COURT OF APPEALS DECISION DATED AND FILED

August 18, 2005

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2003AP3167

Cir. Ct. No. 2002CV3845

STATE OF WISCONSIN

IN COURT OF APPEALS
DISTRICT IV

SUPERIOR CRANBERRY CREEK LANDFILL NEGOTIATING COMMITTEE A/K/A SUPERIOR CRANBERRY CREEK LANDFILL, LLC NEGOTIATING COMMITTEE,

PLAINTIFF-PETITIONER-APPLICANT-APPELLANT,

V.

STATE OF WISCONSIN WASTE FACILITY SITING BOARD,

DEFENDANT-RESPONDENT-ARBITRATOR-RESPONDENT,

SUPERIOR CRANBERRY CREEK LANDFILL, LLC,

DEFENDANT-RESPONDENT-INTERESTED PARTY-RESPONDENT.

APPEAL from an order of the circuit court for Dane County: MARYANN SUMI, Judge. *Affirmed in part; reversed in part and cause remanded with directions.*

Before Lundsten, P.J., Deininger and Higginbotham, JJ.

¶1 PER CURIAM. The Superior Cranberry Creek Landfill Negotiating Committee appeals an order affirming in part and remanding in part an arbitration decision by the State of Wisconsin Waste Facility Siting Board relating to a proposed landfill. We affirm in part, reverse in part, and remand for the circuit court to remand to the board for further proceedings.

¶2 The landfill in question was proposed by Superior Cranberry Creek Landfill, LLC, which, along with the board, appears as a respondent in this appeal. The negotiating committee and the landfill company participated in a negotiation and arbitration process under WIS. STAT. § 289.33 (2003-04).[1] At the end of that process, the board selected the final offer submitted by the company, but deleted certain items on the ground that they were not arbitrable. The circuit court affirmed the arbitration award "in all respects," except for certain items that the court remanded to the board for further consideration of arbitrability.

¶3 The negotiating committee argues that the board acted improperly by striking as nonarbitrable certain provisions that both the committee and the landfill company had agreed on and included in their final offers. In effect, the committee argues that it makes no sense to strike items that the parties have agreed on and which both have included in their offers. We reject the committee's argument because it ignores the statutory scheme. The statutes do not contemplate that parties will submit offers that include items that amount to a partial negotiated agreement. Rather, the statutes specify what is not subject to arbitration and direct

[1] All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

the board to delete those items. *See* WIS. STAT. § 289.33(8) and (10)(p). The fact that both parties agreed to items and included them in their final offers does not make them arbitrable, and does not relieve the board of its obligation to strike nonarbitrable items. The statute provides a negotiation process before arbitration, § 289.33(9), and provides a process for continued negotiation during arbitration, § 289.33(10)(j). Both of those processes lead to "written agreements" between the parties. Neither of those processes requires or allows the parties to submit agreed upon, but non-arbitrable, items to the board for inclusion in the final arbitration award.

¶4 With respect to the sixteen items in the final arbitration award we discuss below, we note that the negotiating committee often places primary reliance on its argument that the board should not have struck the items as nonarbitrable because the committee and the landfill company agreed that these items should be included in both of their final offers. We have rejected that argument and, therefore, do not repeat our conclusion when addressing the items individually.

¶5 The board struck sixteen items of the company's final offer on the ground that they were not arbitrable. On appeal, the negotiating committee addresses all sixteen items. We first discuss our standard of review, then turn to each of the items. The items on which arbitration is permitted are stated in WIS. STAT. § 289.33(8)(b).

¶6 The landfill company argues that *de novo* review of arbitrability is not appropriate in this case because the negotiating committee failed to raise any question about arbitrability of these items before the board. This argument lacks merit given the posture of this case. The deleted items were all submitted *by the*

landfill company as part of its final offer. By submitting these items in its offer, the company was implicitly asserting that these items are arbitrable. There was no dispute at that time about the arbitrability of these items. Instead, the dispute about arbitrability was created by the board's decision to delete certain items. The reason there is a dispute on appeal about these items is that the landfill company has changed its position and is now arguing that items it submitted for arbitration are *not* arbitrable. If any waiver occurred here, it was by the landfill company, not by the committee.

¶7 We conclude that the standard of review is controlled by ***Madison Landfills, Inc. v. Libby Landfill Negotiating Committee***, 188 Wis. 2d 613, 524 N.W.2d 883 (1994). Reviewing an arbitration decision by the board, the court stated:

> [A]n arbitrator's decision of substantive arbitrability—whether the parties agreed to submit an issue to arbitration—is reviewed de novo by the courts. The Board's conclusion on the arbitrability of the design features is a substantive arbitrability decision, and so is subject to de novo review by this Court.
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> ….
>
> Although we review de novo whether an issue is arbitrable, we will not deny an order to arbitrate a particular matter unless it may be said with "positive assurance" that the language defining the arbitrable issues is "not susceptible of an interpretation that covers the asserted dispute." Further, we resolve any doubts in favor of coverage.

Id. at 625, 634 (citations omitted).

¶8 The landfill company asserts that in ***Madison Landfills*** the court decided to conduct a *de novo* review "because" the board had previously considered the arbitrability of that issue at a party's request. This argument

mischaracterizes the opinion. Nothing in ***Madison Landfills*** shows any cause-and-effect relationship justifying the landfill company's use of the word "because" in its brief before this court. It is true that the board in ***Madison Landfills*** had previously considered arbitrability, ***id.*** at 619, but the supreme court did not rely on that fact in discussing the applicable standard of review. Rather, the court simply recited its understanding of general principles for review of arbitration decisions. Therefore, we apply the *de novo* standards set forth in ***Madison Landfills***.

¶9 The negotiating committee addresses all sixteen items, including the ones that were remanded by the circuit court. Although the committee does not expressly say so, we assume this means the committee is arguing that, on the items the circuit court remanded, the court should have directly ruled that these items are arbitrable, instead of remanding.

¶10 The first item rejected by the board was most of the definitional section. The committee argues that this definitional section is necessary to give meaning to other substantive arbitrable sections in the offer. But the committee's argument does not address whether the definitions themselves are arbitrable under WIS. STAT. § 289.33(8)(b). Further, several "definitions" plainly go beyond explaining the meaning of terms used in other parts of the offer. For example, the definitional section contains a commencement date. The committee does not explain, and it is not apparent, why a commencement date fits under any category

in § 289.33(8)(b). Thus, we agree with the board that this item was properly struck.[2]

¶11 The second item struck was "Site Information." Like the first item, this was properly struck because the information provided does not merely define terms used in the award, but includes nonarbitrable subjects.

¶12 The third item is the "Contract Enforcement" provision. The negotiating committee argues that such a provision is an implicit part of each item that is properly a subject of arbitration, in order to permit the award to be legally enforceable. The committee's argument is not tied to language in WIS. STAT. § 289.33(8)(b). Moreover, we disagree that this statute implies that terms of enforceability are subject to arbitration. The committee does not argue that the award is unenforceable without such a provision, and in fact the committee appears to acknowledge that the award is enforceable by obtaining a judgment under WIS. STAT. § 788.12.

¶13 The fourth item is called "Administrative Action." Apart from the general argument that the board should not have struck agreed-on items, an argument we addressed in paragraph 3 of this decision, the committee does not explain why this subject is arbitrable under the statute.

¶14 The fifth item is called "Height Restriction," and provided in its entirety: "The maximum height of the proposed Active Fill Area shall be set forth

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[2] We do not address each individual definition in the stricken definitional section. The committee broadly states: "Even a cursory review of these provisions underscore[s] their absolute necessity." Unfortunately, the committee's argument is itself cursory. The committee makes only the broad argument we have addressed in the text. We will not, *sua sponte*, address each individual definition to determine whether it defines an arbitrable issue.

in the approved Plan of Operation." No party explains to us what the practical significance of this provision is. On its face, the only thing this provision does is require a document (the plan of operation) to state the maximum height of a portion of the landfill (the active fill area). The provision does not set a specific maximum height, and does not create or identify any further process that will set a maximum height. The reference to "plan of operation" is presumably to the document required by WIS. STAT. § 289.30, in which the landfill proposes certain technical requirements for operating the landfill. The content of that document is governed by § 289.30(4).

¶15 We see nothing in WIS. STAT. § 289.33(8)(b) that makes the content of the plan of operation subject to arbitration. The negotiating committee argues that this item is permitted under § 289.33(8)(b)2., which authorizes arbitration over: "Screening and fencing related to the appearance of the facility." But that statute says nothing about arbitration over the plan of operation. The committee argues that the height restriction in the plan of operation directly affects whether screening or fencing will be necessary. That may well be true, but it is beside the point. The statute authorizes arbitration over only screening and fencing, not over all the variables that may potentially lead some persons to believe screening or fencing is necessary. Nor, by its reference to "appearance of the facility," does the provision authorize arbitration of every aspect of the landfill that produces its appearance, such as its height. The reference to "appearance of the facility" is a limitation on the arbitrability of screening and fencing; not all screening and fencing is arbitrable, only screening and fencing that relate to appearance. Therefore, this item was properly stricken from the award.

¶16 The sixth item is in a section called "Disposal Operations, Storage Operations and Treatment Operations," and provided that the landfill operator

shall be subject to various enumerated laws. The negotiating committee argues that this is "directly related" to the "operational concerns" that can be arbitrated under WIS. STAT. § 289.33(8)(b)3. The board succinctly concluded that "compliance with the law is not arbitrable." We agree. In addition, to the extent this item might be an attempt to subject the landfill to various laws that do not otherwise apply, the negotiating committee has not sufficiently developed an argument that such a provision is permissible. For that matter, the negotiating committee has not developed an argument that specific laws described in the offer relate to operational concerns.

¶17 The seventh item is "Existing Agreements," which provided that "[t]he Affected Municipalities" and the landfill operator stipulate that "this Agreement" supersedes a certain previous agreement, with an exception. The reference to "this Agreement" is apparently to the final offer submitted by the landfill, and the fact that both parties submitted this item in their final offers. The landfill's final offer included a definition of "affected municipalities" that includes the Towns of Sigel and Seneca, the City of Wisconsin Rapids, and Wood County. We concluded above that this definition was properly struck by the board as not arbitrable. It may be that this definition was simply a description of the communities that meet the statutory definition of "affected municipality" found in WIS. STAT. § 289.01(1). "Affected municipalities" comprise the universe from which "participating municipalities" in the negotiation and arbitration process can be drawn, if the municipalities choose to participate. WIS. STAT. § 289.33(3)(f) and (6)(a). According to the board, only the Town of Sigel and Wood County took the necessary steps to participate.

¶18 The board rejected this item because by statute the arbitration award is binding on *participating* municipalities, *see* WIS. STAT. § 289.33(10)(q), and

arbitration is not authorized to expand the scope of municipalities bound by the arbitration. The negotiating committee acknowledges that this is legally correct, but appears to argue that the board should then have struck other provisions of the offer as well. We fail to discern how this argument is relevant to whether the seventh item is arbitrable. We conclude the seventh item is nonarbitrable.

¶19 The eighth item is "Future Expansions," which provided that the "Affected Municipalities" will have an option to waive negotiation for future landfill expansions which, if exercised, would make all provisions of "this Agreement" applicable to the expansion. The board noted that negotiations about future expansions would be governed by the process in WIS. STAT. § 289.33. We agree that the arbitration statute does not authorize arbitration over what procedure will be followed in the future and does not authorize arbitration creating an "agreement" that is binding regarding future expansions to a landfill.

¶20 The ninth item is "Sociological Payments," which provided that the landfill operator would pay "the Affected Residents certain sociological payments" as set forth in an attached exhibit. The exhibit shows payments to owners of thirty named owner-occupied parcels within one mile of the landfill. Owners within three-quarters of a mile receive a higher amount. As best we can tell, the term "affected residents" does not have a statutory definition, and a definition was not provided in the landfill's final offer. We assume "affected residents" refers to the owners of these listed parcels. In rejecting this item, the board stated: "Compensation without demonstration of a direct 'substantial economic impact' is not arbitrable under sec. 289.33(8)(b)1, Wis. Stats." That statute authorizes arbitration over: "Compensation to any person for substantial economic impacts which are a direct result of the facility including insurance and damages not covered by the waste management fund." The negotiating committee

argues that historically the term "sociological payments" in this context includes economic effects on affected residents for loss of property value and loss of enjoyment and use of their property.

¶21 In analyzing item nine, it is important to keep separate the questions of whether an issue is arbitrable and whether a party has made the best offer on the issue. With that distinction in mind, we limit our review to the question of arbitrability. We do not review the record to determine whether it was shown that the economic impact is "substantial" or whether it is a "direct result" of the facility. To determine arbitrability, the analysis must proceed at a higher level of generality. Moreover, we repeat that the item is arbitrable unless it may be said with assurance that the language defining the arbitrable issues is not susceptible of an interpretation that covers the asserted dispute, and we resolve doubts in favor of arbitration. ***Madison Landfills***, 188 Wis. 2d at 634. Looked at in that light, we conclude that the proposed "sociological payments" were arbitrable.

¶22 The label "sociological" is not dispositive. We look instead at the type of payments proposed. The payments are not being made to municipalities or organizations, but to specific persons, thereby tracking the statutory language authorizing arbitration of "[c]ompensation to any person." The payments are limited to a small group of owner-occupied residential property owners with close proximity to the landfill. These are the type of persons that it could reasonably be expected would suffer substantial economic impact as a direct result of the facility. The fact that higher amounts are being paid to the closest owners reinforces that conclusion. The amounts to be paid are not so grossly large that they suggest the payments must be for some purpose beyond economic impact caused by the facility. Accordingly, we conclude that this item in the landfill's final offer was arbitrable, and should not have been stricken by the board.

¶23 The tenth item is "PCB Impacted Sediment," which provides a definition of that term, and then states that such sediments disposed of at the site are subject to a 25-cents-per-ton surcharge. The provision does not say by whom or to whom that surcharge will be paid. However, the context of the item is an article called "compensation" that sets a per-ton rate for payments by the landfill operator to certain municipalities. We assume the PCB surcharge is to be paid by the landfill to the municipalities. The negotiating committee argues that arbitration on this item is authorized by the "economic impact" provision, WIS. STAT. § 289.33(8)(b)1., because this type of waste directly affects the environmental risks to affected neighbors and potentially to the municipalities. We disagree. The compensation in this item is not to any person, but directly to governments. In addition, "risks" and "potential" effects cannot reasonably be considered substantial economic impacts that are a direct result of the facility. We conclude this item was not arbitrable.

¶24 The eleventh item is "Expansion," which provided that no further expansion of the active fill area shall occur except by applicable procedures set forth by law or else as specifically set forth in "this Agreement." For reasons explained above, neither compliance with law nor compliance with the arbitration award is arbitrable.

¶25 The twelfth item is "Monthly Truck Inspections," in which the board struck the first sentence, which required the operator to perform random truck inspections as required by the DNR. This item requires compliance with existing law, and compliance with law is not arbitrable.

¶26 The thirteenth item is "Headings," which provided that the titles to the paragraphs of "this Agreement" are for informational purposes only. The

committee argues that this provision is necessary to clarify the offer and to avoid future litigation. The committee, however, points to nothing in the statute that makes this arbitrable. This item was properly stricken.

¶27 The fourteenth item was a choice of law provision, setting Wisconsin law as governing. The committee points to no authority for the proposition that choice of law is arbitrable.

¶28 The fifteenth item related to compliance with air quality standards. Compliance with law is not arbitrable.

¶29 The sixteenth item is "Acknowledged Transporter Compliance Policy." The board struck Exhibit K of the offer, which carried that title, explaining: "This item is not arbitrable under any of the eight arbitrable items" in the arbitration statute. Exhibit K provided that the landfill operator would require waste transporters to agree to certain vehicular requirements, and it provided a specified agreement form for use with those transporters that states the vehicular requirements, hours of operation, and permitted highway routes to approach and leave the landfill, among other things. Exhibit K did not stand alone in the offer, but was referenced three times in the offer itself, on pages 13, 17, and 18. The board did not strike the provisions in which those references occurred.

¶30 We conclude that this item was arbitrable under WIS. STAT. § 289.33(8)(b)3., which authorizes arbitration over: "Operational concerns including, but not limited to, noise, dust, debris, odors and hours of operation but excluding design capacity." It was also covered, in part, by § 289.33(8)(b)4., which covers "[t]raffic flows and patterns resulting from the facility." The exhibit, and the provisions in the offer that rely on it, relate to operational concerns specifically identified in this statute, or to similar operational concerns, and to

traffic flow. Providing a method for transporters to be informed of and to agree to provisions about operational concerns and traffic flow can reasonably be considered a part of addressing those concerns.

¶31 The negotiating committee argues that the board erred for reasons related to our discussion of item seven above. The committee argues that if it is true that only participating municipalities are bound by the arbitration award, then the board erred by allowing the award to provide compensation to municipalities that were "affected," but not also "participating." The committee cites no authority that compels this result. The argument appears to assume that a municipality not bound by the award cannot receive compensation under the award. As a matter of common sense, it is not necessary for an affected, but non-participating, municipality to be bound by an award in order to receive compensation under it.

¶32 The negotiating committee argues that the board's selection of the landfill company's final offer instead of the committee's was not reasonable. The argument overlooks the standard of review. The landfill arbitration statute provides that arbitration awards under it are governed by certain provisions of WIS. STAT. ch. 788 that apply to other arbitrations. WIS. STAT. § 289.33(10)(r). The provisions under which a court may vacate or modify an arbitration award are §§ 788.10 and 788.11. The committee does not attempt to tie its argument to these provisions. Reviewing the reasonableness of the award is not one of the options available to a court. Therefore, we do not address this argument further.

¶33 The committee also argues that the case should be remanded to the board because the board failed to provide an explanation of why it chose the landfill company's offer. However, the committee cites no legal authority

requiring such an explanation in an award by this board, or in arbitration awards generally. We reject the argument.

¶34 Still, we conclude that a remand for a further decision by the board is appropriate. We concluded above that the board erred by deleting as nonarbitrable two provisions of the landfill company's final offer, items nine and sixteen. When the circuit court reviewed this case, it stated that it was affirming the award "in all respects" except that it was remanding for the board to further consider the arbitrability of some of the provisions it had struck. We do not regard the award as severable into separate parts that can be independently affirmed or remanded. When the board chose the landfill's final offer, it may have done so after first having struck the provisions it considered nonarbitrable in both offers. That is the method that would have given the board the most accurate comparison of the two offers. We do not know whether the board would have chosen the landfill's offer if the board had known that items nine, "Sociological Payments," and sixteen, "Acknowledged Transporter Compliance Policy," are arbitrable. The board should have a further opportunity to review its choice in light of that change. Although items nine and sixteen are identical in the two offers, the board's view of which offer is preferable may change now that we have ruled that the two items are arbitrable and should not have been stricken. It is the arbitrator, not this court, that is charged with making that choice and, therefore, we remand for the circuit court to order the board to reconsider its decision in light of this opinion, and to amend the award consistently with the analysis in this opinion.

By the Court.—Order affirmed in part; reversed in part and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.