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6th Circ. Orders Atty Fees Paid In Power Co.'s \$5M Arbitration

By **Emma Cueto**

Law360 (August 14, 2020, 9:05 PM EDT) -- The Sixth Circuit has overturned a lower court decision regarding attorney fees in a nearly \$5 million contract dispute between a power company and its supplier, with the appellate court ruling that the contract did allow for the court to grant attorney fees even though the arbitrator could not.

The court said in a split decision Thursday that Bay Shore Power Company had made a case that even though its contract with supplier Oxbow Energy Solutions LLC expressly did not allow an arbitrator to award attorney fees, it was reasonable to interpret other provisions as allowing a court to make such an award.

As such, the majority said, the Ohio trial court was wrong to conclude that the seemingly contradictory provisions closed off the possibility of attorney fees.

"Ultimately, the provisions at issue can either be read together to permit the recovery of attorneys' fees in court but not before an arbitration panel, or they are hopelessly contradictory and unenforceable," U.S. Circuit Judge Eric L. Clay wrote for the majority. "Bay Shore presents a reasonable construction of the terms to harmonize them while Oxbow only presents reasons to be skeptical of Bay Shore's interpretation. None of those reasons are compelling."

In a dissent, U.S. Circuit Judge Eric E. Murphy said that, while he also disagreed with the trial court's reasoning, the request for attorney fees before the trial court went against the Federal Arbitration Act and the terms of the agreement and should have been denied.

The FAA gave the court the authority to confirm an award, but by requesting attorney fees of the court, Judge Murphy wrote, Bay Shore was essentially asking the court to modify the award. However, he said, courts are not permitted to reverse an arbitration panel's decision that attorney fees are not allowed.

In addition, he added, the contract specifically mandated that all disputes that could not be resolved informally or through mediation submit to arbitration. There was nothing in the contract that allowed for a special judicial proceeding over attorney fees, he said.

The case arose out of a dispute between Bay Shore and Oxbow over limestone, according to the decision.

The two companies had a longstanding contract under which Oxbow provided Bay Shore with limestone with certain chemical properties to use in its facilities, the decision said. However, in 2013, the source that provided Oxbow with limestone raised its prices, such that it was no longer profitable to sell to Bay Shore at the agreed-upon price, according to the decision.

Oxbow initially switched to another supplier with lower-quality limestone, the decision said, but the inferior limestone created a risk to the power plant's equipment, the decision said. In order to obtain quality limestone, Bay Shore then agreed under protest to pay higher prices, according to the decision.

The parties filed for arbitration in 2016 after failing to work out the dispute in mediation, according to the decision. In 2017, the arbitration panel sided with Bay Shore and awarded it nearly \$5 million in damages, plus costs and interest, the decision said.

However, the arbitration panel concluded that it could not grant attorney fees because of a clause in the contract at the heart of the dispute, which specified that attorney fees in an arbitration could not be awarded and should be paid separately, according to the decision.

Bay Shore filed to confirm the award and also asked the court to award attorney fees.

It pointed to two other provisions in the contract that mandated that attorney fees be awarded, according to the decision. The three provisions could be reconciled, it argued, if the contract prevented only an arbitrator or arbitration panel — but not a court — from granting such fees.

The trial court rejected this analysis, but the majority of the Sixth Circuit panel found it to be a valid interpretation. The appellate court sent the case back to the trial level with instructions to calculate reasonable attorney fees.

Counsel for both parties did not respond Friday to a request for comment.

Judges Eric L. Clay, Karen Moore and Eric E. Murphy sat on the panel for the Sixth Circuit.

Bay Shore is represented by Gregory J. Phillips, Nicholas J. Secco, Trevor G. Covey and James E. Von Der Heydt of Benesch Friedlander Coplan & Aronoff LLP.

Oxbow is represented by John P. Gilligan, Daniel M. Anderson and Derek R. Molter of Ice Miller LLP.

The case is Bay Shore Power Company v. Oxbow Energy Solutions, case number 20-3119, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Michael Watanabe.