



INTERIOR BOARD OF INDIAN APPEALS

Pima Country Club, Inc. v. Acting Phoenix Area Director, Bureau of Indian Affairs

21 IBIA 33 (10/24/1991)

Reconsideration denied:

21 IBIA 70



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

PIMA COUNTRY CLUB, INC.

v.

ACTING PHOENIX AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-109-A

Decided October 24, 1991

Appeal from a finding that a lease renewal clause could not be invoked because the lessee was in default at the expiration of the initial term.

Affirmed.

1. Board of Indian Appeals: Jurisdiction--Bureau of Indian Affairs:
Administrative Appeals: Leases--Indians: Leases and Permits: Arbitration

When a lease of trust or restricted land provides that arbitration "may" be used to resolve disputes arising between the parties, arbitration is not the exclusive remedy available to the parties. The Bureau of Indian Affairs and the Board of Indian Appeals have authority to consider disputes arising under such a lease when the parties do not agree to the use of arbitration.

2. Administrative Procedure: Hearings--Board of Indian Appeals: Generally

The Board of Indian Appeals will not order an evidentiary hearing under 43 CFR 4.337(a) where there is no need for further inquiry to resolve a genuine issue of material fact.

3. Administrative Procedure: Burden of Proof--Indians: Leases and Permits:
Commercial Leases

In appeals arising under 25 CFR Part 2, the appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence.

APPEARANCES: Preble E. Pettit, Esq., Scottsdale, Arizona, for appellant; Wayne C. Nordwall, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Phoenix, Arizona, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Pima Country Club, Inc., seeks review of a May 15, 1990, decision of the Acting Phoenix Area Director, Bureau of Indian Affairs (BIA);

Area Director) , finding that appellant did not have the right to invoke the renewal clause of Lease No. B-45 on the Salt River Pima-Maricopa Reservation (lease) because appellant was in default on the expiration date of the initial term. For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

On June 1, 1964, Stover's Inc., entered into a 25-year lease covering approximately 160.85 acres of allotted lands in sec. 6, T. 2 N., R. 5 E., Gila and Salt River Meridian, Maricopa County, Arizona. The lease, which was for the purpose of operating a golf course and appurtenances incidental to a golf course, began July 1, 1964, and extended through June 30, 1989, with an option to renew for an additional 25-year term, "provided lessee not be in default on [the] expiration date" (Lease paragraph 15(b)).

On July 19, 1968, with the approval of the lessors and the Acting Superintendent, Salt River Agency, BIA (Superintendent), the lease was assigned to Roadrunner Golf Resort, Inc. Appellant states that the name Roadrunner Golf Resort, Inc., was changed to Pima Inn and Golf Resort, Inc., on August 30, 1972, and to Pima Country Club, Inc., on December 8, 1981. Thus, appellant indicates that it is the approved successor-in-interest to the original lessee.

Based upon a number of possible violations of the lease, by letter dated December 16, 1988, the Superintendent informed appellant that it had 10 days in which to show cause why the lease should not be cancelled. See 25 CFR 162.14. Correspondence between appellant and the Superintendent concerning the violations alleged in the show-cause letter continued through December 11, 1989. The Superintendent concluded that the 1988 show-cause letter had been premature, and requested additional information relating to a narrowed number of possible violations.

Following additional correspondence, the Area Director issued the May 15, 1990, decision under appeal. In that letter, the Area Director indicated that appellant had violated the lease by failing to pay percentage rentals on the full amount of golf membership fees and on an imputed rent for the house on the leasehold, and for failing to maintain the house. The Area Director further held that this matter was not required to be submitted to arbitration under paragraph 25 of the lease. He concluded

that [appellant] was in breach of Paragraph 14(d) of the lease on June 30, 1989, and that the lease effectively terminated on that date; pursuant to that conclusion, we are hereby requesting that [appellant] remit payment of \$33,246.85 and vacate the premises within thirty days of your receipt of this letter. (The requested amount represents the sum of percentage rentals due on 40% of the membership fees reported between January 1, 1983, and June 30, 1989, and house rentals imputed between July 1, 1979, and July 1, 1989, together with 6% interest, compounded quarterly.) As indicated in the agency's December 11, 1989, letter, holdover rental

will be established by the joint appraisal now being completed pursuant to Paragraph 14(c) of the lease.

(Letter at 2-3) .

The Board received appellant's notice of appeal on June 18, 1990. In addition to the briefs filed by appellant and the Area Director, several motions are pending.

Jurisdiction

Appellant challenges the Board's jurisdiction over this matter, stating that the lease requires that all disputes between the parties be submitted to arbitration. Appellant initially bases this argument on paragraph 25 of the lease, which states:

ARBITRATION. Any controversy or dispute arising out of or relating to the interpretation of this agreement or any provision thereof which the parties cannot settle by agreement within ten (10) days after service of notice thereof by the aggrieved party upon the other party and upon the holder of each approved mortgage then existing against the leased premises or any part thereof may, subject to all other terms and provisions of this lease be submitted to arbitration at Phoenix, Arizona, pursuant to the rules then obtaining of the American Arbitration Association and the laws of the State of Arizona. No proceeding between lessor and lessee shall lie in any court or before any administrative tribunal prior to the final award in arbitration. Thereafter judgment may be entered on the award by any court having jurisdiction. The parties hereto agree, however, to accept and be bound by such arbitration award without any court proceedings thereon. * * * It is understood and agreed that the Secretary claims he cannot be legally bound by arbitration, but may be expected to accept any reasonable decision reached by arbitration. Therefore until federal trusteeship shall have terminated no decision reached by arbitration shall be final until approved by the Secretary or until 30 days after service of such decision upon the Secretary during which period he shall not have expressed his disapproval in writing.

In addition, appellant cites Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983), and San Tan Ranches v. United States, No. CIV 80-359 PHX VAC (D. Ariz. July 12, 1982), for the propositions that there is a general Federal policy favoring arbitration and there is no special body of Federal contract law governing the commercial relations of Indians that would render arbitration of this particular issue inappropriate. Appellant argues that the arbitration clause and these cases are controlling and this dispute must be submitted to arbitration.

[1] In contrast to the leases at issue in Racquet Drive and San Tan Ranches, the present lease uses the permissive term "may" in describing the

use of arbitration. Cf., e.g., Racquet Drive, 11 IBIA at 196 n.13, 90 I.D. at 249 n.13 (Article 26 of the lease, Arbitration, stated: "Whenever the terms of this lease require that a dispute be settled by arbitration * * *"). (Emphasis added.) Appellant does not discuss the use of the term "may," but instead quotes the next sentence of paragraph 25, which provides that no proceeding in any administrative tribunal shall lie until the completion of arbitration.

Appellant reads the sentence out of context. The prohibition against judicial or administrative proceedings prior to the completion of arbitration relates to those situations in which arbitration is invoked. Arbitration is a consensual dispute resolution mechanism. The use of the permissive "may" in paragraph 25 indicates that the parties did not agree when the lease was executed that arbitration would be invoked; they merely agreed to the possibility that arbitration could be used. In the absence of an explicit agreement to the use of arbitration in the lease, the parties would have to agree to its use when a dispute arose. There is no indication whatsoever that the lessors were interested in resolving this dispute through arbitration. Without an agreement to the use of arbitration either in the lease or at some later point, the procedures otherwise employed for the resolution of disputes such as the present one, i.e., administrative review with a subsequent right to judicial review, will be followed.

Request for Evidentiary Hearing

Appellant contends that it cannot be found to have been in default without an evidentiary hearing because the Area Director's decision raises questions of fact.

[2] The Board has extensively discussed the circumstances under which it will order an evidentiary hearing pursuant to its authority in 43 CFR 4.337(a). In particular, it has held that it will not order such a hearing when there is no issue of material fact in question. See Dawn Mining Co. v. Portland Area Director, 20 IBIA 50, 64 (1991) ; Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 331-32, 97 I.D. 215, 223-24 (1990); Star Lake Railroad Co. v. Navajo Area Director, 15 IBIA 220, 247, 94 I.D. 353, 367, aff'd sub nom., Star Lake Railroad Co. v. Lujan, 737 F. Supp. 103, 110 (D.D.C. 1990) ("No evidentiary hearing is required when there is no issue of material fact in dispute."), aff'd, 925 F.2d 490 (D.C. Cir. 1991). Based upon the following discussion, the Board finds that there is no issue of material fact that must be resolved in order to consider this case. Therefore, appellant's request for an evidentiary hearing is denied.

Discussion and Conclusions

Paragraph 14(d) of the lease provides that the lessee shall pay to the lessors 4 percent "of lessee's gross receipts from business conducted on the leased premises." The dispute in this case concerns the interpretation of paragraph 14(d)(1), which states:

The term "gross receipts from business conducted on the leased premises" means all receipts from sales and services performed on the leased premises by lessee and its employees, agents, and concessionaires, including without limitation green fees, cart rentals, club storage fees, driving range fees, golf membership fees, pro shop sales, charges for food and beverages, and rentals from the existing house on the premises.

The Area Director found that appellant was in default because it had, for several years, paid the lessors a percentage of gross receipts on only 60 percent of the amount charged for golf membership fees, and because no percentage had been paid for gross receipts on rent for the existing house.

Appellant contends that only 60 percent of the golf membership fees related to the golf course, and that the remaining 40 percent related to services to which golf members were entitled at an adjoining Ramada Inn (hotel), located on fee land across a road from the golf course. It states that the 60/40 split was approved by an official of the Salt River Pima Maricopa Indian Community. Furthermore, appellant argues that it was not required to pay a percentage of gross receipts for the house because the house was not rented. Appellant states that its caretaker lived in the house, without paying rent, as an accommodation to appellant.

[3] Appellant bears the burden of proving that the agency action complained of is erroneous or not supported by substantial evidence. See, e.g., Keester v. Acting Aberdeen Area Director, 20 IBIA 277 (1991), and cases cited therein. Failure to carry this burden of proof will result in an affirmance of the Area Director's decision.

Appellant's argument concerning the 60/40 split of golf membership fees relates to its explanation of the operation of the golf course and the adjacent hotel. Appellant states that the two operations, although physically adjacent, were operated as two separate enterprises, 1/ but that golf memberships included the privilege to use facilities at the hotel. As appellant explains at page 15 of its reply brief: "Members' golf lockers are in the Hotel locker room; their showers, sauna, sports TV facilities are in the Hotel; they and their families use the swimming pool, restaurant and bar and ballroom for social events. The Hotel is effectively the 'club house' for members and their families." Appellant argues:

It is then an economic and judgmental decision to determine what portion of the fee should be reasonably attributed to the "gross receipts" of each of the two components or entities. It was our opinion that attributing 60% of the membership fees to the golf course operations gross receipts, and 40% to the Ramada

1/ Papers filed with the United States Bankruptcy Court for the District of Colorado show that the same individuals are the principals in both the hotel and appellant.

Pima Resort Hotel gross receipts was a more than fair and reasonable distribution of membership receipts. In other words, 60% of the total membership fees is the equivalent of 100% of the golf course allocation. So we, in fact, paid the 4% rate on 100% of the membership fees which were justly attributed to the golf course operations "gross receipts". The so-called 60/40% rule was apparently later concurred in by Mr. Robert Clark, Director of Community Development for the Salt River Pima-Maricopa Indian Community. [2/] Now it may or may not be material as to what Mr. Clark's authority was as to the so-called 60/40 formula as in any event, the allocation from the outset was a fair and equitable allocation of the combined "gross receipts" from membership fees, and payments were made accordingly.

(Letter of Jan. 25, 1990, from counsel for appellant to the Superintendent at 6, quoted in appellant's opening brief at 19, emphasis in brief omitted).

Appellant makes no further attempt to explain or justify the allocation, indicating instead that the Area Director and lessors should rely on its business judgment as to the proper allocation of membership fees, because of the integrated nature of the hotel and golf course operations. 3/

Appellant admits that only 60 percent of the amounts collected as "golf membership fees" were included in determining the payment due the lessors for gross receipts received. Appellant names only one person not in its employ who was allegedly aware of the 60/40 split during the years in which appellant paid percentage rentals based upon that split. The tribal official named is deceased, appellant states merely that he "apparently" concurred in the split, and there is no showing that this official had any authority concerning the matter. The Area Director specifically states that neither BIA nor the lessors were aware of the split, and appellant does not dispute this statement. In fact, appellant's reply brief strongly suggests that the absence of basic user facilities at the golf course, an economic advantage to appellant, was the reason for allowing use of hotel facilities by golf members. Furthermore, appellant provides no analysis as to the

2/ According to the Area Director, Mr. Clark is deceased.

3/ Appellant includes with its reply brief a Sept. 26, 1991, letter from the individual who was appointed to manage the hotel by the Colorado bankruptcy court. That letter concludes:

"It was determined by management long ago that of the 100% membership fees entitling members to use the privileges at both facilities, that 60% of the total membership fees were allocated to the golf course, and 40% to the hotel.

"I think part of the confusion over the 60/40 allocation is erroneously perceived to be a cash allocation to the Hotel out of golf course receipts rather than a division of percentages of membership use of both facilities as is the case."

legitimacy of the split, but merely states that BIA and the lessors should rely on its good business judgment. 4/

Under these circumstances, appellant has not carried its burden of proving error in the Area Director's decision as it relates to the split of membership fees. 5/

The Area Director also found that rental from the existing house should have been included in the calculation of gross receipts. Appellant argues

4/ At the request of BIA, the Office of Inspector General for the Department of the Interior (OIG) conducted an audit of gross receipts reported by appellant. The OIG's Feb. 26, 1991, Report No. 91-I-502, states at pages 4-5:

"[Appellant] estimated that 40 percent of Club membership fees and dues were allocable to benefits that Club members received from hotel facilities that were not located on the leased premises. These facilities are separated from the golf course by a 2-lane road and included such amenities as a swimming pool, locker room, and club room. As such, [appellant] said it felt justified in excluding the 40 percent from its gross receipts determination. However, the Club does not offer memberships specifically for the use of the hotel facilities only, but it promotes memberships on the basis of golf privileges, including priority tee times and green fees at no additional charge.

"Based on our review of the Golf Course Daily Reports for January 1, 1986, to June 30, 1989, and our physical observations of business at the golf course and hotel facilities, we believe that all membership fees should be assigned to the leased premises. This is also demonstrated by the value of the golf benefits received by Club members. For example, we estimated that the value of the rounds played by Club members in 1988 was about \$220,000, or 42 percent more than the revenues of \$155,213 recorded for membership fees in 1988. In the first half of 1989, we estimated that the value of the membership rounds was \$128,850, or 50 percent more than the membership fees of \$85,840 for that entire year.

"Until 1988, Club membership required that members buy a minimum amount of food and beverages at hotel facilities or pay additional dues. As such, we believe that the minimum spending requirement, including the charges levied for not purchasing the minimum requirement, is properly allocable to the leased premises because it is an additional charge for membership privileges."

5/ Appellant continually contends that it was not prohibited by the lease from allocating part of the golf membership fees to the hotel. This is not the question. Rather, the question is whether appellant was entitled to make a unilateral decision to allocate part of the golf membership fees to the hotel, without informing BIA or the lessors of that decision and without presenting any evidence whatsoever concerning the appropriateness of the allocation made. In other words, the question is whether appellant had the right to unilaterally modify the lease.

that it did not collect rent on the house, and therefore there were no gross receipts, and that it was not required to rent the house.

Appellant admits that a caretaker in its employ resided in the house for several years. The use of the house by appellant's caretaker was for appellant's benefit. The fact that the caretaker was living rent-free was an element of the caretaker's total compensation package, whether or not it actually appeared as part of his pay. If rent was not charged, rent should have been imputed. The imputed rent should then have been considered part of the gross receipts.

Because of these findings, the Board holds that appellant was in breach of the lease on its expiration date and, therefore, was not entitled under the terms of that lease to invoke the renewal clause. Appellant's lease expired as of June 30, 1989. 6/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the May 15, 1990, decision of the Acting Phoenix Area Director, including his calculation of damages and demand for payment, is affirmed. 7/

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

6/ Because these two findings are sufficient to support a holding of breach, the Board does not reach the Area Director's further finding that the house was not properly maintained as was required by paragraph 16 of the lease. The Area Director does not discuss this issue in his answer brief.

7/ All motions not previously addressed are hereby denied.