

The Fourth Circuit: What Constitutes a Final Award and Who Makes the Call?



Final Award 2

What constitutes a "final arbitration award" for purposes of the Federal Arbitration Act is important because it bears on whether an award can be confirmed, vacated, or modified under Sections 9, 10, or 11 of the Federal Arbitration Act (the "FAA"). We addressed the basics concerning final awards in a 2009 post, [here](#).

In *Northfolk Southern Railway Co. v. Sprint Communications Co., L.P.*, 883 F.3d 417 (4th Cir. 2018), the U.S. Court of Appeals for the Fourth Circuit was faced with the question whether an award (the "Appraisal Award"), convened under an agreement's appraisal clause, and issued by three appraisers, was a final arbitration award under the FAA. The unusual procedural posture of the case raised an additional, related question: whether under the FAA an arbitration panel, convened under the arbitration provision of the parties' agreement, had the authority to declare the Appraisal Award to be a final award. That question matters, for if an arbitration panel has that power, then its decision concerning finality is subject only to the very highly deferential review permitted by Section 10 of the FAA. See *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942-43 (1995); *Oxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068-69 (2013).

Concededly with the benefit of 20/20 hindsight, we wonder whether a different litigation and appellate strategy might have yielded a different outcome. The Court held that the Appraisal Award was not final, and remanded the matter back to the appraisers. But the Court did not, for the reasons set forth below, definitively answer the "who?" question. The Court's decision that the Appraisal Award was not final was unquestionably correct if one considers from a purely objective standpoint, without deference to the Arbitration Award, which declared that the Award was final. But the correct outcome would be considerably less certain had the Railroad sought confirmation of the Arbitration Award and urged the Court to accord deference to the arbitrators who made it.

Background: *Northfolk Southern Railway Co. v. Sprint Communications Co., L.P.*, 883 F.3d 417 (4th Cir. 2018)



Final Award 1

The dispute between Northfolk Southern Railway Co. (the "Railroad" or the "Appraisal Award Defending Party") and Sprint Communications Co., L.P. (the "Carrier" or the "Appraisal Award Challenging Party") arose out of a 25-year-term 1987 licensing agreement (the "Agreement") under which the Carrier's predecessor licensed from the Railroad's predecessor the right to use for fiber-optics-cable purposes certain parts of the Railroad's rights of way. The Carrier renewed that Agreement for an additional 25-year term (the "renewed Agreement term"), and a dispute arose about the renewal price.

The Appraisal Clause

The Agreement contained an appraisal clause (the "Appraisal Clause"), which was designed to address disagreements about payment amounts. Under the Appraisal Clause's procedures the Carrier would appoint an appraiser who would arrive at a valuation according to certain criteria. If the Railroad disagreed, then it would appoint its own appraiser, who would perform its own appraisal. If the two appraisers could not agree on an amount, then they would select a third appraiser, who was supposed to "broker a compromise." 883 F.3d at 420.

The Arbitration Agreement

The Agreement also contained an arbitration provision (the "AAA Arbitration Agreement"), which provided for Arbitration administered by the American Arbitration Association (the "AAA").

The Appraisal Award



Final Award 3

The Carrier and Railroad each appointed an appraiser, but the two appraisers could not reach an agreement. Accordingly they appointed Charles Argianas as a third appraiser. Argianas requested guidance from the parties as to how they wanted him to proceed, and by a joint response, the Carrier and Railroad "instructed Argianas to seek a compromise with one (or both) of the other appraisers[,] and to "perform his own appraisal" "[o]nly if he was unable to" reach a compromise. 883 F.3d at 420.

Argianas consulted with the party-appointed appraisers, and on December 11, 2014, he emailed the parties the Appraisal Award, which was entitled "Majority Decision for Settlement Purposes Subject to Extraordinary Appraisal Assumptions." The Appraisal Award embodied a compromise Argianas made with the Railroad's Appraiser, and deemed the value of the license to be

\$6,100,000.00. The Appraisal Award explained that Argianas and the Railroad's appraiser "had assented to this Majority Decision but that Argianas "reserve[d] his assent without prejudice or time limitation subject to the following extraordinary appraisal assumptions: 1) [the Railroad] in fact has marketable title of the occupancy corridor; and 2) [the Railroad's appraiser's] ATF value is reasonable, which it appears to be." 883 F.3d at 420 (quoting Appraisal Award). The Appraisal Award "further state[d] that "[i]f either of these extraordinary assumptions are found to not be true, Argianas ... reserves the right to withdraw his assent." 883 F.3d at 420-21 (quoting Appraisal Award).

The Railroad billed the Carrier for the \$6,100,000.00 payment amount, but the Carrier refused to pay, contending it was too high. Litigation and arbitration ensued.

The AAA Arbitration and FAA Litigation



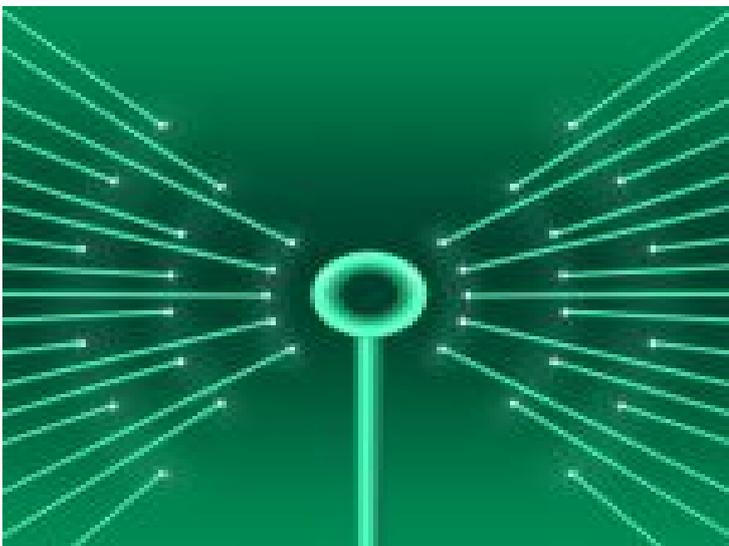
Final Award 4

Pursuant to the Agreement's arbitration provision, the Carrier demanded AAA arbitration. The carrier contended that the Railroad had "unilaterally terminated" the Section 2.2.2 [i.e., appraisal] process, before that process had run its course such that no final determination had been issued as to the amount [the Carrier] owed." 823 F.3d at 421 (quoting AAA Arbitration Demand). The Carrier requested "the AAA panel to determine the amount Sprint owed " even though the parties had already spent significant time and effort attempting to resolve that same question pursuant to the [appraisal] procedures. . . ." 823 F.3d at 421.



Final Award 7

In turn, the Railroad commenced an action in the district court seeking enforcement of the [Appraisal Award] as a final and binding arbitration award. Id. The Railroad contended that the AAA arbitration provision did not apply, and that the issue was governed solely by the appraisal provision. The Railroad sought declaratory relief declaring the Carrier to be in breach of contract and declaring that the Appraisal Award was final and binding. 823 F.3d at 421. In addition, it sought a stay of the AAA Arbitration. Id.



Final Award 5

The Carrier at first appeared to be the victor in the Railroad's FAA enforcement litigation, for on August 21, 2015 the district court, without explanation, stayed that litigation pending the AAA arbitration. That decision effectively determined the "who" question in favor of the Carrier.

But fortunes shifted shortly thereafter, for the AAA Arbitration panel issued a decision in favor of the Railroad, which declared that the Appraisal Award was "a final and binding arbitration award, which [the Carrier] could challenge in court under the narrow grounds provided in the FAA" and not in subsequent AAA arbitration." 823 F.3d at 421-22.



Final Award 6

The Railroad successfully moved to amend its complaint to, among other things, seek confirmation of the Appraisal Award, which the AAA Panel had declared a final and binding arbitration award. The Railroad "claimed the only question for the district court was whether the Appraisal award passed muster under the deferential standard of review outlined in the FAA." 823 F.3d at 422. "It appears," said the Court, "that Sprint agreed, because, although it attacked the [Appraisal] award on other FAA grounds, it never urged the court to hold that the [Appraisal Award] was not an arbitration award." 823 F.3d at 422.

But as far as we can tell from the Court's opinion (we haven't checked the briefs or the record on appeal) the Railroad did not move to confirm the AAA Award, and the Carrier did not move to vacate it. Thus, it appears that the question whether the AAA panel exceeded its powers by ruling that the Appraisal Award was final was not squarely presented to the district court or the Fourth Circuit.

The district court confirmed the Appraisal Award and denied the Carrier's motion to vacate it. The Carrier appealed. The Fourth Circuit's Decision on the Final Award Issue

FINAL

Final Award 8

The Court prefaced its discussion by: (a) explaining that "the parties focus their dispute on whether the district court erred in concluding the [Appraisal Award] was a 'final' arbitration award under the FAA[;]" and (b) stating "[n]either party claims that the [Appraisal Award] is not an FAA arbitration award." 823 F.3d at 422. By referring to the parties' apparent focus on the district court's conclusion about finality of the Appraisal Award, the Court was able legitimately to avoid addressing in detail whether: (a) the finality of the Appraisal Award was an issue that the parties could clearly and unmistakably agree to submit to AAA arbitration, which is what they apparently did; and (b) if so, whether the AAA Panel's decision exceeded its powers. The Court was also able to avoid definitively resolving those issues because apparently neither party sought to confirm or vacate the AAA Panel's Award.

By noting that neither party challenged whether the Appraisal Award was "an FAA arbitration award," the Court was apparently referring to the issue whether the Appraisal Award "irrespective of its finality or lack of finality" fell under the FAA given that it was the product of an appraisal agreement, rather than a traditional arbitration agreement. For some courts, have held that appraisal is different from arbitration and is not within the scope of the FAA. See, e.g., *Bakoss v. Certain Underwriters at Lloyd's of London*, 707 F.3d 140, 143-44 (2d Cir. 2013) (holding that scope of "arbitration" under the FAA determined by federal (rather than state) common law, which considers appraisal to be within the scope of arbitration under the FAA, but noting conflicting authority).

To be sure the Court acknowledged and described Section 10(a)(4)'s deferential standard of review. "Judicial review of an arbitration award," said the Court, "is severely circumscribed, and a court sits to determine only whether the arbitrator did his job, not whether he did it well, correctly, or reasonably, but simply whether he did it." 823 F.3d at 422 (quotations and citation omitted). Under that demanding standard, even "serious error[s]" by arbitrators are not grounds for Section 10(a)(4) vacatur. *SOxford Health Plans LLC v. Sutter*, 133 S. Ct. 2064, 2068 (2013) (quotation and citation omitted).

But after acknowledging the standard of review that would apply had the parties moved to confirm or vacate the AAA Award (which they apparently did not), the Court explained that the Carrier "claims the award here [i.e., the Appraisal Award] was not 'final' and so the district court erred in confirming the award and denying [the Carrier's] motion to vacate." The Court then explained that "[i]n reviewing a district court's confirmation of an arbitration award, we consider the district court's legal rulings de novo and its factual findings for clear error." 823 F.3d at 422 (citation omitted).



Final Award 9

Because the question of whether the AAA Award should be vacated (or, for that matter, confirmed) was apparently not before the Court, the Court's reference to the de novo "i.e., non-deferential" standard of review, which applies to legal questions decided by district courts, strongly suggests that the Court was reviewing the Appraisal Award finality question for plain legal error, and was not deferring to the AAA Award. Yet when the Court expressed its conclusion that the district court erred by finding the Appraisal Award to be final, the Court made another, passing reference to the deferential standard: "Despite the deferential standard of review accorded to arbitration awards, we must hold that in this case the district court did err in finding that the [Appraisal Award] was a 'final' arbitration award." 823 F.3d at 422 (emphasis added).

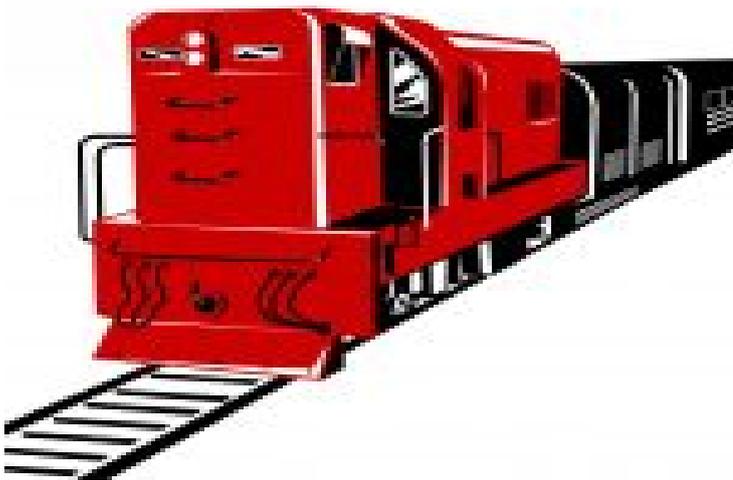
Final Decision

Final Award 9

But rather than explain how the AAA Panel did not 'do their job' when they determined that the Appraisal Award was final, the Court proceeded to recite and apply the legal standards for determining whether an Award is a final award for purposes of the FAA. The Court explained that '[a]n award is not 'final' under the FAA if it resolves an issue presented by the parties to the arbitrators[,] and said the Appraisal Award fell into that category. 823 F.3d at 422-23 (citations and quotations omitted).

'Argianas,' said the Court, 'reserved his assent' to the award 'subject to' two 'extraordinary appraisal assumptions' that [the Railroad] had marketable title and that the ATF [i.e., 'across-the-fence?'] value used by Norfolk Southern's appraiser was reasonable.' 823 F.3d at 423 (quoting Appraisal Award; bracketed text added). The Court explained that 'an arbitration award can be 'final' even if based on assumptions[,] and posited that 'the award might have been 'final'? had Argianas 'merely assumed [the Railroad] held marketable title and then proceeded on the basis of that assumption.' 823 F.3d at 423.

The Court found it 'critical[]' that 'in the text of the award itself, Argianas reserved his assent 'without prejudice or time limitation' if either of [the] two 'assumptions' ever proved to be incorrect.' 823 F.3d at 423. 'That is,' said the Court, Argianas made clear that he might withdraw his assent 'thus dissolving the compromise and the arbitration award itself' at some point in the future.' Id. Because Argianas 'reserved the right to withdraw his assent if his assumptions proved to be incorrect[,] the Appraisal Award could not be 'squared with any conception of 'finality[,] and the Court therefore 'cannot conclude the Majority Decision constituted a 'final' award under 9 U.S.C. § 10(a)(4).' 823 F.3d at 423 (citations and quotations omitted).



Final Award 10

The Railroad attempted to bypass the finality issue by contending that the 'extraordinary assumptions' referenced in the Award 'which relate to marketable title and verification of ATF values' do not fall within the scope of what the parties asked the appraisers to decide.' But the Court found that neither the Appraisal provision 'nor the subsequent email from the parties clarified the scope of issues to be considered by Argianas when attempting to broker a compromise[,] and consequently, 'the interpretation

of Argianas, one of the two appraisers who signed the [Appraisal Award], as to the scope of issues submitted deserves deference.? 823 F.3d at 423 (citation and quotation omitted). That "deference," the Court said, "seems particularly appropriate given that neither of the other appraisers appears to have suggested that Argianas's assumptions involved issues not within the scope of his authority." In any event, "Argianas could have concluded that title issues and ATF values were outside the scope of issues he was to consider[,] but "[i]nstead, he linked his assent to the [Appraisal Award] to those two issues by reserving the right to withdraw that assent should his assumptions about those two issues prove to be untrue." 823 F.3d at 423.

In addition to addressing the finality issue, the Court addressed "two other issues raised by [the Carrier] that might arise in future proceedings[:]" (a) whether the Appraisal Award was ambiguous and unenforceable because it did not state that the \$6,100,000.00 payment amount was intended to be an annual payment; and (b) whether the appraisers exceeded their powers by allegedly basing the Appraisal Award on an "improper reason." The alleged "improper reason" was that Agrianas allegedly believed that the Carrier's appraiser's appraisal amount was "more accurate" than the Railroad's appraisal, but Agrianas brokered a compromise with the Railroad's appraiser, rather than with the Carrier's appraiser. See 823 F.3d at 423-24. The Court rejected the Carrier's position on these two issues for reasons that need not be discussed here. See 823 F.3d at 424.

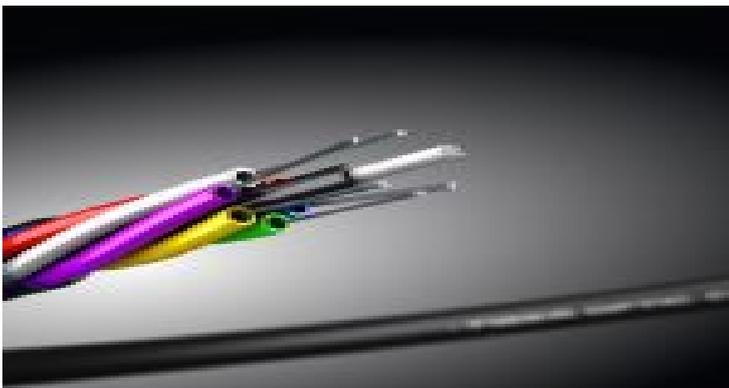
Final Awards: What to Make of Norfolk Southern?



Final Award 11

Norfolk Southern's decision concerning the finality of the Appraisal Award was quite correct, at least, where as here, (a) the parties' apparently decided to focus their arguments on whether the legal standard for finality was met, rather than on the very different question whether any deference to the AAA panel was due; (b) the Railroad' apparently decided not to seek confirmation of the AAA Panel's award;, which declared the Appraisal Award to be final; and (c) the Carrier decided not to request vacatur of the AAA Panel's award.

But suppose the Railroad had sought to confirm the AAA Award "which was unquestionably final"and that the Railroad had focused its argument on whether the district court had to defer to the AAA Panel's determination, even if de novo review would result in a different outcome. The Carrier would have been forced to show that the AAA's decision was not even arguably based on an interpretation of the contract or the law, and that, accordingly, the arbitrators must not have done their job. That would have imposed a tough uphill battle on the Carrier, which could not prevail simply by asserting that the AAA Award was the product of a "serious" error of law (which it was).



Final Award 12

To meet that hypothetical argument, the Carrier would have had to assert that the Appraisal-Award-finality-question was not capable of submission to arbitration. That would have been very difficult because there are hardly any civil disputes that are inarbitrable as a matter of federal law, and, in any event, the carrier is the one that submitted the finality question to arbitration in the first place. The Railroad took the position that the dispute was not arbitrable, but as far as we can tell from the Court' opinion, the Railroad did not achieve any benefit from advocating that position, and its validity is far from clear. The Railroad was therefore apparently not foreclosed from changing its position on arbitrability in the circumstances.

Further, because the AAA Arbitration was presumably subject to the AAA Commercial Rules, a good argument that the parties clearly and unmistakably submitted the question of arbitrability to the arbitrators could have been made. See AAA Commercial Arbitration Rules R. 7(a) (2013) (?The arbitrator shall have 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 the arbitrability of any claim or counterclaim.?) And that would be so irrespective of what position the Railroad asserted in the district court concerning arbitrability.

Had the Railroad advocated for a deferential standard of review, and prevailed, the resulting decision that the Appraisal Award would not necessarily have been the ?best? or ?fairest? decision, but it would likely have been warranted by the FAA, and the Railroad might have achieved the result it set out to achieve.

Photo Acknowledgements:

The photos featured in this post (captioned Final Award 1 - Final Award 12) were licensed from **Yay Images** and are subject to copyright protection under applicable law. L&L added text to Final Award 9.