

HAROLD LADD PIERCE

IBLA 70-95

Decided July 19, 1971

Rules of Practice: Government Contest--Rules of Practice: Hearings

In a government contest of the validity of certain mining claims where the only two charges in the complaint, alleging the nonmineral character of the land and the insufficient quantity of mineral, are negated by stipulation at a prehearing conference, and no new charges are incorporated by amendment and no new issues are stipulated, it is error for the hearing examiner to proceed with and decide the contest on the unilateral determination, announced at the hearing over contestee's objection, that the issue is whether the material is a common variety under the act of July 23, 1955.

Rules of Practice: Government Contest--Rules of Practice: Hearings

The complaint which initiates a contest action must clearly and concisely state the facts constituting the grounds of the contest, and may be amended only after the other parties have been given due notice and afforded an opportunity to object. The complaint sets the standard of relevance which governs the proceedings at the hearing, and no issue unrelated to the complaint may be interjected without the implied or expressed acquiescence of the contestee.

Rules of Practice: Government Contest--Rules of Practice: Hearings

Where issues not relating to the contest complaint are raised for the first time in a hearing, the contestee's failure to object or to request a continuance may constitute a waiver of the defective notice, but where objection is made and a continuance is requested to afford contestee an opportunity to prepare his defense, it is error to refuse the continuance and proceed with the hearing on the new issues.

Rules of Practice: Government Contest--Rules of Practice: Hearings

A decision holding mining claims to be null and void will be vacated where the contest did not proceed upon any grounds stated in the complaint or upon any issue to which the contestee had expressly or impliedly consented, as will a ruling that an associated mill site is null and void because of the invalidity of the claims, and the contest will be dismissed without prejudice.

Rules of Practice: Hearings

Where at a prehearing conference the parties agree to stipulations which make meaningless the charges set out in the complaint and there is a dispute as to whether a substitute issue was agreed upon, and where the contestant does not timely seek to amend the complaint, the failure of the hearing examiner to issue an order, as required by regulation, is error which necessitates that his decision be vacated.

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| IBLA 70-95 | : | Contest R-0170646 |
| UNITED STATES, | : | Mining claims and mill site |
| Contestant | : | claim declared null and void |
| v. | | |
| HAROLD LADD PIERCE, | : | Bureau decision reversed, |
| Contestee | : | Examiner's decision vacated, |
| | : | Contest dismissed |

DECISION

Harold Ladd Pierce has appealed from the October 15, 1969, decision of the Office of Appeals and Hearings, Bureau of Land Management, which affirmed the hearing examiner's decision of November 4, 1968, holding the H. L. Pierce, G. W. Pierce, and Harold placer mining claims and Mill Site B null and void.

With reference to the placer mining claims, the decisions below were premised on a finding that the material found on the claims was a common variety of sand and gravel within the purview of the act of July 23, 1955 30 U.S.C. 611, and that as no market was established for the common uses of the materials prior to the date of the act, and no market was established for the more uncommon uses after that date, a valid discovery of a valuable mineral deposit did not exist upon any of the claims.

The contest complaint which initiated this action contained two charges with reference to the placer mining claims, namely:

- (a) The land embraced within the claims is nonmineral in character.
- (b) Minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

With reference to Mill Site B the complaint contained the following charge:

- (a) The Mill Site B claim is not being used or occupied for mining, milling, beneficiation or other operation in connection with any placer or lode mining claim.

The contestee requested a prehearing conference and one was ordered by the hearing examiner to consider: 1) The simplification of the issues; 2) The possible necessity of amendments to the pleadings; 3) The possibility of obtaining stipulations, admission of facts and agreements to the introduction of documents; 4) And such other matters as may aid in the disposition of the proceedings.

The prehearing conference was held on April 5, 1967, eight months before the hearing convened. There is some lack of agreement as to everything that transpired at the prehearing conference, but there is agreement that the hearing examiner dismissed the charge that the land occupied by the three placer claims is nonmineral in character and that it was stipulated that a sufficient quantity of sand and gravel existed on the claims. These actions served to negate the only two charges against the placer mining claims recited in the contest complaint. According to the hearing examiner, ten enumerated agreements were stipulated by each of the parties at the prehearing conference. None of these stipulations raised the issue of whether the material located thereon was a common variety within the meaning of the act of July 23, 1955, nor did any of the stipulations raise the issue of the claims being located or perfected after the date of that act, or the consequences of such an event. The act was alluded to obliquely in the second stipulation, which was to the effect that there are two materials involved on the claim in question, sand and gravel used for common purposes, of which 30 yards had been sold or were sold prior to July 1955, and specialty sand described as blow sand.

The contestee admits that a discussion was had concerning "common varieties" in which he attempted to secure a stipulation that specialty sand was not a "common variety" within the purview of the act of July 23, 1955. However, the contestee vigorously denies that he stipulated then or subsequently that the salient issue was whether the materials on the claims are common varieties within the meaning of the act of July 23, 1955. He further states unequivocally that at the prehearing conference the contestant did not ask for leave to amend the charges or issues raised by the complaint.

When the hearing convened, the hearing examiner recited the ten enumerated stipulations agreed upon by the parties at the prehearing conference. He then stated that the remaining issue was whether the materials on the claims are common varieties within the meaning of the act of July 23, 1955. At that point, counsel for the contestant requested permission of the hearing examiner to amend the complaint to include the charges of common variety in connection with the three placer claims. Contestee's counsel objected, stating that the original complaint did not put into issue whether the minerals on the claims were common varieties and that the complaint made no reference whatsoever to common varieties. He insisted that the Government should be bound by what it put in the complaint and by what it required the contestees to prepare to defend. He pointed out that the Government had had ample opportunity to prepare the charges that it wished to litigate. The hearing examiner observed that the complaint could have been more clearly worded; the contestant's attorney agreed and stated that it should have been. Contestee's counsel pointed out that he had made the objection to this issue on three previous occasions to which contestant's counsel responded, "Well, I will tell you I would like to dictate the charges for common variety for the placer claims." Counsel for the contestee replied:

I object to having this complaint changed when we are sitting here at the hearing itself. Now if you want to do this then I want a continuance so I have ample opportunity to find out just what you are going to put in issue here. I don't want to have my client put at a disadvantage.

Now, for instance, we have spent a considerable amount of time. We have spent money making deep trenches on this property because what was put in issue here was quantity and we prepared ourselves to talk about quantities. I am not talking about now, just since the hearing, but since the complaint was filed. The Government has put us to a lot of expense and now we get down here and you say we are not going to talk about that, we are going to talk about something else. At a court of law you would not get away with that type of complaint, you would be stuck with what is in that complaint.

CONTESTANT'S COUNSEL: We always have the right to amend.

CONTESTEE'S COUNSEL: Not when you get to the hearing. The hearing examiner may have the right before you get here but I doubt when you get here without our consent.

HEARING EXAMINER: Correct. Except we had a prehearing conference in April this year to discuss this very problem and at that time it was my understanding that you agreed that the only question or only issue was whether or not the material was common.

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CONTESTEE'S COUNSEL: I was of the opinion at that time you had no case left because of your complaint.

CONTESTANT'S COUNSEL: Of course, the only question involved in the case is whether or not the minerals on the claims are common variety within the purview of the act of July 23, 1955.

CONTESTEE'S COUNSEL: Yes. Let me get this on the record. I state that as of this moment the Government has no complaint before this hearing. They have stipulated that the nonmineral or the mineral character of the land is not at issue. They have stipulated that there are sufficient quantities. Now, if the hearing examiner wants to continue with this hearing, then I will continue, but I want that on the record.

CONTESTANT'S COUNSEL: Well, I still have my motion to amend it to include the charges of common variety.

CONTESTEE'S COUNSEL: I oppose the motion.

HEARING EXAMINER: State your amended charges.

CONTESTANT'S COUNSEL:

Well, we have in connection with the Harold Claim. The claim was located on February 15, 1949, and its pre-167 location. So, for that claim the charges in the complaint should have read: Minerals have not been found within the limits of the claim in sufficient quantity to constitute a valid discovery. No discovery of valuable minerals has been made within the limits of the claim because the mineral material present cannot be marketed at a profit and it had not been shown that there exists an actual market for these materials. Now, in connection with the G. W. Pierce claim and the Harold Claim . . .

HEARING EXAMINER:

You just talked of the Harold Claim.

CONTESTANT'S COUNSEL:

Yes, the G. W. and the H. L. Pierce claims were originally located in 1948, but Mr. Pierce relocated the claim in 1960 and 1961, in which he took in additional land not covered by the original location. So, under these conditions the matter boils itself down to a new location by Mr. Pierce after July 23, 1955.

CONTESTEE'S COUNSEL:

Now, this is an entirely different issue and I object most strenuously.

HEARING EXAMINER:

Well, do you wish to prove that as part of the issue of whether or not there is locatable minerals on the claim? I don't think you have to raise that as an issue, all you have to do is establish that the claims were located after 1955, don't you?

CONTESTANT'S COUNSEL:

Yes, that is correct, but the charge that I have stated is the charge that has been set

forth in the manual put out by the Bureau of Land Management for the guidance of personnel in preparing complaints in contest cases. And that is the charge they state is the proper charge in a pre-167 location.

HEARING EXAMINER:

If that is the motion then the motion is denied as not being timely. The issue is whether or not there is sufficient minerals on the claims to constitute a discovery, bearing in mind that it must not be a common variety under the act of July 23, 1955. That is the sole issue.

CONTESTANT'S COUNSEL:

O.K. Well, I will proceed on that basis then.

HEARING EXAMINER:

Alright.

CONTESTEE'S COUNSEL:

I have registered my objection to that as being in issue.

CONTESTANT'S COUNSEL:

Alright.

HEARING EXAMINER:

I thought we agreed at the conference in April that that was the issue.

CONTESTEE'S COUNSEL:

It was my purpose at that time to eliminate the nonmineral character of that issue, the mineral character of the land, which we did. It was also my purpose to get a stipulation, if possible, regarding the sufficient quantity of the sand, which is the only mineral we are talking about. Now, my recollection is there was no amendment to the complaint asked for or stipulated to at the hearing.

HEARING EXAMINER:

Well, are you claiming surprise now?

CONTESTEE'S COUNSEL: I am not claiming surprise because my experience with a Government contest is that they will bring the common variety out every time you turn around, your Honor. I am claiming that the hearing will proceed not on the complaint if we proceed upon the issue you just stated.

HEARING EXAMINER: Very well. Let us proceed.

The hearing then proceeded with the presentation and questioning of the first witness and some discussion between the Hearing Examiner and respective counsel regarding the introduction of certain evidence. Then the matter of the amended locations was broached and evidence concerning the amendments was introduced, at which point the contestee's counsel renewed his objections. The examiner ruled that the question of the amended locations after 1955 was a legal problem applicable to the issue, whereupon the following colloquy ensued:

CONTESTEE'S COUNSEL: Then we are changing the issue and I will want a continuance because this is a matter of law. This means I have to research the law also.

HEARING EXAMINER: Well, you can research the law prior to preparing a brief.

CONTESTEE'S COUNSEL: At this time I would not be prepared to know whether I want to put evidence in to support some of the things I am going to put in my brief. Some factual evidence, your Honor.

CONTESTANT'S COUNSEL: Leave the matter for determination by the Examiner.

HEARING EXAMINER: Well, that is a legal question that can be covered later. The purpose of the hearing is merely to gather the factual background.

CONTESTEE'S COUNSEL: As to the point of their position in regards to this title, I am surprised by this. This is specific enough that it could have been made an issue in this, I think. I could have been appraised of this particular point and I have not been.

HEARING EXAMINER:

All right, that is strictly a legal matter that can be covered in briefs after the hearing. And if your request was a motion to postpone the hearing I will deny it. . . .

The hearing then proceeded over the next two days' time during which both sides offered testimony and exhibit evidence relative to the standing of the claims with respect to the act of July 23, 1955.

In his decision the Hearing Examiner found that, pending construction of a proposed processing plant, the only possible uses for the sand and gravel on the three placer claims are the common uses for which most sand and gravel can be employed. For these uses, he found, the materials on the claims are common varieties which were excluded from location after July 23, 1955. Therefore, he held that since no market was established with the materials prior to that date, and no market was established for an uncommon use after that date, the three placer mining claims were null and void. He also declared the Mill Site B to be null and void for lack of a supporting valid placer claim and lack of use of the mill site in connection with a locatable mineral. Finally, he rejected the pending application for the patent to these claims in its entirety.

On appeal to the Director, Bureau of Land Management, and by separate motion, the contestee urged that the contest be summarily dismissed because the complaint did not state in clear and concise language the grounds of the contest, contending that it is contrary to due process of law to require the contestee to defend against a charge that a mineral is a common variety or that it was not a valuable mineral deposit when all the charges against the placer claims had been dismissed. The Bureau decision held that the essential question was not the adequacy of the original complaint, but whether there was sufficient notice to the contestee which provided adequate opportunity to prepare on the issue formulated at the prehearing conference. The Bureau then concluded that the contestee had been apprised of the issues by the discussions at the prehearing conference and that this constituted actual notice to him with more than ample opportunity to prepare his case. Moreover, it noted that counsel for the contestee expressly stated that he was not claiming surprise and that the record made at the hearing by the contestee disclosed that the issue was clearly understood and therefore there was no lack of due process. Accordingly, the Bureau decision held that the contention was without merit and denied the motion for summary dismissal of the contest. It then affirmed the Hearing Examiner's conclusion that the placer claims were invalid because of a lack of marketability before and after July 23, 1955, and that the three placer mining claims and the mill site "B" claim were null and void.

In this appeal present counsel for the contestee renews the contention that summary dismissal was required under 43 CFR 4.450-4(a), formerly 43 CFR 1852.1-4(a), in that the complaint does not contain a statement in clear and concise language of the facts constituting the grounds of contest.

The regulation requires that the complaint contain a statement in clear and concise language of the facts constituting the grounds of the contest. Although the original complaint did contain such statements, the grounds therein stated with regard to the mining claims were eliminated at the prehearing conference, leaving only the charge against the mill site to be determined by the hearing. Since no new charges were incorporated by amendment and no new issues were stipulated, it was error for the hearing examiner to proceed with and decide the contest on his unilateral determination, announced at the hearing over contestee's objection, that the issue was whether the material on the claims is a common variety under the act of July 23, 1955.

While an amendment timely proposed may be allowed, contestant's motion to amend the complaint came too late. Of course, allowing an amendment which a party has inadequate chance to meet is error. N.L.R.B. v. Kanmak Mills, Inc., 200 F.2d 542 (3d Cir. 1952). The hearing Examiner acted correctly in denying the contestant's motion to amend the complaint at the hearing. the regulation, 43 CFR 4.450-4(b), 36 F.R. 7202, formerly 43 CFR 1852.1-4(b), 7202, provides:

Amendment of complaint. Except insofar as the Manager, Examiner, Director, Board or Secretary may raise issues in connection with deciding a contest, issues not raised in a complaint may not be raised later by the contestant unless the examiner permits the complaint to be amended after due notice to the other parties and an opportunity to object.

That portion of the foregoing which invests the examiner with authority to raise issues might at first appear to sanction what was done in this case. However, it should be noted that he may do so "in connection with deciding a contest." This presupposes that the contest has been properly brought on stated grounds which give rise to issues which the examiner may recognize and articulate. In this case the issue cannot be presumed to arise from anything stated in the complaint or in the stipulations agreed upon by the parties.

The Administrative Procedure Act, under which the hearing was conducted, requires that, "Persons entitled to notice of an agency hearing shall be timely informed of . . . the matters of fact and law asserted." 5 U.S.C. § 554 (b) (Supp. V, 1970).

By comparison, Rule 15(b) of the Federal Rules of Civil Procedure states:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.

Obviously, there was no express or implied consent by the contestee in this case. The hearing went forward over his strenuous objection.

The key to pleading in the administrative process is nothing more than the opportunity to prepare. K. DAVIS, ADMINISTRATIVE LAW TREATISE, § 8.04 (1958). The complaint, much like a pleading in a proceeding before a court, is designed to notify the adverse party of the claims that are to be adjudicated so that he may prepare his case, and to set a standard of relevance which shall govern the proceedings at the hearing. Douds v. International Longshoremens' Ass'n., 241 F.2d 278, 283 (2d Cir. 1957). It has been held that where a party introduced evidence on two issues concerning which it had no prior notice it waived the allegedly defective notice, but in that case the court noted that the party "had adequate opportunity to obtain whatever continuances were necessary." Montana Power Co. v. F.P.C., 185 F.2d 491, 497 (D.C. Cir. 1950), cert. denied, 340 U.S. 947 (1951). Failure to request a continuance may constitute a waiver of a defective notice. Sisto v. C.A.B., 179 F.2d 47, 52 (D.C. Cir. 1949). But, as we have seen, in the instant matter the contestee did request a continuance which was denied by the examiner.

In affirming the action nullifying an order of the Federal Trade Commission, the Supreme Court held, in effect, that a complaint issued by a federal agency must state a cause of action with particularity. F.T.C. v. Gratz, 253 U.S. 421 (1920). The dissent of Justice Brandeis, in which Justice Clark concurred, cited with approval in F.T.C. v. Brown Shoe Co., Inc., 384 U.S. 316 (1966), contained the following language which is especially relevant to this case:

The function of the complaint is solely to advise the respondent of the charges made so that he may have due notice and full opportunity for a hearing thereon. It does not purport to set out the elements of a crime like an indictment or information, nor the elements of a cause of action like a declaration at law or a bill in equity. All that is requisite in a complaint before the Commission is that there be a plain statement of the thing claimed to be wrong so that the respondent may be put upon his defence. 253 U.S. at 430.

This analysis comports well with the requirements of our regulation and with the judicial view of due process in proceedings under the Administrative Procedure Act. In Akers Motor Lines, Inc. v. United States, 286 F. Supp. 213 (D.N.C. 1968) it was said, "Strictures of this chapter require as a maximum no more than that agency's pleadings be sufficiently particularized to withstand motion to dismiss."

It is now well-settled law that an agency may not change theories in mid stream without giving respondents reasonable notice of the change. Rodale Press, Inc. v. F.T.C., 407 F.2d 1252 (D.C. Cir. 1968), citing N.L.R.B. v. Johnson, 322 F.2d 216 (6th Cir. 1963), cert. denied 376 U.S. 951; and N.L.R.B. v. H. E. Fletcher Co., 298 F.2d 594 (1st Cir. 1962).

On several previous occasions this Department has had cause to consider whether the charges contained in complaints in mining claim contests were adequate to raise issues under the act of July 23, 1955. See United States v. Harold Ladd Pierce, 75 I.D. 255 (1968); United States v. Harold Ladd Pierce, 75 I.D. 270 (1968); United States v. Keith J. Humphries, A-30239 (April 16, 1965); United States v. Neil Stewart et al., 1 IBLA 161 (1970); United States v. Paul M. Thomas et al., 78 I.D. 5 (1971). The principal distinction between these cases and the one at bar is that in each previous instance the hearing had convened upon viable charges, which if proven, would have conclusively established the invalidity of the contested claims. It was not so in this case, where the only charges relating to the validity of the placer mining claims were eliminated prior to the convening of the hearing, leaving only the single charge against the validity of the mill site claim. The last minute effort of the contestant to rectify the defective condition of its pleadings by amendment was properly denied by the hearing examiner; contestee's objections to the proceedings were overruled and his motion for continuance was denied. The hearing proceeded exclusively upon an issue fabricated by the hearing examiner without reference to the contents of the complaint or to any issue properly raised by the preliminary proceedings.

However, there is another aspect of this matter, to which appellant has not alluded, which dictates our disposition of the case. The applicable regulation, 43 CFR 4.430, 36 F.R. 7201, formerly 43 CFR 1852.3-1, requires the following action upon the conclusion of a prehearing conference:

(b) The Examiner shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made as to any of the matters considered, and which limits the issues for hearing to those not disposed of by admission or agreements. Such order shall control the subsequent course of the proceedings before the Examiner unless modified for good cause, by subsequent order.

The examiner's failure to follow this procedure resulted in the ensuing confusion. Although, as implied, it may be that the issue formulated by the examiner at the hearing was agreed to and understood by all parties as a result of the prehearing conference, the Board can find no tangible evidence of such understanding in the record of the case. In the absence of the prescribed order there was a combined failure of notice and lack of basis on which the hearing could proceed.

As the court noted in Akers Motor Lines v. United States, supra, some flexibility in administrative proceedings is necessary to prevent incredible waste of energy, time and money. But in this case, the Procrustean adaptation of the proceeding transcended reasonable flexibility to such a degree that it constituted a denial of administrative due process. Accordingly, the decision below must be reversed and contestee's motion for dismissal must be granted.

Because the decisions below with reference to the invalidity of Mill Site B depended exclusively on the conclusion that the associated mining claims are invalid, we must also reverse the holding with reference to Mill Site B.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision appealed from is reversed, the decision of November 4, 1968 is vacated, and the contest is dismissed without prejudice to the contestant.

Edward W. Stuebing, Member

We concur:

Martin Ritvo, Member

Francis Mayhue, Member

