

BUSINESS COURT OF TEXAS, FIRST DIVISION

BNSF Railway Company v. Level 3 Communications, LLC

BNSF Railway, 2026 Tex. Bus. 8 (Business Court of Texas First Division 2026) · No. 25-BC01A-0025 ·
Decided February 24, 2026

SUMMARY

The Texas Business Court, First Division, denied BNSF Railway Company’s application to vacate an arbitration award and granted Level 3 Communications, LLC’s counter-application to confirm it. The court held that the parties’ adoption of the AAA Commercial Rules clearly and unmistakably delegated substantive arbitrability questions to the arbitration panel, while applicable law assigned procedural arbitrability questions to the panel as well. The court confirmed the panel’s June 2, 2025 final award and denied Level 3’s request for additional attorneys’ fees because no supporting evidence was presented.

OPINION

BNSF Railway v. Level 3 Communications 2026 Tex. Bus. 8
PER CURIAM.

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BUSINESS COURT OF TEXAS
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BNSF RAILWAY COMPANY, §
Plaintiff, § v. § Cause No. 25-BC01A-0025
LEVEL 3 COMMUNICATIONS, §
LLC, §

Defendant. § _____ Syllabus 1

_____ Granting a motion to confirm an arbitration award and denying a motion to vacate the same award, the Court holds: the parties’ contract and applicable law gave the arbitration panel authority to decide both substantive and procedural arbitrability questions. Judgment is entered confirming the award. 1 This syllabus is provided for the convenience of the reader; it is not part of the Court’s opinion and should not be cited or relied upon as legal authority. 2026 Tex. Bus. 8 The Business Court of Texas, First Division

BNSF RAILWAY COMPANY, §
Plaintiff, § v. § Cause No. 25-BC01A-0025

I. Case Summary ¶1 On June 15, 1998, BNSF Railway Company (“BNSF”) and Level 3 Communications, LLC (“Level 3”) executed a Master Right-of-Way Agreement (“the MROW” or “the Agreement”) by which BNSF would allow Level 3 to infringe upon BNSF’s right-of-way in order to construct and install fiber optic facilities along BNSF railroad segments in the United States in exchange for cash and other consideration. See Arbitration Demand (“Arb. Dem.”) ¶ 11, Tr. Ex. 1B at p. 4. The initial term of the Agreement was twenty- five years. See Arb. Dem. ¶ 17, Tr. Ex. 1B at p. 6. The Agreement was thus anticipated to expire on June 14, 2023. See Arb. Dem. ¶ 19, Tr. Ex. 1B at p. 6. ¶2 BNSF gave Level 3 the right to extend the Agreement for two renewal periods. See MROW § 17.a, Tr. Ex. 1B at pp. 547-48. If Level 3 elected to extend the MROW, the MROW required the parties to negotiate a then- current rate. See MROW § 17.a, Tr. Ex. 1B at p. 548. In the event the parties failed to agree on a renewal rate during a 30-day negotiation period, Section 17 of the MROW purported to lay out a procedure (the appraisal process) by which the parties were to arrive at a mutually agreeable renewal rate. See MROW § 17, Tr. Ex. 1B at pp. 547-49. ¶3 On December 9, 2022, Level 3 notified BNSF of its intent to renew the MROW, and the parties commenced the 30-day negotiation period. See Pet. ¶ 21; Arb. Dem. ¶ 21, Tr. Ex. 1B at p. 7. The parties did not reach an agreement on the then-current renewal rate, and the negotiation period was extended several times. See Pet. ¶ 23; Arb. Dem. ¶¶ 26-27, 34, Tr. Ex. 1B at pp. 8, 10. The extended negotiation period ended on October 31, 2023. See Pet. ¶ 39. Despite the extensions, the parties did not reach an agreement on the then-current renewal rate. See id. ¶ 23. Page 2 ¶4 The MROW contained several provisions concerning resolution of disputes between the parties. See MROW §§ 17-18, Tr. Ex. 1B at pp. 547-50. Section 17 set out an appraisal process to reach a renewal rate. See MROW § 17, Tr. Ex. 1B at pp. 547-49. Separately, the MROW contained a formal dispute resolution procedure in Section 18.b, and an arbitration clause in 18.c. See MROW § 18, Tr. Ex. 1B at pp. 549-50. Per its terms, the parties agreed “to submit any disputes arising out of [the MROW] and not settled pursuant to Section 18.b. to binding arbitration.” MROW § 18.c, Tr. Ex. 1B at p. 549. The arbitration clause did not expressly reference renewal rate disputes or the appraisal process, either inclusively or exclusively. ¶5 On October 31, 2023, Level 3 filed a demand for arbitration with the American Arbitration Association (“AAA”). See Pet. ¶ 39; see generally Arb. Dem., Tr. Ex. 1B at pp. 1-21. The arbitration demand centered on the renewal rate dispute, specifically the methodology to be used to calculate the rate. See Arb. Dem. ¶ 67, Tr. Ex. 1B at p. 18. Level 3 claimed that “by failing to act in good faith and approve a rate consistent with the terms in the [MROW], BNSF waived its rights under the [MROW] including the right to enforce the appraisal process set forth in Section 17.a. . . .” Arb. Dem. ¶ 73, Tr. Ex. 1B at p. 19.

Page 3 ¶6 BNSF filed a Motion to Dismiss Claimant’s Demand for Arbitration and Request for Relief, arguing that “under well-established Texas Law, an agreement to negotiate in good faith in the future is unenforceable, even if the agreement calls for a ‘good faith effort’ in the negotiations.” Mtn. to Dismiss at p. 2, Tr. Ex. 1B at p. 135. BNSF thus asked the arbitration panel (“the Panel”) to dismiss the arbitration demand and to allow the negotiations to proceed to the appraisal process. See Mtn. to Dismiss at p. 5, Tr. Ex. 1B at p. 138. ¶7 Before the motion was adjudicated, Level 3 filed a First Amended Statement of Claims and Request for Relief. See generally 1st Am. St., Tr. Ex. 1B at pp. 200-27. In it, Level 3 argued, inter alia, that the parties’ agreement to the appraisal process was premised on the parties’ mutual obligation to act in good faith. See 1st Am. St. ¶ 62, Tr. Ex. 1B at p. 218. Because BNSF had failed to act in good faith, Level 3 argued, BNSF had waived its right to enforce the appraisal process. See 1st Am. St. ¶ 65(i), Tr. Ex. 1B at p. 220. ¶8 On March 12, 2024, BNSF filed a second motion to dismiss. See generally Mtn. to Dismiss II, Tr. Ex. 1B at pp. 324-39. BNSF again asked the Panel to dismiss the arbitration demand and to allow the parties to proceed to appraisal. See Mtn. to Dismiss II at p. 12, Tr. Ex. 1B at p. 335. Level 3 Page 4 demurred, challenging every argument raised by BNSF in its motion. See generally Mtn. to Dismiss II Resp. at pp. 5-29, Tr. Ex. 1B at pp. 380-404. On April 5, 2024, the Panel denied BNSF’s motion to dismiss, concluding that “the arbitration should proceed to a hearing on the merits of Level 3’s complaint.” Order on Mtn. to Dismiss II at p. 2, Tr. Ex. 1B at p. 429. ¶9 On May 1, 2024, Level 3 filed an Expedited Motion to Stay Appraisal Process and Request for Interim Award, noting BNSF’s “refus[al] to agree to postpone the appraisal process” despite the Panel’s denial of BNSF’s motion to dismiss. Mtn. to Stay at p. 2, Tr. Ex. 1B at p. 439. In its response, BNSF argued that “the appraisal process must come before any other adjudication related to the Agreement.” Mtn. to Stay Resp. at p. 2, Tr. Ex. 1B at p. 467 (emphasis in original). On June 3, 2024, the Panel stayed the appraisal process. See Order on Mtn. to Stay at pp. 1-2, Tr. Ex. 1B at pp. 497- 98. ¶10 BNSF then filed a counterclaim. See generally Countercl., Tr. Ex. 1B at pp. 514-26. BNSF asked the Panel to, among other things, “order[] Level 3 to participate in the agreed upon Appraisal Process.” Countercl. at p. 10, Tr. Ex. 1B at p. 523. Page 5 ¶11 “Disputatious” discovery proceeded in due course. Final Award ¶ 6, Tr. Ex. 1B at p. 3201. The final hearing on the merits began on March 10, 2025, in Dallas. See Final Award ¶ 8, Tr. Ex. 1B at p. 3201. At the conclusion of Level 3’s case-in-chief, BNSF renewed its motion to dismiss as a motion for directed verdict. See Final Award ¶ 9, Tr. Ex. 1B at p. 3202. The Panel carried the motion to the conclusion of the hearing, and it was ultimately denied as part of the Final Award. See Final Award ¶ 6, Tr. Ex. 1B at p. 3201. ¶12 In issuing an award in favor of Level 3, the Panel found that BNSF had failed to negotiate in good faith, rendering further negotiations and the appraisal process futile or impossible. See Final Award ¶ 42, Tr. Ex. 1B at p. 3215. Consequently, the Panel determined that BNSF had “waived any right to pursue” either further negotiations or the appraisal process. Id. It thus “order[ed] the parties to abide by” a rate negotiated between the parties’ lead negotiators earlier in the dispute resolution process. Final Award at p. 1, Tr. Ex. 1B at

p. 3199. ¶13 On June 20, 2025, BNSF filed an application to vacate the arbitration award in this Court because—in BNSF’s view—the Panel exceeded its authority when it replaced a contractually-mandated appraisal process with arbitration. See Pet. at pp. 1-2. Level 3 counterclaimed with an application to Page 6 confirm the arbitration award. See Countercl. at p. 1. The Court entered an agreed scheduling order on September 19, 2025, which outlined briefing deadlines for both parties. See Scheduling Order at p. 4. A bench trial was held in this Court on January 12, 2026. II. Applicable Law ¶14 The arbitration clause in the MROW does not specify whether the Federal Arbitration Act (“FAA”) or the arbitration law of the state (here, the Texas Arbitration Act (“TAA”)) applies. However, the MROW does contain a Texas choice of law provision. See Pet. ¶ 53. The parties agree that the MROW is governed by both the FAA and TAA “[b]ecause the agreement does not specifically exclude the application of federal law.” *Moody Nat’l Grapevine MT, LP v. TIC Grapevine 2, LP*, 651 S.W.3d 450, 455 (Tex. App.—Houston [14th Dist.] 2022, pet. denied); see Pet. ¶ 53 (citing *Moody*, 651 S.W.3d at 455); Countercl. ¶ 43 (quoting same). ¶15 Under both the TAA and the FAA, a court must—on application of a party—confirm an arbitration award “[u]nless grounds are offered for vacating, modifying, or correcting an award.” TEX. CIV. PRAC. & REM. CODE § 171.087; see also 9 U.S.C. § 9. Section 171.088 of the TAA and Section 10 of the FAA enumerate the grounds under which a court may vacate an arbitration Page 7 award. See TEX. CIV. PRAC. & REM. CODE § 171.088; 9 U.S.C. § 10. Of relevance to this case, those grounds include a showing that the arbitrators exceeded their authority. See TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A); 9 U.S.C. § 10(a)(4). ¶16 “In determining whether an arbitrator has exceeded his authority, the proper inquiry is not whether the arbitrator decided an issue correctly, but rather, whether he had the authority to decide the issue at all.” *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 518 S.W.3d 422, 431 (Tex. 2017). Because arbitration is the byproduct of the parties’ agreement, vacatur on the ground that the arbitrators exceeded their authority requires a showing that the arbitrators decided a matter that the agreement did not submit to their judgment. ¶17 In examining the scope of the arbitrators’ authority in this case, the key issue is arbitrability. The Texas Supreme Court (like the United States Supreme Court) recognizes a distinction between questions of substantive arbitrability and procedural arbitrability. See *G.T. Leach Builders, LLC v. Sapphire V.P., LP*, 458 S.W.3d 502, 520 (Tex. 2015) (citing *BG Grp., PLC v. Republic of Arg.*, 572 U.S. 25, 33 (2014); *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 81 (2002)). Whether a particular dispute is arbitrable—“a Page 8 gateway dispute”—is a question of substantive arbitrability. *Howsam*, 537 U.S. at 84. Satisfaction (or not) of a condition precedent to arbitration, and similar matters not at issue here, present questions of procedural arbitrability. *G.T. Leach Builders*, 458 S.W.3d at 520. The outcome of the case at hand turns not on what is arbitrable, but on who decides what is arbitrable. III. Discussion ¶18 In its Original Petition and Application to Vacate Arbitration Award, BNSF identified TAA Section 171.088(a)(3)(A) and 9 U.S.C. § 10(a)(4) as its bases for vacatur. See Pet. ¶ 54; see also TEX. CIV. PRAC. & REM. CODE § 171.088(a)(3)(A); 9 U.S.C. § 10(a)(4).

Specifically, BNSF argued that the Panel exceeded its authority in two ways. See Pet. ¶¶ 72-74. First, BNSF argues the Panel exceeded its authority “by ignoring [a] clear contractual mandate and permitting Level 3 to replace the required appraisal process for the renewal-rate determination with arbitration. 1 BNSF Supp. at p. 27 (emphases in original); see Pet. ¶ 68. Second, BNSF argues (in the alternative) that the Panel exceeded its authority by allowing arbitration prior to the

1 In a variation of this argument, BNSF also argued that appraisal was “at a minimum” a condition precedent to arbitration, and as such, should be completed prior to arbitration. Pet. ¶ 62; see BNSF Supp. at p. 25. Page 9 parties’ completion of a condition precedent to arbitration, including the formal settlement process described in Section 18.b of the MROW. See BNSF Supp. at p. 28; Pet. ¶ 73. ¶19 The key issue in this case is arbitrability: did the Panel have the authority to determine whether the renewal rate dispute was subject to arbitration, and thereafter, to enter an award resolving that dispute? For the reasons that follow, the Court finds that it did. ¶20 BNSF’s primary argument—that the Panel exceeded its authority by adjudicating the renewal rate dispute despite contractual provisions requiring resolution of that issue by other means—raises a question of substantive arbitrability. In the absence of contractual provisions to the contrary, questions of substantive arbitrability are typically decided by the court. See *G.T. Leach Builders*, 458 S.W.3d at 520. Here, however, the parties agreed—in the MROW’s arbitration clause—that “[a]ny arbitration under this Agreement shall be conducted in accordance with the Commercial Rules of the American Arbitration Association.” MROW § 18.c, Tr. Ex. 1B at p. 549. ¶21 Rule 7 of the AAA Commercial Rules grants to the arbitrator the “power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to Page 10 the arbitrability of any claim or counterclaim without any need to refer such matters first to a court.” AAA Comm. R. 7. “[A]s a general rule, an agreement to arbitrate in accordance with the AAA or similar rules constitutes a clear and unmistakable agreement that the arbitrator must decide whether the parties’ disputes must be resolved through arbitration.” *TotalEnergies E&P USA, Inc. v. MP Gulf of Mex., LLC*, 667 S.W.3d 694, 708 (Tex. 2023); see *Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012) (“[T]he express adoption of [the AAA rules] presents clear and unmistakable evidence that the parties agreed to arbitrate arbitrability.”). ¶22 The parties’ agreement to arbitrate “in accordance with” the AAA Commercial Rules (see MROW § 18.e, Tr. Ex. 1B at p. 549) bound the parties to those rules, absent conflict between the arbitration agreement and the rules. See *TotalEnergies*, 667 S.W.3d at 709. And once “the parties have contractually agreed to delegate arbitrability issues to the arbitrator, courts must enforce that agreement.” *Id.* at 702. Accordingly, the parties’ adoption of the AAA Commercial Rules removed questions of substantive arbitrability from the hands of the court and placed it squarely in the hands of the arbitrators. Page 11 ¶23 Because substantive arbitrability was contractually entrusted to the arbitrators, the Court cannot hold, as BNSF urges, that the arbitrators exceeded their authority in determining that the renewal rate dispute was arbitrable or in rendering an award resolving that dispute. On this basis, the Court

rejects BNSF's motion to vacate the award. In so holding, the Court does not reach Level 3's claims that "BNSF did not raise a timely objection to arbitrability." Level 3 Opening Br. at p. 25. ¶24 BNSF's alternative argument—that the Panel exceeded its authority by allowing arbitration prior to the completion of a condition precedent—raises a question of procedural arbitrability. In this regard, Texas law is clear: the arbitrators—not the court—have the authority to determine procedural arbitrability. See *G.T. Leach Builders*, 458 S.W.3d at 520. To the extent BNSF argues that Section 17's appraisal process and Section 18.b's formal settlement process were conditions precedent to arbitration, the enforceability or satisfaction of such conditions were matters for the Panel to decide. Nothing in the parties' agreement operates to shift such questions into the court's hands. ¶25 In sum, an arbitration panel only exceeds its power when it "exceeds [its] contractual authority." *Clendening v. Blucora, Inc.*, No. 05-22- Page 12 01190-CV, 2024 WL 980359, at *2 (Tex. App.—Dallas Mar. 7, 2024, no pet.) (mem. op.). Here, the Panel had authority to decide both substantive and procedural arbitrability issues by virtue of the contract language and applicable law. Thus, the Panel—per the terms of the MROW—had the power to decide whether the renewal rate dispute was subject to arbitration, whether any condition precedent to arbitration was enforceable or satisfied, and ultimately, how to resolve the renewal rate dispute. ¶26 "[J]udicial review of an arbitration award is extraordinarily narrow" and "focuses on the integrity of the process, not the propriety of the result." *Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*, 446 S.W.3d 58, 75 (Tex. App.—Houston [1st Dist.] 2014), *aff'd*, 518 S.W.3d at 432. "Review of an arbitration award is so limited that even a mistake of fact or law by the arbitrator is not a proper ground for vacating an award." *Id.*; see also *Ancor Holdings, LLC v. Peterson, Goldman & Villani, Inc.*, 294 S.W.3d 818, 826 (Tex. App.—Dallas 2009, no pet.). BNSF urges the Court to hold that the renewal rate dispute should not have been arbitrated. But under the parties' contract and applicable law, the Panel—and not this Court—was entrusted to make that determination. Accordingly, BNSF's arguments for vacatur must be rejected and the Court must confirm the arbitration award. Page 13 ¶27 Finally, insofar as Level 3 has pleaded for recovery of fees and costs (see Level3 Opening Br. at p. 40), the Court notes that no evidence of fees or costs was presented at trial. As the party bearing the burden of proof, it was incumbent upon Level 3 to present such evidence at the time of trial. See *Yowell v. Granite Operating Co.*, 620 S.W.3d 335, 354 (Tex. 2020). In the absence of the same, Level 3's claim for fees and costs must be denied regardless of the merits of the parties' arguments concerning recoverability. IV. Conclusion and Final Judgment ¶28 IT IS THEREFORE ORDERED that BNSF's Application to Vacate Arbitration Award is DENIED and Level 3's Counter-Application for Confirmation of Arbitration Award is GRANTED. Level 3's request for additional attorneys' fees is DENIED. Judgment is RENDERED that the Final Award entered by the Panel on June 2, 2025, is CONFIRMED. All relief requested and not granted herein is DENIED. _____

ANDREA K. BOURESSA

Judge of the Texas Business Court, First Division SIGNED ON: February 24, 2026. Page 14

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