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File No. A-183-LAG

TRACKRACKET, INC., MICHELE POST, DAVID CARROW, ELIZABETH MILNE and BRYON ROBBINS,

Petitioners

v.

NEW JERSEY MOTORSPORTS PARK, LLC,

Respondent

ARBITRATION AWARD

January 24, 2013

For Petitioners: Oliver D. Griffin, Esquire
Spector Gadon & Rosen, P.C.
1635 Market Street
Philadelphia, PA 19103

For Respondent: Brian D. Heun, Esquire
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INTRODUCTION

This dispute has been placed before me for non-binding arbitration pursuant to a stipulation entered into between the parties in October of 2011. At that time the respondent, New Jersey Motorsports Park (hereafter NJMP), was in bankruptcy and the petitioners, Trackracket, Inc., et al (hereafter TR), were unsecured creditors/claimants.

The procedural path that lead the parties to that point need not be recited except to note that TR's claims related then, as they do now, to the noise emanating from the activity at the respondent's motorsports park in Millville, NJ.

Among other things, the stipulation memorialized NJMP's agreement to reduce the noise being generated at its park first by limiting operation times, subject to certain exceptions, and then by modifying and updating its public address system. Most importantly for present purposes, both parties also agreed to create a so-called Sound Committee (SC) the goal of which was to determine "mutually acceptable methods to reduce noise complaints…" generated by exhaust noise levels. See Stipulation, ¶ 5. The committee was to be comprised of at least two representatives from each of the parties and was to meet once a month. In the interim, they were to monitor sound levels at a distance of 50 feet from track-side (by NJMP) and simultaneously at surrounding residences off-track (by TR). These readings were designed to provide data that would generate "mutually agreed upon and commercially reasonable recommendations… to identify and (if necessary) reduce decibel levels from NJMP to the location of the residential receptors". Ibid. The stipulation further provided, that if, after thirty (30) days following the submission of proposals for resolution, the parties could not mutually agree to 2012 sound control mechanisms, then the parties were to attend confidential, non-binding arbitration, to last not more than one (1) day.

Needless to say the parties were never able to agree on a mutually acceptable remedy and this arbitration ultimately ensued.

FACTUAL FINDINGS

Aside from the continuing disagreement regarding an appropriate remedy to supplement the steps that NJMP has already taken to reduce its hours of operation and to modify its public address system, both of which TR agrees that NJMP has effectively implemented, the primary factual disputes relate to the reliability of the TR's noise measurement data and whether that data justifies the decibel level restrictions that TR

seeks, that is, whether the proposed limitations on trackside exhaust noise are commercially reasonable.

Before addressing those issues, however, it is helpful to recognize the context within which these disputes arose. Petitioners are residents of Millville whose homes are located approximately two to three miles away from the Motorsports Park. The Park itself is located in a relatively rural area and is adjacent to an operating airport. NJMP is the site of a variety of racing events during its active season which runs generally from March through November. The airport operates throughout the year during which time it is engaged in typical airport activity. Both facilities generate considerable noise when they are active although the noise generated by the airport is more sporadic. Petitioners complain that the noise being generated at the Park during the various scheduled events is both more continuous and more offensive and thereby significantly impairs their ability to peacefully enjoy their homes.

As to the noise measurement data, the evidence on this subject is clearly conflicting. Representatives of TR took sound readings primarily at two residential sites, one at David Drive and one at 1401 Silver Run Road. The testimony they proffered and the exhibits they submitted reflect readings in July, October and November of 2011 and demonstrate sound levels ranging from a low of 50 decibels to a high of about 73 dB. However, the bulk of the readings were closer to the middle of those extremes with the average being in the 63-64 dB range. Their October 30, 2011 readings appear lower than that and fall more in the 56 dB range. The readings recorded in behalf of NJMP vary significantly from most of TR's data and, NJMP's expert, David Shropshire, P.E. P.P. questions the accuracy of TR's data. Mr. Shropshire made a number of points both in his written report and during his testimony that not only question the legitimacy of the protocol that TR followed but which also contrasts TR's data with the hundreds of readings performed both in behalf of the City of Millville and by his company during both the 2008 and the 2009 seasons. During all of that time the decibel levels that they recorded all fell well below the readings TR reported. For example, Mr. Shropshire highlights the readings his group recorded at Porreca Drive, a site considerably closer to

the Park than those used by TR, and points out that the average during the motorsports events' readings there were 56 dB with peaks of 63 dB. As noted, he also questioned the reliability of TR's data based on alleged technical flaws such as TR's failure to record the temperature and wind speed at the measurement locations, a protocol required by the New Jersey Noise Control Act and which he claims to be an industry standard. TR's witnesses sought to rebut these challenges by noting that although wind and temperature were not recorded, they were taken into account. In particular, they emphasized the importance of taking readings downwind from the Park, which they did, as opposed to doing so at random sites. No expert testified for TR and all of their readings were recorded by individual members of the committee.

As a fact-finder it is difficult to reconcile these competing positions but given the large number of readings that were taken by the City and by NJMP's expert and in view of the technical expertise that supports their reliability, my reaction is that the evidence presented by NJMP as to the noise levels was more persuasive. By itself, however, that conclusion is not dispositive. For example, I was equally persuaded by petitioners' testimony that, regardless of the disparities in the decibel level readings, the noise levels they described are legitimately offensive to them and significantly interfere with their ability to enjoy the peace and comfort of their homes. However, that too does not end the analysis.

While addressing the factual findings it is also necessary that I evaluate the evidence relating to whether the decibel level restriction proposed by the petitioners is "commercially reasonable". Once again, the evidence on this subject is sharply divided. In support of their position that the answer is "yes" and that track-side dB level limitations are commercially reasonable, petitioners cited various tracks around the country and in Canada that impose such restrictions. The limitations at those tracks range from 89 dB to 104 dB at a distance of 50 feet. However, it is not clear to what extent the limitations applicable to these sites represent a generalized industry practice and petitioners concede that there are other tracks that do not operate pursuant to such restrictions, including two that are probably the closest to respondent, Watkins Glenn in

New York and the Pocono Park in Pennsylvania. In addition, very little is known regarding circumstances surrounding the tracks that do have these restrictions such as their exact proximity of residential housing, the duration of the racing there and perhaps most importantly, what the economic impact of those restrictions is on the commercial viability of the tracks. Although not stated this explicitly, the implication that petitioners presumably seek is that since these tracks can operate with this type of restriction, such a limitation is therefore "commercially reasonable". Indeed, absent evidence to the contrary, that seems to be a reasonable conclusion.

In response, however, respondents offered testimony as to the negative financial impact that the proposed dB level restrictions would actually have on their park. Essentially, it is respondent's position that such restrictions would be an economic disaster and would probably put them out of business. For example, Lee Brahin, one of the principals of NJMP, described the extensive investment that was made in the park and the somewhat precarious financial experience the park has had to date (including the earlier referenced bankruptcy). He estimated that the restriction TR proposes could reduce the park income by as much as 50%. Although he offered very little financial data to support that conclusion, he did cite one specific. For example, the debt service for the park up until this year required interest only payments whereas, going forward, they will be obligated to begin amortizing the debt and thus will experience an enhanced revenue burden. Against that financial backdrop, he then described the reactions he got from various customers with which he had discussed the proposed dB restriction and was told that certain of his major customers would simply go elsewhere, either because the cost of modifying their racing vehicles would be financially prohibitive or because some of the cars were simply not capable of being converted.

Incidentally, there does not appear to be any challenge to the notion that, in order for a racing vehicle to achieve a reduction in exhaust noise, it needs to modify or replace its existing muffler system. Petitioners suggest that this is not a large financial burden but respondents disagree; neither side presented any evidence that would allow me to independently evaluate these claims. Intuitively, however, it seems unlikely that

competitors would be willing to undergo that type of effort and expense if there were reasonably available alternative raceways that did not require it and, in this case there are. One of the other troublesome aspects of the evidence relating to the economic consequences of track-side decibel level restrictions, in general, and a restriction of 92 dB in particular, is that the evidence presented by both sides was, to a large extent, lacking in detail. Although this is understandable given the one-day time limitation on the arbitration required by the stipulation, it presents an enhanced challenge to me as the fact-finder. The hearsay testimony, in particular, while admissible in this setting, also made the evaluation of these competing positions particularly difficult.

All that having been said, based on the evidence that was presented, I am more persuaded by the testimony proffered by NJMP; that is, that the decibel level restriction that TR is proposing would not be commercially reasonable. The margin for this Park between economic viability and failure, at least based on the testimony presented, does not appear too great and logic supports NJMP's claim that many of the Park's potential renters and other customers would simply go elsewhere if confronted with the proposed restriction. The operational time restrictions that have been imposed have already created difficulties for some of the Park's participants and although that adjustment has apparently been accommodated, superimposing vehicle modifications on top of that would likely be a tipping point for many.

Before proceeding with the legal conclusions that are to be drawn from all of this, mention should also be made of a second proposed solution, that is, the one advanced by NJMP; the so-called "Good Neighbor Policy." Although the details of that proposal are outlined in Exhibit "D" of the submission by counsel for NJMP, the essence of it is to provide an enhanced process for having the park disseminate information to the community and allowing for greater community input. This process would include notice of events that may cause abnormal noise, providing a mechanism for neighborhoods to raise issues and basically providing mechanisms to keep the line of communication open. It would also provide special access to NJMP's facility. What it would not provide,

however, is any mechanism for a reduction of the noise levels that were to be addressed by the Sound Committee.

LEGAL CONCLUSIONS

Given the legal framework created by the stipulation, the essential question to be answered here is whether either of the proposals presented by the separate factions of the Sound Committee reasonably fulfill the terms of their agreement. In terms of the proposal presented by the residents/petitioners, the more precise question is whether the imposition of a track-side noise level restriction of 92 dB represents commercially reasonable remedy. As for the proposal put forth by the NJMP/respondent, the question is whether the communication mechanisms it contains satisfy what the parties reasonably anticipated would be the outcome of the creation of the Sound Committee. Given the factual findings already related and the legal analysis which is to follow, my reaction is that the answer to both questions is no.

A core ingredient of the stipulation was the reduction of noise emanating from the motorsports park. That was to be accomplished in more than one way. The first was the reduction in the hours during which the Park would operate, that is, both starting times and ending times. The second element was the modification of the Park's public address system. The third element was the creation of the Sound Committee. Representatives from both the residents and Park owners were to monitor vehicle exhaust noise levels over time and then seek to determine mutually acceptable methods to reduce the ongoing noise complaints. Although decisions were then to be made based on those proposals, those proposals had to be based on commercially reasonable standards or controls. If, despite those efforts, the parties could not agree on the Sound Committee proposed remedy, then the matter was to be submitted to non-binding arbitration. Stipulation, ¶ 5. As it turned out, of course, not only were the parties unable to agree, the Sound Committee itself could not agree. Thus, in the technical sense, there never has been a "Sound Committee Proposed Remedy". That said, both sides agree that this dispute is ripe for arbitration and both have asked that I pass on their individual proposals.

Prior to dealing with each of these proposals in more detail, however, it is necessary that I address threshold legal argument by NJMP and, that is, since the current operations of the Park are not violating any local or state regulations relating to noise controls, the legal foundation for TR's proposal is essentially flawed. For example, although the City of Millville does have a noise control ordinance, its noise level restriction is only triggered when the sound levels at the nearest residential site reach 80 dB and even then, only after that level is sustained for at least twenty minutes. The State of New Jersey also has a noise control regulation and that control is triggered at 65 dB. However the State regulation exempts race tracks. Both sides agree that neither of these regulations are being violated here, regardless of whose noise measurements one accepts. That conclusion, however by no means dictates the outcome. When the parties agreed to resolve petitioners' claim as part of the bankruptcy proceeding, NJMP committed to various noise reduction steps. Thus, the focus, at least for purposes of this arbitration, is no longer whether the Park operations constitute an actionable nuisance and/or whether that alleged nuisance requires remediation in the civil sense. Rather, the issue is whether the contractual terms incorporated into the stipulation of settlement have been fulfilled.

That conclusion requires a brief revisit to the terms of the stipulation and an examination of what the term "commercially reasonable" is intended to mean. Although Mr. Brahin testified that he did not understand the stipulation to require the imposition of track-side decibel level restrictions, neither he nor anyone on the TR side offered testimony on what they did have in mind in utilizing the "commercially reasonable" standard. Given the proofs that petitioners offered, that is, the reference to the restrictions in place at certain other parks, my assumption is that they view this term as being tied to a recognized industry practice. Respondent's proofs were two-fold. On the one hand they sought to challenge the conclusions petitioners had proffered as to parks in general. Mainly however, their proofs focused on the negative impact of track-side sound restrictions on this Park in particular. In other words, they sought to demonstrate that the vehicle modifications that a 92 dB level track-side limitation would impose on

potential customers would motivate those users to go elsewhere and thereby reduce revenues to a point where the Park could not successfully operate.

Since the "commercially reasonable" term is not defined in the stipulation and since it can be arguably read to support either party's version of what was intended, I view that term as ambiguous, at least based on the limited proofs presented here.[1] Given that limited input, any legal analysis would have to be similarly limited. That said, my sense is that the "commercially reasonable" standard needs to be evaluated based on what is reasonable for this Park. In other words, in the absence of evidence to the contrary, it seems highly unlikely that the NJMP representatives that negotiated this stipulation would have intend to embrace a standard that carried with it a significant risk of putting them out of business. Having reached that conclusion and having concluded as a fact-finder that the available proofs support the conclusion that a 92 dB level restriction would be potentially fatal to the Park operation, it also follows that I cannot comfortably conclude that TR's proposed remedy is communicably reasonable. Even if I were to reject the respondent's evidence as to the negative financial impact on this Park, I would still be left with the dilemma of not being able to fairly evaluate the circumstances that are operative at those parks that are limited by track-side decibel level restrictions in order to make a fair comparison with the impact on the NJMP operation. Stated differently, I cannot conclude from the proofs that simply because track-side decibel level restrictions work and are presumably commercially reasonable elsewhere, that that makes them commercially reasonable everywhere.

Finally, I need to revisit the proposal advanced on behalf of the Park, that is, the "Good Neighbor Policy." Although I find all of its components as positive and potentially beneficial, nothing in the proposal addresses sound levels. The stated purpose of Section 5 of the stipulation was to reduce noise complaints and although better avenues of communication are a valuable component of that process without more, it seems unlikely that they would reasonably satisfy these residents and/or fulfill the intent

[1] Cf. NJJA 12A:9-507. Although the term "commercially reasonable" has a particularized meaning with regard to the sale of goods under the Uniform Commercial Code, that statute provides no guidance here.

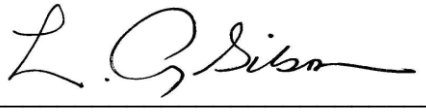
of this portion of the stipulation. For example, to conclude that good neighbor policies are, by themselves, adequate, would make the sound measuring steps that were built into the process superfluous. In Section 5(j) of the stipulation the parties acknowledged that "accommodation in this matter comes down to decibel/sound control". The challenge here is how to achieve that in a commercially reasonable way and unfortunately that goal continues to be elusive.

CONCLUSION

Based on the proofs presented and for all of the reasons already related, I am not convinced that either proposal that has been submitted satisfies the conditions outlined in the Stipulation. With regard to the proposal by TR, I am not persuaded that the evidence presented here adequately makes the case for a 92 dB track-side noise level restriction; that is, that it represents a commercially reasonable remedy for this Park. Although I am sympathetic to the frustration that petitioners experience given the noise emanating from the facility and the negative impact that it apparently has on their ability to comfortably enjoy the peace and quiet that they seek, their proposed solution does not, in my judgment, meet the requirements of the Stipulation, at least not based on the proofs presented. Likewise, respondent's proposal is also unacceptable, not because it is not laudatory but because it does not go far enough.

Respectfully submitted,

Dated: January 24, 2013

By: 

L. Anthony Gibson, J.S.C. (ret.)