

PAUL UNRUH

IBLA 72-66

Decided November 29, 1972

Appeal from "Notice and Decision" of the Nevada State Office, Bureau of Land Management, canceling a homestead entry and denying appellant a preference right.

Reversed and remanded.

Homesteads (Ordinary): Preference Rights

A party who initiated a contest against a homestead entry prior to any action by the Department to cancel the entry, which contest is eventually successful, obtains the preference right granted by 43 U.S.C. § 185 (1970), provided the "procures" the cancellation of the homestead entry, even though the Department subsequently intervenes and introduces independent evidence to cancel the entry.

Words and Phrases

"Procured the cancellation of * * *". A preference right applicant will be deemed to have "procured the cancellation of * * *" a homestead entry, within the meaning of 43 U.S.C. § 185 (1970), where he has alleged and proven facts, which are admittedly not a matter of public record, sufficient to cancel a homestead entry, even though the Department has alleged and proven other facts which would be sufficient to cancel a homestead entry, provided that the preference right applicant initiated the contest of the homestead entry prior to any action by the Department to cancel the entry.

APPEARANCES: Ralph M. Crow, Esq., Carson City, Nevada, for appellant.

OPINION BY MR. HENRIQUES

On May 8, 1964, one Wesley Laverne Edwards filed a homestead application to enter a quarter section of land consisting of the SW 1/4 sec. 35, T. 14 N., R. 20 E., M.D.M., Nevada. This entry was allowed on June 1, 1964.

On December 14, 1964, appellant herein, Paul Unruh, initiated a private contest against the entry seeking a preference right pursuant to 43 U.S.C. § 185 and 43 CFR 4.450. The contest was dismissed by a Hearing Examiner on September 28, 1965. On appeal, this decision was affirmed by the Department sub nom., Paul Unruh v. Wesley Laverne Edwards, A-30584 (September 21, 1966) and subsequently by the United States District Court for the District of Nevada (Civil No. 1894-N, June 14, 1967).

On January 15, 1968, appellant instituted a second contest against the entry alleging that the entryman failed to establish a residence upon the land within the six months after entry or within the extended time allowed; that he failed to maintain a residence for three years; that he had failed to cultivate his entry; and that he had abandoned his entry. The contestee denied these charges.

On April 29, 1968, the government moved to intervene and dismiss the first and third charges on the grounds that the first charge had been decided against the appellant in Paul Unruh v. Wesley Laverne Edwards, supra, and was therefore res judicata, and that the third charge alleged facts that were a matter of Bureau record in that they were reflected in the untyped notes of a government field examiner, and thus could not serve as the predicate of a private contest action, citing 43 CFR 1852.1-1; Margaret L. Gilbert v. Bob H. Oliphant, 70 I.D. 128 (1963); and Burl C. Stephen, Jr. v. Howard S. Moen, A-30350 (August 19, 1964).

On May 14, 1968, the Administrative Law Judge 1/ granted the government's motion to intervene, but denied its motion to dismiss the various charges. The government pursued an immediate appeal to the Office of Appeals and Hearings, BLM, which reversed the Judge's decision as it related to the government's motion to dismiss the third charge of the contest, but affirmed the decision as to the first charge. See Paul Unruh v. Wesley Laverne Edwards, Nevada Contest No. 064160 (October 15, 1968). Appellant thereupon appealed this decision. In Paul Unruh v. Wesley Laverne Edwards, A-31083 (April 9, 1970) the Department held that the decision of the Judge was interlocutory and could not be appealed prior to a decision on the merits, and accordingly set aside the decision of the Office of Appeals and Hearings and remanded the case for a hearing, noting that the government could intervene to protect its interests.

1/ The change of title of the hearing officer from "Hearing Examiner" to "Administrative Law Judge" was effectuated pursuant to order of the Civil Service Commission, 37 F.R. 16787 (August 19, 1972).

On April 9, 1968, the government filed a complaint charging that the entryman's homestead entry was invalid because he had not cultivated it in a manner reasonably calculated to produce profitable results. This allegation was denied by the entryman.

The government's and appellant's charges were consolidated for hearing, which was held on December 1, 1970. The entryman did not appear, but both the government and appellant presented their evidence. The Judge filed his decision on April 27, 1970, in which he found that the entryman had not established residence and had not cultivated the land as required. Accordingly, he held that the homestead entry was void. ~~On appeal, the Judge affirmed his decision on the basis of the earlier determination and held that the information as regards the lack of cultivation was a matter of public record, and thus not actionable by a private party. Finally, he affirmed his decision that the previous contest proceedings were not res judicata on the issue of residence. The Judge made no findings relating to appellant's preference rights.~~

On July 20, 1971, the Chief of the Division of Technical Services of the Nevada State Office, BLM, issued a "Notice and Decision" which was primarily directed toward the question of appellant's preference rights and which concluded that as he had not "procured the cancellation" of the entry as required by 43 U.S.C. § 185 (1970), he had obtained no preference right. In order to seek review of this "Notice and Decision" appellant was forced to appeal from a decision which he had originally sought.

Thus, the issue in the case of bar is not whether the entry is void. No appeal has been taken from the decision canceling the entry, and thus the decision invalidating it is final. Rather, the issue here is solely limited to the preference right, if any, of appellant. For reasons stated infra, we find that the cancellation of the entry was procured by appellant within the meaning of 43 U.S.C. § 185 (1970), and that he is entitled to a preference right, all other things being normal.

The crucial conclusion of the State Office was that since the Judge found that there had been no cultivation in addition to finding a failure to fulfill the residence requirements, and as the Judge had also reversed his original decision and held that the evidence relating to the lack of cultivation was a matter of public record and thus non-actionable by a private party, appellant had not procured the cancellation. In the "Notice and Decision" the following language appears:

* * * The entry was not canceled merely on the basis of only one of two charges, but on the basis of the proof of both charges. * * * (Emphasis in the original)

Accepting this statement as true, and it should be noted that it nowhere appears in the Judge's decision, we are constrained to say that of necessity the contestant "procured" the cancellation within the meaning of the statute. To hold otherwise would result in the anomalous situation in which the appellant is denied a preference right after a successful contest because no one "procured" the cancellation, since it would, by force of logic, appear that the United States had not procured the cancellation of the entry either. If both charges were indeed the basis of cancellation, then appellant and the United States have jointly procured the cancellation. And we think it of great importance in this case that the private contestant commenced his action on his concededly independent charge prior to any action by the government to cancel the entry.

The preference right given by statute is in the nature of a reward to an informer. The person who first initiates charges of noncompliance by a homestead entryman with the mandatory requirements of the law and subsequently supports his allegations with proof at a hearing on the contest is entitled to the preference right given by the statute after cancellation of the homestead entry, even though other contest proceedings against the same homestead entry may have been instituted by the government and heard at the same hearing. Cf. Crook v. Carroll, 37 L.D. 513 (1909).

On the basis of the entire record, we find that appellant has procured the cancellation within the meaning of 43 U.S.C. § 185. In view of the result reached, we expressly make no findings on the issue of whether the information available to the government as regards to cultivation constituted Bureau records, other than to note that the decision of the Office of Appeals and Hearings cannot be deemed a precedent on this point since that decision was subsequently vacated.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR. 4.1, the decision appealed from is reversed and remanded for further action in accordance with this opinion.

Douglas E. Henriques, Member

We concur:

Joseph W. Goss, Member

Frederick Fishman, Member

