

Supreme Court of Nebraska.

WIEKHORST BROTHERS EXCAVATING &
EQUIPMENT CO., A Partnership, Appellee,

v.

SANITARY AND IMPROVEMENT DISTRICT
NO. 337 OF DOUGLAS COUNTY, Nebraska,
Appellant.

No. 87-765.

June 2, 1989.

Sewer contractor petitioned for confirmation of arbitration award against sanitary and improvement district arising out of sewer construction contract dispute. The District Court, Douglas County, J. Patrick Mullen, J., confirmed award as modified, and district appealed. The Supreme Court, Fahrnbruch, J., held that: (1) arbitration hearing did not proceed erroneously, and (2) pleadings were sufficient to support judgment confirming arbitration award.

Affirmed.

West Headnotes

[1] Arbitration  73.4
[33k73.4 Most Cited Cases](#)

If bill of exceptions of arbitration hearing is not offered into evidence in district court, that evidence will not be considered by Supreme Court.

[2] Arbitration  37
[33k37 Most Cited Cases](#)

Substitution of arbitrator by arbitration association, and proceeding with arbitration with only two arbitrators, while three arbitrators were originally selected to hear dispute, did not render arbitration proceeding erroneous, as sewer construction contract provided that disputes would be submitted to arbitration in accordance with rules of arbitration association, and association's rules permitted appointment of replacement arbitrator, and proceeding with two rather than three panel members.

[3] Arbitration  72.3
[33k72.3 Most Cited Cases](#)

Pleadings of sewer contractor, which requested confirmation of arbitration award in favor of contractor and against sanitary and improvement district in sewer construction contract dispute, were sufficient to support district court judgment affirming arbitration award in favor of contractor.

****489** Syllabus by the Court

***377** Evidence: Records: Appeal and Error. If a bill of exceptions of an arbitration hearing is not offered into evidence in the district court, that evidence will not be considered by this court.

John A. Rickerson, of Rickerson, Welch & Kruger, Omaha, for appellant.

Dan D. Stoller, Elkhorn, for appellee.

Herbert M. Fitle, Omaha City Atty., and Robert J. Hamer, for amicus curiae City of Omaha.

BOSLAUGH, WHITE, CAPORALE, SHANAHAN, GRANT, and FAHRNBRUCH, JJ., and COLWELL, District Judge, Retired.

FAHRNBRUCH, Justice.

Sanitary and Improvement District No. 337 (S.I.D.) appeals a \$249,363 arbitration award which it was ordered to pay to Wiekhorst Brothers Excavating & Equipment Co., a partnership (Wiekhorst).

The award arose out of a sewer construction contract dispute between the S.I.D. and Wiekhorst. The original arbitration award was modified and then confirmed by the Douglas County District Court. Judgment for the award and costs was entered accordingly. We affirm the district court's judgment.

Wiekhorst contracted to perform work on a sewer project for the S.I.D. The written contract provided that in the event of a dispute between the parties, the matter would be submitted to binding arbitration before arbitrators of the American Arbitration Association (A.A.A.) under the Construction Industry Arbitration Rules (Jan. 1, 1986). The S.I.D. terminated the contract because it claimed that Wiekhorst was performing its work defectively. Before the arbitration panel, ***378** Wiekhorst sought (1) reinstatement to the contract and the right to correct defective work, or (2) compensation for the work it performed and lost profits.

(Cite as: 232 Neb. 377, 440 N.W.2d 488)

After considering added items claimed by Wiekhorst and offsets claimed by the S.I.D., the arbitration panel found that Wiekhorst was entitled to a total of \$267,615. The panel further found that the S.I.D. had paid Wiekhorst \$18,252 prior to terminating the contract and that the unpaid amount due Wiekhorst was \$249,363. The panel also assessed 12 percent interest compounded annually on the unpaid amount due from November 4, 1986. Wiekhorst petitioned the Douglas County District Court for confirmation of the award. The award was confirmed after modification to provide for simple, rather than compound, interest.

At the district court hearing, only four exhibits were offered into evidence: (1) the agreement to arbitrate, (2) the arbitration panel's findings and award, (3) an affidavit of the plaintiff's attorney, and (4) an affidavit of the defendant's attorney. The record does not reflect that testimony, exhibits, or other evidence before the arbitration panel was offered or received in evidence in the district court. The court reporter's certificates indicate that preparation of the arbitration hearing record was first requested when the S.I.D. filed its appeal to this court.

[1] If a bill of exceptions of an arbitration hearing is not offered into evidence in the district court, that evidence will not be considered by this court. See, [Scottsbluff Typewriter Leasing v. Beverly Ent., 230 Neb. 699, 432 N.W.2d 844 \(1988\);**490Timmerman v. Hertz, 195 Neb. 237, 238 N.W.2d 220 \(1976\).](#)

[2] In the record before us, there is evidence regarding only one of appellant's four assigned errors: that the arbitration hearing proceeded erroneously.

Originally, three arbitrators were selected to hear this dispute. The day before the hearing was to commence, it was announced that two of the arbitrators were unable to serve on the panel. One substitute was selected by the A.A.A. The hearing was held as scheduled, over the S.I.D.'s objection, with one arbitrator from the original panel and the newly selected arbitrator. The S.I.D. claims that proceeding with the hearing before the panel as finally constituted was error.

*379 Article 16 of the contract between the parties provides that disputes will be submitted to arbitration in accordance with the Construction Industry Arbitration Rules of the A.A.A. A copy of those rules is attached to exhibit 1, the award by the arbitration panel.

Rule 20 concerns vacancies on an arbitration panel. In the event of a vacancy, rule 20 requires that the hearing proceed with the remaining arbitrators unless both parties agree otherwise.

Rule 13, dealing with the appointment of arbitrators, gives the A.A.A. authority to appoint new arbitrators if those selected are unable to act. Rule 17 provides that disputes be heard by one arbitrator unless the A.A.A., in its discretion, directs otherwise.

The record does not show a violation of any of the above rules. The appointment of a replacement arbitrator, proceeding as scheduled, and proceeding with two rather than three panel members are all permitted by the A.A.A. rules.

The S.I.D.'s fourth assigned error is without merit.

[3] Because the record of the arbitration hearing is not before this court, the other assigned errors cannot be considered. The only remaining issue is the sufficiency of the pleadings to support the judgment. [Scottsbluff Typewriter Leasing v. Beverly Ent., supra; Nimmer v. Nimmer, 203 Neb. 503, 279 N.W.2d 156 \(1979\).](#)

After review of the pleadings and the exhibits properly before this court, we find that the judgment of the district court is correct.

The judgment of the district court is affirmed.

AFFIRMED.

440 N.W.2d 488, 232 Neb. 377

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