INTERIOR BOARD OF INDIAN APPEALS

Pittsburg & Midway Coal Mining Co. v. Acting Navajo Area Director,
Bureau of Indian Affairs

21 IBIA 45 (11/21/1991)

United States Department of the Interior

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

THE PITTSBURG & MIDWAY COAL MINING CO.
v.
ACTING NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-139-A Decided November 12, 1991

Appeal from a decision denying the use of arbitration to resolve an appraisal dispute for certain business leases.

Reversed and remanded.

1. Bureau of Indian Affairs: Generally--Indians: Leases and Permits: Generally

   The Bureau of Indian Affairs is bound by the terms of leases it has approved, when the leases are not in conflict with governing regulations.

2. Indians: Leases and Permits: Generally

   Although the Bureau of Indian Affairs must approve a lease of trust or restricted land for the lease to be effective, it is not the lessor under the lease, and is not a party to the lease.

3. Indians: Leases and Permits: Arbitration

   There is a general Federal policy favoring the use of arbitration. There is no statute suggesting that Congress intended to exempt the commercial dealings of Indians from that policy. Therefore, in the absence of extenuating circumstances, a provision in a lease of trust or restricted land requiring the use of arbitration for resolving disputes arising under the lease will be enforced.

APPEARANCES: Ray D. Gardner, Esq., Englewood, Colorado, for appellant; Thomas O'Hare, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for the Area Director.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Pittsburg & Midway Coal Mining Company seeks review of a July 13, 1990, decision of the Acting Navajo Area Director, Bureau of Indian Affairs (BIA; Area Director), denying appellant's request to submit to arbitration a dispute over the appropriate renewal rental rate for 14 business leases on allotted Navajo lands in McKinley County, Arizona. 1/ For the reasons discussed below, the Board reverses that decision and remands this matter to the Area Director for the initiation of arbitration.

Background

Thirteen of the 14 leases at issue here were entered into on various dates between December 16, 1960, and February 14, 1961. The fourteenth lease was entered into on October 30, 1962. All of the leases were approved by the Acting Assistant Area Director. The leases provide compensation to the allottees for appellant's use of the surface estate in furtherance of its coal mining activities. The leases had initial terms of 25 years, with options to renew for an additional 25 years. The option to renew is contained in paragraph 17 of each of the leases, which states:

> RIGHT TO RENEW. The lessee [appellant] shall have the first right of an option to renew this lease as to any part, parts, or all of the leased premises at the end of the term hereof for an additional twenty-five (25) years. The rental for the renewal period shall be mutually agreed to. If the lessee and lessor are unable to agree on the rental for the renewal period, such rental will be determined by a board of arbitration, composed of one person to be selected by the lessor, one person to be selected by the lessee, and the third person to be selected by these two. The three appraisers so selected shall constitute the appraisal board to evaluate the fair rental for the renewal period and the majority vote of such a board shall be binding upon the lessor and the lessee.

Appellant and BIA, as the representative of the lessors, each obtained appraisals for the renewal term rental. The appraisals were significantly different and neither appellant nor BIA was willing to accept the other's appraisal. Two additional appraisals were obtained with equally unsuccessful results.

On February 20, 1990, appellant attempted to invoke the arbitration clause in order to resolve the impasse. By letter dated July 13, 1990, the Area Director denied the request for arbitration, stating at page 3:

1/ These leases are Contract Nos. 14-20-0603-6158, Heirs of Es ka it da dith; -6159, Es ka elth ha nat; -6160, Altso nuz ba (Mary Notah; Mrs. Billy Notah); -6161, Heirs of Na dolth; -6162, Ha bah; -6163, Heirs of Es zon e chee; -6164, Heirs of Zonnie; -6165, Ash Key (Joe Gay); -6166, Heirs of Eszon necli; -6167, Ge ba (Mary Hoskey Yazzie); -6168, Glint a na ba; -6169, Yont des ba; -6170, Heirs of Ya ha ba; and -6171, Hos Kath na ha ya.

> At the time the leases were approved, the regulation of the Secretary (25 CFR Part 131) did not provide for determination of rental value by arbitration. The present regulations, 25 CFR Part 162, do not provide for determination of rental value by arbitration. The Secretary of the Interior or his authorized representative does not have the authority to approve a lease with a binding arbitration clause absent applicable legislation enacted by Congress. The consent to binding arbitration is a waiver of sovereign immunity of the United States. The determination of annual rental value must be governed by the provisions of 25 CFR Part 162.
>
> The leases themselves state that the applicable leasing regulations and any amendments thereof, govern the leases. Therefore, that portion of lease Article 17: Right to renew which specifies arbitration for setting the lease rental rates is a nullity.

The Board received appellant's notice of appeal from this decision on August 17, 1990. Both appellant and the Area Director filed briefs on appeal.

Discussion and Conclusions

One overriding issue is raised in this case: Is the arbitration clause enforceable? If it is enforceable, the Area Director's decision must be reversed and this case remanded for the initiation of arbitration. If it is not, the Board must decide on the appropriate means for determining the rental for the renewal period.

The Area Director gave two reasons for his refusal to submit this dispute to arbitration: (1) the leasing regulations do not provide that rental rates will be set by arbitration, and (2) the Secretary lacks authority to approve a lease provision requiring binding arbitration without express legislative authorization, because binding arbitration represents a waiver of sovereign immunity. 2/

Appellant argues that the arbitration clause is binding on both the allottees as the lessors under the lease and BIA as the representative of

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2/ Although these reasons are expressed differently in the Area Director's answer brief, the reasons given there are generally recognizably related to the reasons set forth in the decision letter: (1) no specific statute, regulation, or court case required the Secretary to submit this particular dispute to arbitration; (2) the leases were poorly drafted in violation of regulations and represent erroneous actions by a BIA employee that are not binding on the Secretary; (3) the Secretary has a trust responsibility to the allottees which cannot be contracted to a third party; and (4) the leases were not true arm's-length transactions and the illegal arbitration provision was forced upon the allottees by appellant.

the lessors. It further contends that no issue of sovereign immunity is raised in this case. Appellant states its belief that arbitration would be advantageous to everyone involved in this controversy.

[1] The Area Director first contends that paragraph 17 is a nullity because the leasing regulations do not provide for the use of arbitration in setting rental rates. The Board agrees that the regulations do not provide for the use of arbitration. However, that fact does not necessarily require a finding that the provision is a nullity. In Abbott v. Billings Area Director, 20 IBIA 268 (1991), the Board considered the enforceability of an oil and gas lease provision requiring the allottee's consent to any communitization agreement. The oil and gas leasing regulations did not provide for such a consent provision. Stating that the consent provision was of no force and effect, the Billings Area Director approved a communitization agreement over the objections of the allottee. The Board reversed the Billings Area Director's decision, holding, inter alia, that the consent provision did not conflict with the regulations, and its approval was within BIA's authority. The Board held that once the lease including the consent provision had been properly approved, BIA was bound by the provision.

As in Abbott, there is no essential conflict between the arbitration provision in the present leases and the regulations. Although the regulations do not explicitly provide that arbitration is an acceptable means for resolving disputes under leases of trust or restricted lands, they also do not prohibit its use. The Area Director has raised no convincing reason why an arbitration provision could not be included in a lease of trust or restricted lands with the consent of the parties. The Board has previously held that such leases are contracts that can be tailored to the desires of the parties. White Sands Forest Products Inc. v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 299, 90 I.D. 396 (1983). 3/ The Board rejects the Area Director's argument that BIA lacked authority to approve the arbitration clause merely because it was not provided for in the regulations.

[2] The second reason the Area Director gave for refusing to submit this dispute to arbitration was that there was no authority to approve binding arbitration without express legislative authorization because binding arbitration represents a waiver of sovereign immunity. The sovereign immunity of the United States would be raised in this case only if the United States were a party to the lease. This lease is between appellant, as lessee, and the individual allottees, as lessors. Although the lease could not take effect until it was approved by BIA, BIA is not the lessor and is not otherwise a party to the leases. See Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 371 (1968) ("Although the approval of the Secretary [of the Interior] is required [to lease trust or restricted land], he is not

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3/ Although the Area Director suggests in his answer brief that appellant forced the allottees to accept the arbitration clause, he presents no evidence to support this contention.

the lessor"). Therefore, the Area Director erred to the extent that his refusal to submit this matter to arbitration was based upon a belief that arbitration would infringe upon the sovereign immunity of the United States.

[3] Moreover, the Board has previously considered the enforceability of arbitration clauses in leases of trust or restricted lands. In Racquet Drive Estates, Inc. v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 184, 90 I.D. 243 (1983), the Board remanded a case for arbitration. Article 41 of the lease at issue in Racquet Drive, Force Majeure, provided that "[a]ny questions of fact arising hereunder shall be arbitrated under Article 26, 'Arbitration.'" In holding that the factual issue raised in Racquet Drive fell within the category of issues covered by the arbitration clause and that the arbitration clause itself was enforceable, the Board quoted San Tan Ranches v. United States, No. CIV 80-359 PHX VAC, slip op. at 2-4 (D. Ariz. July 12, 1982):

> [T]here is a general federal policy favoring arbitration, and * * * in cases of doubt, the doubt is to be resolved in favor of arbitration. See, e.g., Federal Arbitration Act, 9 U.S.C. § 1 et seq.; [4/] Stateside Machinery Co., Ltd. v. Alperin, 591 F.2d 234, 240 (3rd Cir. 1979). * * * [There is no] statute which indicates that Congress intended to exclude Indian-related matters from its policy favoring arbitration. Cf. United States v. Electronic Missile Facilities, Inc., 364 F.2d 705 (2nd Cir.), cert. denied, 385 U.S. 924 * * * (1966) (Miller Act case). Furthermore, there is no special body of federal contract law governing the commercial relations of Indians, Gila River Indian Community v. Henningson, Durham & Richardson, 626 F.2d 708, 714-15 (9th Cir. 1980), neither is there anything in the nature of the instant dispute which suggests that the matter falls peculiarly within the realm of expertise of the Department of the Interior. Compare Bache Halsey Stuart, Inc. v. French, 425 F. Supp. 1231 (D.D.C. 1977).

11 IBIA at 198, 90 I.D. at 250-51.

The general Federal policy favoring arbitration was strongly reaffirmed and specifically applied to the Federal Government in the Administrative Disputes Resolution Act of November 15, 1990, P.L. 101-552, 104 Stat. 2736.

4/ The Federal Arbitration Act provides at 9 U.S.C. § 2 (1988):

"A written provision in * * * a contract * * * to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

This section has not been amended since its enactment on July 30, 1947.

Senate Rep. No. 101-543, reprinted in 1990 U.S. Code Cong. & Admin. News 3931-32, stated:

> Agencies are currently able to, and several do, take advantage of ADR [alternative dispute resolution] methods without express authorization by statute or regulation. The purpose of [this bill] is to place government-wide emphasis on the use of innovative ADR procedures by agencies and to put in place a statutory framework to foster the effective and sound use of these flexible alternatives to litigation. The goal of the bill is to send a clean message to agencies and private parties that the use of ADR to resolve disputes involving the federal government is an accepted practice and to provide support for agency efforts to develop and/or enhance individual ADR programs.

In applying the general Federal policy favoring arbitration to Indian leases, both the court and the Board recognized that no regulation, statute, or court decision prohibited the use of this consensual dispute resolution mechanism. Furthermore, at least in those areas in which there is no need for the application of the special expertise of the BIA or in which the Federal trust responsibility is not raised, the cases also recognized that there was no policy reason against the use of arbitration as a means for resolving disputes.

Although the Board has thus held that arbitration clauses in leases of trust or restricted lands are not illegal and can generally be enforced, it has also held that arbitration clauses are not enforceable under some circumstances. For example, it has held that a party to a lease cannot invoke an arbitration clause after BIA has canceled the lease. Franks v. Acting Deputy Assistant Secretary--Indian Affairs (Operations), 13 IBIA 231 (1985). It has also held that arbitration is not required when the lease uses a permissive term, rather than a mandatory one, in providing for the use of arbitration. Pima Country Club, Inc. v. Acting Phoenix Area Director, 21 IBIA 33 (1991). However, unless an equally compelling extenuating circumstance exists, the Board will enforce arbitration clauses in leases of trust or restricted lands.

This case will, therefore, be reviewed under the principles set forth above. The leases as approved provide in paragraph 17 for the arbitration of disputes over the renewal period rental. This provision is unequivocal in providing that such a dispute "will be determined by a board of arbitration" whose "vote * * * shall be binding upon the lessor and the lessee" (emphasis added). The determination of fair rental does not require the special expertise of BIA, but rather is extremely well-suited for resolution through arbitration. The Board holds that this arbitration clause is enforceable. 5/

5/ The Area Director has also argued that he is not required to accept the determination of fair rental reached through arbitration. The leases clearly provide that the lessors are bound by the arbitration determination. They are, however, silent as to BIA.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the July 13, 1990, decision of the Acting Navajo Area Director is reversed, and this case is remanded to him for the initiation of arbitration.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

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fn. 5 (continued)

In approving leases of trust or restricted lands, BIA is exercising the trust responsibility of the United States. In some leases that have been before the Board, BIA has specifically stated that the Secretary does not accept that, in exercising his trust responsibility, he can be bound by the determination of a third party. These leases generally also state that even though the Secretary does not believe he is bound by the determination reached through arbitration, he can be expected to abide by any reasonable determination reached. The present leases do not contain such a provision.

The Board need not reach this issue because BIA has not refused to accept a determination reached through arbitration.