PARTIES' INSTRUCTIONS

The parties discussed the third appraiser's role at length. The parties also exchanged emails with Mr. Argianas regarding his retention. The instructions that were agreed upon and emailed to Mr. Argianas as a joint response from the parties provided:

> Under the License Agreement, there are two aspects to the work of the third appraiser. The first entails efforts to come to an agreement with Mr. Rex or Mr. Goldsborough or both as to the fair market value of the License. Those efforts do not necessarily entail identification of inconsistencies, weaknesses, or errors in the appraisers' logic, disqualification of an appraiser's report, or fieldwork or research by the third appraiser. The License Agreement also does not require you to act as a "review appraiser" or to perform an "appraisal review" – as those terms are defined in the Uniform Standards of Professional Appraisal Practice. Nor does the License Agreement preclude any of those steps. Rather, it leaves to you the determination of how the process should be structured. The base fee is intended to cover the services you provide in those resolution efforts.

> The second aspect of the work entails an independent appraisal. You would perform the appraisal only if you cannot agree with one or both of the other appraisers on the fair market value of the License. If you perform an independent appraisal, you would charge for the appraisal on a time and expense basis. We contemplated that the Third Appraiser Agreement would retain you to perform the appraisal, if it is to be performed, and we proposed to enter, on page 3 of the Agreement, the rates that you've quoted. We would agree to pay those same rates for any time you are required to spend in follow-up, including as a witness. The latter commitment is qualified, "to the extent permitted by applicable law and ethical rules," because, in some states, there are legal and ethical limitations on a party's ability to compensate an occurrence witness. If a party were to retain you as an expert witness on a separate matter, it would do so under a separate contract.

ECF No. 27-3.

Mr. Argianas was directed explicitly to avoid conducting a formal valuation or even any field work if he could reach a compromise with one of the other appraisers who had completed a formal valuation. Although Mr. Argianas' assent was subject to assumptions, he complied with the parties' request; he came to an agreement with one of the appraisers. On December 11, 2011, the arbitrators issued the Majority Decision. Mr. Argianas and Mr. Rex agreed that the fair rental value of the rail corridor was $6,100,000. Mr. Goldsborough dissented.

2. MR. ARGIANAS' ASSUMPTIONS ARE NOT GROUNDS FOR VACATING THE MAJORITY DECISION

Mr. Argianas' assumptions are reasonable and understandable. The parties clearly described Mr. Argianas' role as evaluating whether he could "compromise" with Mr. Rex or Mr. Goldsborough regarding their fair market rental valuations. ECF No. 27 at 5; ECF No. 27-2. The parties directed Mr. Argianas to seek this compromise before conducting an independent MAI valuation or doing fieldwork.

The parties' open-ended instructions compelled assumptions. The parties' directions to Mr. Argianas requested that he seek compromise, and also indicated that he need not identify "inconsistencies, weaknesses, or errors in the appraisers' logic, disqualification of an appraiser's

report, or [conduct] field work or research" of his own. ECF No 27-3. There is no authority or evidence suggesting that Mr. Argianas could have come to a compromise with either Mr. Rex or Mr. Goldsborough *without* making assumptions. Mr. Argianas was instructed to seek compromise with either of the appraisers, and he did so.

The Court finds that Mr. Argianas followed the parties' instructions. Sprint has failed to carry its burden of demonstrating that the assumptions listed in the Majority Decision constitute grounds for vacating the arbitration award. *See MCI Constructors, LLC v. City of Greensboro,* 610 F.3d 849, 857 (4th Cir. 2010) (the district court may only vacate an arbitration award for grounds specified in the FAA).

3. THE ARBITRATION PROCESS WAS NOT PREMATURELY TERMINATED

Sprint also argues that NSR terminated the arbitration process prematurely. Sprint cites email communications between the parties and Mr. Argianas after the appraisers released the Majority Decision. Specifically, Sprint refers to Mr. Argianas' response to an email after the Majority Decision was issued, in which Mr. Argianas offered to "perform an ATF valuation" or to "conduct research and random sampling" on the ATF valuations of Mr. Rex. ECF No. 29-5.

Sprint's argument lacks merit. The issuance of the Majority Decision concluded the work that the three appraisers were retained to complete. The email communications occurring after the issuance of the Majority Decision between NSR, Sprint, and Mr. Argianas did not terminate the appraisal process prematurely.

C. CONFIRMATION OF THE MAJORITY DECISION

No valid basis to overturn the Majority Decision exists. The Court determines that, pursuant to 9 U.S.C. § 9, confirmation of the Arbitrators' decision is appropriate. The arbitration award was made within the appropriate time period for requesting confirmation, and the award

has not been vacated, modified, or corrected. The Court **GRANTS** Plaintiff's Motion to Confirm Arbitration Award. The Majority Decision establishing the $6,100,000 rental renewal rate is hereby **CONFIRMED**.

CONCLUSION

For the reasons stated herein, Plaintiff's Motion to Confirm Arbitration Award (ECF No. 26) is **GRANTED**; and Defendant's Motion to Vacate Arbitration Award (ECF No. 4) is **DENIED**.

The Clerk of the Court is **REQUESTED** to send a copy of this Order to all counsel of record.

**IT IS SO ORDERED.**

/s/
Arenda L. Wright Allen
United States District Judge

8/25, 2016
Norfolk, Virginia