Commonwealth of Virginia

CIRCUIT COURT JUDGES:

MICHAEL L. MOORE
Russell County Courthouse
P.O. Box 435
Lebanon, VA 24266
(276) 889-8049
(276) 889-8090 Fax

PATRICK R. JOHNSON
Buchanan County Courthouse
P.O. Box 1995
Grundy, VA 24614
(276) 935-2451
(276) 935-8516 Fax

TWENTY-NINTH JUDICIAL CIRCUIT

COUNTIES OF BUCHANAN, DICKENSON, RUSSELL AND TAZEWELL

HENRY A. VANOVER
Dickenson County Courthouse
P.O. Box 190
Clintwood, VA 24228
(276) 926-1635
(276) 926-5580 Fax

TERESA M. CHAFIN
Tazewell County Courthouse
P.O. Box 968
Tazewell, VA 24651
(276) 988-5998
(276) 988-3081 Fax

September 4, 2009

J. Scott Sexton, Esq.
Gentry, Locke, Rakes & Moore
10 Franklin Road, S.E.
P. O. Box 40013
Roanoke, VA 24022

Benjamin A. Street, Esq.
Street Law Firm
P. O. Box 2100
Grundy, VA 24614

James R. Creekmore, Esq.
The Creekmore Law Firm
52 Pondview Court
Daleville, VA 24083

Re: Yukon Pocahontas Coal Company, Buchanan Coal Company, and Sayers-Pocahontas Coal Company v. Island Creek Coal Company, Inc.
Buchanan County Circuit Court
Case No. CL05-339

Dear Counsel:

This matter is before the Court on Yukon Pocahontas Coal Company, et al.'s (Yukon) Notice of Appeal and De Novo Review filed on October 17, 2005, and Application to Vacate Arbitration Award filed on September 29, 2008. The

Court has reviewed the numerous briefs, responses and reply briefs filed by both parties. This matter was argued before the Court on October 31, 2008.

I. STATEMENT OF CASE

The history of this case dates back to July 29, 1961, when Yukon and Island Creek entered into a lease agreement for Island Creek to mine coal on 27,000 acres of land owned by Yukon in Buchanan County. The Lease provided that "any difference or dispute" arising between the parties in relation to any provision of the Lease "shall be submitted in writing to the decision of arbitrators." [Lease p. 51] The Lease provided that the decision of the Panel majority "shall be binding and conclusive." The Lease also stated that arbitration "shall be a condition precedent to any suit, action or proceeding to enforce or determine any disputed rights, duty or obligation arising hereunder." [Lease p. 52]

In August 1998, Yukon demanded arbitration on its claim for monetary damages it claims it suffered due to Island Creek's mining activities. Only after five years of discovery was the Arbitration Panel finally convened on August 16, 2004. The evidentiary hearing lasted two weeks, with numerous witnesses and exhibits presented.

A major issue arose prior to the arbitration as to what binding effect the Panel's decision would be given. The transcript of this discussion between counsel and the Panel indicates that the parties agreed that the Panel's findings of fact would be final, binding and non-appealable. However, counsel did specifically reserve a right to file an application with the Panel that it "may have announced [its] facts inappropriately under the Uniform Arbitration Act," or that if the Panel announced "the facts that you found wrong, we can ask you to correct your own mistake." This agreement provided for the parties to request the Panel to correct miscalculations or clerical errors. Yukon and Island Creek further agreed that a party had the right to appeal the Panel's erroneous application of law to any

dispositive issue in the case. The parties did not address the procedure, forum or time limits for such appeals.

The primary issue addressed by the Panel arose from the mining activity conducted by Island Creek at the Beatrice Mine site. After mining coal for several years at the Beatrice site, Island Creek shut down the mine in 1986 because of extremely low coal prices and its determination that it could no longer profitably operate the mine. Subsequently, in the midst of the continued economic downturn in the coal industry, Island Creek sealed the mine, filled the shaft and reclaimed the surface.

After Island Creek was purchased by Consolidated Coal (Consol) in 1993, Consol obtained a permit from the Virginia Division of Mined Land Reclamation and commenced pumping coal wastewater from Consol's Buchanan No. 1 Mine into the Beatrice Mine. Yukon estimates that 2.8 billion gallons of toxic wastewater were pumped into the Beatrice Mine without Yukon's permission.

Prior to the arbitration, Yukon and Island Creek each submitted Proposed Findings of Fact and Conclusions of Law to the Panel. After a two-week evidentiary hearing, the Panel returned a unanimous 3-0 decision in favor of Island Creek on June 20, 2005. The various findings of the Panel are set forth in the June 20, 2005 Panel decision. The effective date of the Panel decision was extended to July 19, 2005 due to a delay in delivery of the decision to Yukon. On August 8, 2005, Yukon filed an Application/Petition to Modify, Correct and Clarify with the Panel. On September 30, 2005, the Panel issued a letter denying the Application/Petition to Modify, Correct and Clarify.

Yukon filed its Notice of Appeal and De Novo Review on October 17, 2005 in the Buchanan County Circuit Court. After a brief foray into Federal Court, and a default judgment issue, Judge Williams entered a Consent Order on December 12, 2007, directing the parties to submit requested relief and supporting

argument and authority. On April 21, 2008, Yukon filed its Opening Brief setting forth five Assignments of Error.

I. The Panel erred by interpreting the Lease to allow damages for lost or threatened coal only when it is also shown that Island Creek's operations under the Lease could be conducted at a reasonable profit. This interpretation of the Lease language is in error and defeats the clear intent of the parties as shown by the unambiguous language of the lease.

II. To the extent that the Panel found that the dumping of 2.8 Billion tons of contaminated mine water from a foreign mine into the Beatrice Mine did not threaten the Beatrice coal to the north of the Mine works, then such a finding was clearly wrong and would have been corrected through a subsequent hearing before the Panel had it honored the parties' contractual arbitration agreement.

III. To the extent that the Panel found that the dumping of 2.8 Billion tons of contaminated mine water from a foreign mine into the Beatrice Mine did not cause lost coal to the north of the Mine works, then such a finding was clearly wrong and would have been corrected through a subsequent hearing before the Panel had it honored the parties' contractual arbitration agreement.

IV. The Panel erred in ruling that the statute of limitations barred Yukon from recovery on issues related to the permanent closure of the Beatrice Mine, the removal of surface equipment and structures, and the permanent

filling and sealing of the Mine shafts when Island Creek did not take any such actions until 1995 and Lessors filed their demand for arbitration less than five years later. The Panel erroneously concluded that a letter from Island Creek dated August 6, 1992, notifying Yukon of its intent to close the Mine constituted the start date for purposes of calculating the limitations period. To the extent that the Panel actually believed or found that permanent reclamation took place in 1992, such a finding would constitute such egregious error as to evidence gross inattention, neglect, or dereliction so as to merit reversal as a matter of law and/or such a finding would have been corrected through a subsequent hearing before the Panel had it honored the parties' contractual arbitration agreement.

V. The Panel erred by refusing to allow the [sic] Yukon its contractually agreed right to seek reconsideration of the Panel's factual findings as agreed to by the parties at the outset of Arbitration. The refusal of the Panel to afford to Yukon the rights in arbitration bargained for and stipulated to at the outset of the Panel proceedings, require that any factual errors should be reviewed by this Court or that the Panel Decision should be vacated.

In its Application to Vacate Arbitration Award filed on September 29, 2008, Yukon seeks to vacate the Panel decision based on fraud.

II. FINDINGS AND CONCLUSIONS OF LAW

It is clear that the parties to this suit entered into a lease agreement in 1961 that contained an agreement to arbitrate any disputes arising between the

parties concerning their rights or duties under the Lease. Prior to the arbitration, the parties orally modified the arbitration agreement and placed the modification on the record before the Panel. All parties agreed that the factual findings of the Panel would be final, binding and non-appealable. The parties also agreed to allow either party the right to file an application with the Panel seeking reconsideration and to appeal any erroneous applications of law.

The Court finds that the parties are bound by their agreement. Factual findings made by the Panel are final and binding, and are not subject to de novo review. Yukon's Assignment of Error V alleges that the Panel denied its right to seek reconsideration of the Panel's factual findings. However, the Panel did consider Yukon's Petition to Modify, Correct and Clarify but chose not to change any factual findings. Yukon's Assignment of Error V is denied.

The Court finds that this arbitration is subject to the Uniform Arbitration Act except for the agreed modifications stated to the Panel prior to the Arbitration hearing. The Uniform Arbitration Act limits a party's right to seek to vacate, modify or correct an award to narrowly defined circumstances, but the parties in this case expanded their appeal rights by agreeing that errors of law could be appealed. Although the agreement did not set a time period for perfecting the appeal, this Court finds that the 90-day provisions under Virginia Code Section 8.01-581.010 should apply. Neither the 10-day appeal period from General District Court nor the 30-day appeal period to the Supreme Court is analogous to this unique situation. The 90-day appeal period under the Uniform Arbitration Act should apply to petitions to vacate this award.

Yukon's First Assignment of Error claims the Panel improperly construed the 1961 Lease to allow claims for lost or threatened coal only when the Lessor proved that coal could be sold at a reasonable profit, i.e. was "merchantable." The Lease term at issue, Article 11, states:

> If at any time Lessee shall not conduct its operations on the leased premises as provided in this lease, and loss of coal or other damage to the Lessors thereby results or is threatened, Lessee shall pay to Lessors the full amount of royalty on the estimated tonnage of coal lost or that may remain unmined in the leased premises by reason of the failure of Lessee to conduct its operations as aforesaid, in the same manner as if said coal had been mined and removed, and shall compensate Lessors for the full amount of any other damage that Lessors shall sustain thereby, such royalty of other damages to be recovered in default of prompt payment, under Article Eighteen and Twenty-Two hereof. [Lease, Article 11, pp. 36-37]

The Panel interpreted this Article to contemplate that damages for lost or threatened coal are allowed only when it is shown that Lessee's operations could be conducted at a reasonable profit. Typically, an arbitration panel's interpretation of contract provisions is not reviewable; however, as previously discussed, these parties orally modified the arbitration agreement and specifically reserved the right to appeal errors of law. The interpretation of a contract provision presents such a question of law.

The Court finds that the terms of Article 11 are clear and unambiguous. The Article provides that claims for lost or threatened coal can be made "at any time." The Article contains no requirement or condition that the Lessee's operation be shown to be profitable before Lessors could seek damages. The Panel's interpretation adds terms to the Lease that the parties did not agree to, and it is plain error for the Panel to add such language. The Court finds that Yukon's First Assignment of Error should be sustained.

Yukon's Second and Third Assignments of Error claim that the Panel erred by finding that the dumping of water into the Beatrice Mine did not threaten

Beatrice coal and did not cause a loss of coal to the north of the mine works. Although the Panel ruled that Island Creek did not have a contractual right to dump water from its Buchanan No. 1 Mine into the Beatrice Mine without permission, the Panel nevertheless held that Yukon could not recover damages without first proving that mining could be conducted in a mineable and merchantable manner. The Court finds that this interpretation of the Lease provision is plainly in error. The Court finds that Article 11 contains no language to require that lost or threatened coal could only be recovered if it could be mined profitably. Island Creek's action of pumping water into the Beatrice Mine has apparently negated any possibility that coal could ever be mined profitably. The Court finds that Yukon's Second and Third Assignments of Error should be sustained.

Yukon's Fourth Assignment of Error claims the Panel erred in ruling that the statute of limitations barred Yukon from recovery on its claims. The Panel and parties agree that actions for breach of a written contract shall be brought within five years of the date of breach. Virginia Code Section 8.01-246(2). The Panel noted that the claims for breach by Yukon accrued in 1986 when the Beatrice Mine was idled. Alternatively, the Panel determined that the five-year period began to run no later than August 6, 1992, the date that Beatrice Pocahontas Company, an affiliate of Island Creek, sent Yukon a letter stating that the equipment and buildings at the Beatrice Mine would be removed and the property reclaimed. The Panel did except from its ruling the claim regarding the introduction of water into the Beatrice Mine which began in 1993.

The controlling factor of this statute of limitation issue is the date of the breach. The determination of when a breach accrued is a question of fact and often requires an evidentiary hearing. After such a hearing, the Panel found that any breach of the terms and conditions of the Lease accrued in 1986 when the Beatrice Mine was idled. The Panel also found that Island Creek's decision to close the mine in 1992 also created a breach which required action by Yukon within five years.

The Court finds that these findings of fact by the Panel are final, binding and not subject to appeal. As previously noted, these parties agreed that the Arbitration Panel's factual findings would be binding and this Court will not disturb those findings. Yukon's Fourth Assignment of Error will be dismissed. It should be noted that the Panel found that all of Yukon's contract claims were barred by Virginia Code Section 8.01-246(2) except for the claim regarding the introduction of waste water into the Beatrice Mine. Even though the Court has sustained Yukon's First Assignment of Error, the Panel's factual findings, that any claims for lost or threatened coal damaged by means other than water are barred by the applicable statute of limitations, are final and binding.

Finally, on September 29, 2008, Yukon filed an Application to Vacate Arbitration Award. Yukon's application is apparently based on Section 8.01-581.10 and/or common law fraud. Section 8.01-581.10 provides that a party can file an application to vacate an award where the award was procured by corruption, fraud or other undue means. The statute requires that the application be made "within ninety days after such grounds are known or reasonably should have been known." Section 8.01-581.10.

The Court finds that the Consent Order entered on December 12, 2007 required Yukon to include in its Opening Brief "any and all grounds for the requested relief' within 90 days. This deadline was apparently extended by agreement of Island Creek, and the Opening Brief was filed on April 21, 2008. That brief contained no allegation of fraud. The Court finds that Yukon agreed, as part of a resolution to pending motions, to submit all grounds for relief in its Opening Brief. Any requested relief filed after the deadline set forth in the Consent Order is not timely and will be dismissed. Additionally, the Court finds that any alleged fraud reasonably should have been known more than 90 days prior to the filing of this application, and is, therefore, untimely under the statute. The Court agrees with Island Creek's contention that this claim for fraud is merely a request for the Court to preview the Panel's determination as to the credibility of the witnesses. As previously stated, the findings of facts are binding under the

terms of the lease and by agreement of the parties. The determination of the facts was based, in large part, on the credibility of the witnesses who testified before the Panel. This Court will not substitute its judgment as to credibility of those witnesses for that of the Panel. Finally, the Court finds that Yukon has failed to allege sufficient grounds to establish statutory or common law fraud, and its Application will be dismissed.

The Court further finds that the parties shall submit to a rehearing before new arbitrators chosen in accordance with the 1961 Lease subject to the findings of facts made by the previous panel and subject to the rulings of law made herein. Counsel for Yukon is directed to prepare an Order for endorsement by counsel and entry by the Court.

Very truly yours,

Michael L. Moore, Judge

MLM/cds