

**AMERICAN ARBITRATION ASSOCIATION
Construction Industry Arbitration Tribunal**

**McCreary County Heritage Foundation d/b/a
Big South Fork Scenic Railway**

Case 01-19-0002-2727

Claimant

v.

**Wasatch Railroad Contractors; John E Rimmasch
Respondents**

DECISION AND FINAL AWARD

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into between the above-named parties and dated on or about April 10, 2012 and having been duly sworn, and having duly heard the proofs and allegations of the Parties, hereby AWARD as follows:

Pursuant to the Construction Industry Arbitration Rules of the American Arbitration Association (AAA), this arbitration between Claimant McCreary County Heritage Foundation d/b/a Big South Fork Scenic Railway ("MCHF") and Respondents Wasatch Railroad Contractors ("Wasatch") and John E. Rimmasch ("Rimmasch") came before the undersigned Arbitrator for hearing on August 3, 4, 5 and 6, 2020. A view of the steam locomotive which is the subject of the dispute occurred on the fourth day of hearing on August 6, 2020. The Parties submitted Post-Hearing Briefs and the hearing was declared closed as of September 1, 2020.

A. CLAIMANT'S CONTRACT CLAIMS

Claimant MCHF and Respondent Wasatch entered into a Contract dated or about April 10, 2012 (Joint Exhibit 7) for the restoration of a historic steam locomotive known as K&T No. 14. The work to be performed under the Contract will be referred to as the "Project." The locomotive has special significance to Stearns, Kentucky due to local connections, and Claimant is particularly interested in operating the locomotive as part of its scenic railway operation.

The restoration effort has been ongoing for several years and has involved the work of many people including volunteers. Unfortunately, the restoration process remains unfinished, and much remains to be done. The Contract at Article 4 provides that work shall commence by April 10, 2012 and be completed by July 31, 2013.

The original Contract price was \$695,500. In September 2014, the Parties entered into a Memorandum of Understanding (Joint Exhibit 8), which contemplated an additional \$100,000 of funding for the Project, increasing the Contract amount to \$795,000. Claimant MCHF paid Respondent Wasatch the amount of \$752,797.40 (See Joint Exhibit 1, Joint Stipulation of Facts, at paragraph 1.i.).

The evidence established that Respondent Wasatch breached the Contract by, *inter alia*, performing defective work, failing to remedy defective work, and failing to complete the Contract work on time. Respondent Wasatch asserted defenses arguing that it was excused from performance, because Claimant materially breached the contract by failing to provide promised project safety, support, oversight, and management. While project management by MCHF was not the best, Wasatch did not establish that these alleged breaches by MCHF were material in causing Wasatch to perform defective work. Further, part of the management issues of MCHF arose as a result of delay of the Project by Wasatch.

Nor did Respondents present persuasive evidence that any shortcomings by MCHF materially delayed its performance. The alleged “locking out” of Wasatch’s employees from the worksite in 2017 was not the reason for failure to timely complete the Project. The Project should have been completed by Wasatch long before that time, the defective work had already been performed, and Wasatch had ample time to remedy it.

Claimant relied on the expert testimony of Jason Sobczynski to establish the scope and cost of corrective work. MCHF also relied on notices from the Federal Railroad Administration (FRA) that the boiler work was not complete or in compliance with all regulations and required corrective work. A February 17, 2017 email from the FRA to Wasatch (Joint Exhibit 46) made clear that the FRA had returned to Stearns to re-inspect the Locomotive “to ensure all the noncompliant conditions were addressed.” The FRA communicated to Wasatch that the defects were not, in fact, remedied.

The Arbitrator found Mr. Sobczynski to be qualified as an expert based on his experience in steam locomotive restoration, and a credible witness in terms of honesty and candor. Even though Mr. Sobczynski lacked certain expertise and lacked full familiarity with all applicable regulations, many of the items that he opined upon were corroborated by others. For example, some of the defective work was also described in notices from the FRA as needing corrective work by Wasatch. Some items opined on by Mr. Sobczynski include work

that everyone agrees has not yet been performed, but are required to complete the Project. Other items include remedying defective work which multiple witnesses confirmed require correction.

Mr. Sobczynski opined that the total remedial cost was between \$944,000 and \$965,000 (Joint Exhibit 21, last page). Mr. Sobczynski did not support his estimates of material costs with proposals or estimates from material suppliers.

Respondents presented the expert testimony of Doyle McCormack to counter the testimony of Mr. Sobczynski. Although Mr. McCormack disagreed with many of the opinions of Mr. Sobczynski, Mr. McCormack's testimony tended to corroborate Mr. Sobczynski's opinions regarding labor cost. Mr. McCormack acknowledged certain deficiencies and acknowledged that substantial work remained to be performed to complete the Project and restore the locomotive to operational condition. He also acknowledged the need for material certification sheets to complete FRA Form 4.

Mr. McCormack estimated that it would take 5 to 6 people, 3 to 6 months to repair any deficiencies and finish the boiler work. Taking the upper end of this range, and using a 40-hour work week, amounts to 6240 hours (26 weeks x 40 hours x 6 workers). Mr. McCormack also acknowledged that once the boiler work was complete, other substantial work remained to be performed on the locomotive to finish the project and restore the locomotive to operational condition. He testified that the \$219,663 amount estimated by Mr. Sobczynski for this part of the project was a "little salty," but acknowledged that the cost for this part of the work could be in that range depending on the circumstances.

Mr. Rimmasch testified that the usual rate charged by Wasatch for its workers is \$65.00 per hour. This labor rate is confirmed by reference to the Bid Item Sheet of Wasatch which is page 5 of its bid attached to the Contract in Exhibit 7. Dividing the total labor cost of \$547,775.80 by the total man hours of 8427.32 equates to an hourly rate of \$65.00. Applying this hourly rate to the number of hours testified to by Mr. McCormack yields an amount of \$405,600 (6240 hours x \$65/ hour) for the estimated labor cost to repair any deficiencies and complete the boiler work. Adding the additional amount of \$219,663 to finish the project and restore the locomotive to operational condition, results in a total labor cost of \$625,263. This is very close to the labor component of Mr. Sobczynski's estimated costs.

As pointed out in Respondents' Post-Hearing Brief at page 13, Mr. Sobczynski included

approximately \$355,742 in his repair and completion cost estimate for materials. If this amount is subtracted from Mr. Sobczynski's total estimated cost, the resulting labor component of his cost estimate is remarkably close to the amount arrived at by utilizing the upper end of the range testified to by Mr. McCormack, and the hourly rate testified to by Mr. Rimmasch. In short, the testimony of Respondents' own witnesses tends to corroborate Mr. Sobczynski's opinions regarding the labor cost to remedy and complete the Project work.

The next question is what amount of damages should be awarded to MCHF for material costs to remedy and complete the Project work. As pointed out at page 13 of Respondents' Post-Hearing Brief, the material costs estimated by Mr. Sobczynski are not supported by any quotes or estimates from suppliers. Further, Respondent disputes that all of these materials are required to complete the work, and claims that MCHF misplaced or lost some parts.

The Contract contains a Buy American Provision (*see* Contract, Exhibit 7, at General Conditions, Article 28). The Buy American Provision was highlighted by MCHF during the bidding phase. Becki Egnew, in an e-mail dated December 21, 2011 wherein John Rimmasch is listed as a recipient, highlighted that due to Federal Funding for the project, the Buy American requirement applied. (See Exhibit 15). During his testimony, Mr. Rimmasch acknowledged, purchasing Chinese bolts which were installed in the locomotive. MCHF presented evidence, including an order invoice, showing that Wasatch purchased (unthreaded) rigid staybolts, flexible staybolts, and rivets from China.,

Wasatch did not provide Mill Test Reports ("MTR") for all rigid staybolts, flexible staybolts, and rivets installed in the boiler. The FRA requires MTRs for all materials installed in a locomotive boiler as part of the Form 4, which the parties' Contract requires Wasatch to do before the Locomotive would be authorized to operate. According to Mr. Sobczynski, under these circumstances, all staybolts and rivets must be removed and replaced with new materials for which there are MTRs.

In light of the defective work, lack of MTRs, and use of foreign materials, the Arbitrator concludes that the work of Wasatch will need to be substantially re-done. In its Bid Item Sheet (referenced above), Wasatch listed total materials in the total amount of \$147,724.20. This represents a reasonable cost for materials to perform the remedial and completion work.

The Arbitrator concludes that the reasonable cost to remedy and complete the work that Wasatch was required to perform under the Contract is \$625,263.00 for labor and \$147,724.20

for materials for a total of \$772,987.20. In arriving at the final Contract damages recoverable by MCHF, this amount must be reduced by the remaining Contract balance of \$42,702.60 (the final Contract price of \$795,500.00 less the amount of \$752,797.40 paid to Wasatch as stipulated in Joint Exhibit 1, paragraph 1.i). The net Contract damages recoverable by Claimant MCHF is the amount of \$730,284.60 ($\$772,987.20 - \$42,702.60 = \$730,284.60$).

B. CLAIMANT'S NEGLIGENCE CLAIM

MSHF asserts a negligence claim against Wasatch and Mr. Rimmasch for negligent supervision of the volunteers. Wasatch, in defense, relies on statements in a liability waiver form signed by volunteers, "I am working as a volunteer for the Big South Fork Railroad, Steam Locomotive restoration project" and "I understand that I will be treated like any other employee of the Big South Fork Railroad." The Arbitrator concludes that the volunteer / "employees" were loaned by MCHF to Wasatch who was responsible for supervising the work of the volunteers which was part of Wasatch's Contract work. However, the question of whether the work performed by the volunteers was satisfactory or not is a contract question, and does not give rise to a claim for negligence. The claim of negligent supervision of MSHF is denied.

C. COUNTERCLAIM OF RESPONDENT WASATCH

Respondent Wasatch asserts a Counterclaim in the amount of \$26,654.23 for work performed based on breach of contract for unpaid invoices, or in the alternative, based on *quantum meruit*. Based on the breach of contract by Wasatch, as described above, it is not entitled to payment of any additional invoices.

Quantum meruit is not an appropriate remedy where an express written Contract governs the rights and duties of the parties. Further, for the reasons stated above, Wasatch failed to show entitlement to payment of any sums based on *quantum meruit*.

Respondent Wasatch, in its Counterclaim, asserted a claim for fraudulent inducement. In Respondents Post-Hearing Brief, Wasatch stated "it elects at this time to pursue its contract claims in lieu of its claim for fraudulent inducement". In light of the effective withdrawal of the claim for fraudulent inducement by Wasatch, that claim is denied.

D. CONCLUSION AND AWARD


Having fully considered the evidence and arguments of the Parties, the Arbitrator decides and renders this Final Award as follows:

- a) Claimant McCreary County Heritage Foundation d/b/a Big South Fork Scenic Railway is awarded the amount of \$730,284.60 against Respondent Wasatch Railroad Contractors for breach of contract;
- b) Claimant's negligence claims against Respondents are denied; and
- c) The Counterclaim of Respondent Wasatch is denied.

The administrative fees of the American Arbitration Association, totaling \$18,350.00, and the compensation and expenses of the arbitrator, totaling \$22,775.05, shall be borne equally by Claimant and Respondents' (i.e. Claimant shall pay $\frac{1}{2}$ and Respondents' collectively shall pay $\frac{1}{2}$). Therefore, Wasatch Railroad Contractors and John E. Rimmasch are ordered, jointly and severally, to pay McCreary County Heritage Foundation d/b/a Big South Fork Scenic Railway, the additional amount of \$3,825.00.

The above sums are to be paid on or before 30 days from the date of this Award. This Award is in full settlement of all claims and counterclaims submitted to this Arbitration. All claims not expressly granted herein are hereby denied.

Dated: September 30, 2020



Thomas R. Yocum, Arbitrator