

ANDREW W. MISCOVICH

IBLA 71-240

Decided June 29, 1972

Appeal from decision (F 8597) of Manager, Fairbanks district and land office, dated February 23, 1971, denying extension of timber contract.

Affirmed.

Timber Sales and Disposals: Extension of Contracts

A request for extension of a timber sale contract will not be granted where it appears that the purchaser was not delayed in cutting or removal through causes beyond his control and without his fault or negligence.

Words and Phrases

The term "causes beyond his control" does not encompass lack of economic feasibility in that compliance with contractual terms would render an operation unprofitable. It encompasses those things which might arise in the future and cannot include causes in existence at the time of the execution of the contract. The term only encompasses those things which directly and of themselves prevent compliance with contractual obligations.

APPEARANCES: Joseph W. Sheehan, Esq. of Rice, Hoppner, Blair & Associates, for the appellant.

OPINION BY MR. FISHMAN

Andrew W. Miscovich has appealed from a decision dated February 23, 1971, of the district and land office manager, Fairbanks, Alaska, denying his application for extension of one year on timber sale contract F 8597. The decision stated, in essence, that while deep snows in the season of 1970-71 handicapped, if not prevented, logging operations under the contract, access to the cutting area and sufficient time to cut were available to the appellant during the 1969-70 season. The manager found that the timber could have been cut by the appellant in that period and he denied the application for extension.

The record shows that timber sale contract F 8597 (T-1794) was entered into on February 10, 1969. The contract allowed the appellant 24 months to remove 250 M bd. ft. white spruce pilings. The appellant had paid the total price of \$750 at the rate of \$3 per M Bd. ft. The request for extension, filed on February 9, 1971, was timely, 43 CFR 5473.1 (1971 and 1972).

The appellant contends logging is possible in the prescribed cutting area only during winter months because of the swampy nature of the terrain. Access by land is over a "winter road" opened by the State of Alaska. No operations were planned by the appellant in the cutting area during the 1969-70 season after the Governor of Alaska announced in September, 1969 that the "winter road" would not be opened. The appellant argues that the subsequent opening of the road in late January 1970 was too late in the season for him to assemble and transport equipment and crews to do any substantial cutting that year. Furthermore, he assumed he could complete the cutting under the permit during the 1970-71 winter season. Unfortunately, the deep snows in 1970-71 prevented any logging operations. The Manager specifically recognized that timber operations in 1970-71 winter season were not possible.

The pertinent regulation 43 CFR 5463.2 (1971 and 1972) states:

If the purchaser shows that his delay in cutting or removal was due to causes beyond his control and without his fault or negligence, the authorized officer may grant an extension of time, not to exceed one year, upon written request of the purchaser. Market fluctuations are not cause for consideration of contract extensions. Additional extensions may be granted upon written request of the purchaser.

Sec. 9 of the contract prescribes similar standards.

The resolution of the case turns upon a determination whether the appellant has demonstrated that his delay in cutting "was due to causes beyond his control and without his fault or negligence."

The appeal states that on September 24, 1969, the State of Alaska announced that it would not be opening or constructing a winter haul road north from Fairbanks to the North Slope. However,

the State did in fact open and construct such a road, which was operational on January 17, 1970. The appellant further states:

As is self-evident from Appellant's affidavit, it would have been poor business judgment to assemble men and equipment, at a cost in excess of \$10,000.00, for operations which at most would have been functional for less than three months.

Appellant asserts that the logging season in 1969-1970 lasted only three months because of the early spring which caused the closing of the haul road by March 1, 1970. His failure to undertake the prompt performance of his contract cannot be excused on the basis of a subsequent event which did not militate against the commencement of the operation.

The appellant concedes that his failure to cut the timber during the period described above was due to his exercise of business judgment.

In excusing nonperformance, "causes beyond control" are to be tested objectively and not subjectively. See RESTATEMENT, CONTRACTS § 455.

The term "causes beyond the control of the lessee" has been construed to be

* * * limited to things of the same general sort as those specifically set forth in the same connection, which are, "fire", "flood", "riots", "strikes", "work stoppages", "acts of God" and "failure of car or river transportation for coal", things which directly and of themselves prevent the carrying on of mining operations, not acts or causes which in conjunction with others merely render such operations unprofitable. (Underscoring supplied)

Wheeling Valley Coal Corp. v. Mead, 186 F.2d 219 (4th Cir. 1950). Thus the lack of economic feasibility of compliance with a contract is not a cause beyond the control of the appellant. See Annot.
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A.L.R. 2d 1013, 1038 (1953). Moreover, the exculpatory causes must be such as might arise in the future, and cannot include causes in existence at the time of the execution of the contract. See New York Coal Co. v. Pittsburgh Coal Co., 86 Ohio St. 140, 99 N.E. 198 (1912).

We find that the appellant has not demonstrated that " * * his delay in cutting and removal was due to causes beyond his control and without his fault or negligence * * " Sec. 9 of the contract. Cf. Clark Canyon Lumber Company, 3 IBLA 247 (1971); Nordic Veneers, Inc., 3 IBLA 86 (1971).

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 below is affirmed.

Frederick Fishman, Member

We concur:

Edward W. Stuebing, Member

Douglas E. Henriques, Member

