

Editor's note: 82 I.D. 546; decision modified by order dated April 9, 1976 -- See 22 IBLA 373A &B below.

UNITED STATES

v.

JOHN J. CASEY

IBLA 74-196

Decided November 14, 1975

Appeal from decision of Administrative Law Judge Graydon Holt finding appellee's cattle in trespass and levying fine. Calif. 2-73-1 (SC).

Set aside and remanded.

1. Administrative Procedure: Administrative Procedure Act --
Administrative Procedure: Decisions -- Grazing Permits and Licenses:
Trespass

A cattle trespass decision rendered by an administrative law judge may be set aside and remanded where the decision does not include a statement of findings and conclusions, and the reasons or basis therefor,

22 IBLA 358

on all material issues of fact, law or discretion as required for initial decisions under 5 U.S.C. § 557 (1970) and 43 CFR 4.475.

2. Administrative Procedure: Decisions -- Grazing Permits and Licenses: Trespass -- Intervention

Where a grazing district cattle trespass complaint refers to previous trespasses by the base property owner, he is served with the complaint, and the record indicates he intervened at the hearing thereon but the decision issued makes no mention thereof, the decision appealed from may be set aside and remanded for clarification.

APPEARANCES: Burton J. Stanley, Esq., Solicitor's Office, Department of the Interior, Sacramento, California, for appellant; Ralph M. Tucker, Esq., Reno, Nevada, for appellee.

OPINION BY ADMINISTRATIVE JUDGE GOSS

The Bureau of Land Management (BLM) appeals from the January 7, 1974, Administrative Law Judge decision which found appellee's cattle to have been in repeated trespass and assessed damages of \$6 per

AUM of forage consumed, with total damages \$120. The United States appeals only with respect to the leniency of the penalty, contending that grazing privileges owned or controlled by appellee should be severely reduced or eliminated. Departmental regulations provide that grazing privileges in a district may be reduced or eliminated for trespasses which are willful, grossly negligent, or repeated. 43 CFR 9239.3-2(e).

The proceedings were initiated by the California State Director of the Bureau who issued orders to show cause why appellee's grazing privileges should not be reduced or revoked due to alleged trespasses by cattle owned by appellee. The show cause orders alleged violations in February, March, July and August of 1973. A hearing was held beginning November 27, 1973, in Reno, Nevada.

The first series of trespasses are alleged to have occurred for the most part in an area known as the Rush Creek field, in T. 31 N., Rs. 17 and 18 E., Mount Diablo Meridian, Lassen County, California, and Washoe County, Nevada. They are alleged to have occurred between February 13, 1973, and March 8, 1973.

The second series of trespasses is alleged to have occurred between July 2, 1973, and August 8, 1973, primarily in an area known as Smoke Creek, T. 32 N., Rs. 17, 18 E., M.D.M, Lassen and

Washoe Counties. Other trespasses at this time allegedly occurred in an area between the Painter Ranch and the Dodge Ranch, T. 34 N., Rs. 16, 17, 18 E., M.D.M, Lassen and Washoe Counties.

The Administrative Law Judge was in the process of retiring and his decision is quite brief.

The relevant portion is as follows:

* * * At the conclusion of the hearing a ruling was made that the Respondent had in fact been in trespass to the extent of 20 AUMs and that he had been in trespass repeatedly over a period of years in California, Nevada, and Montana. The Respondent established that in this case there had been mitigating circumstances in part.

Accordingly, the Respondent was assessed \$120 computed at the rate of \$6 for 20 AUMs. * * *

Though a great deal of the hearing was devoted to whether the Casey cattle were in trespass, neither appellant nor appellee takes issue with Judge Holt's finding as to the unspecified trespasses. Appellant BLM argues that because of appellee's repeated trespasses, the penalty in this case should be much more severe. Appellee contends that Judge Holt's decision is correct as to the severity of the penalty, and also argues that because of procedural defects: a) this Board may not review the case, and b) no further penalty may be imposed even if it be found justified. He has moved for dismissal of the appeal.

[1] As to the Board's jurisdiction to review, 43 CFR 9239.3-2(h) provides:

Appeals. Appeal from the decision of the administrative law judge to the Board of Land Appeals of any matter under this § 9239.3-2, shall be made in accordance with § 4.470 and Department Hearings and Appeals Procedures contained in Part 4 of this title.

Section 4.476 provides:

Any party affected by the administrative law judge's decision, including the State Director, has the right to appeal to the Board of Land Appeals, in accordance with the procedures and rules set forth in this Part 4.

The brief record herein does not show compliance with the law or regulations. Departmental regulation 43 CFR 4.474(c) provides in part:

* * * At the conclusion of the testimony the parties at the hearing shall be given a reasonable opportunity, considering the number and complexity of the issues and the amount of testimony, to submit to the administrative law judge proposed findings of fact and conclusions of law, and reasons in support thereof, or to stipulate to a waiver of such findings and conclusions. (Emphasis added.)

There is no indication the parties were given such opportunity, nor is there a stipulation to a waiver.

From the decision quoted, supra, it is not possible to determine which of the alleged trespasses occurred, nor otherwise to determine the basis for the \$120 penalty. Almost 20 percent of

the trespasses charged were apparently found not to have occurred at all, but these trespasses were not specified. While the Judge found some mitigating circumstances, these were not identified. Nor was there any identification of the circumstances which were found to have occurred and not held to be mitigated.

The Administrative Procedure Act, 5 U.S.C. § 557 (1970), requires in part:

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions --

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of --

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.
[Emphasis added.]

Further, 43 CFR 4.475 requires that the Judge

* * * render a decision upon all material issues of fact and law presented on the record. * * * The reasons for the findings, conclusions, and decisions made shall be stated, and along with the findings, conclusions, and decision, shall become a part of the record in any further appeal. * * *

Such laws and rules are an integral part of the administrative process. In Panama Refining Co. v. Ryan, 293 U.S. 388, 432 (1935), the Supreme Court stated:

* * * As the Court said in Wichita Railroad & Light Co. v. Public Utilities Comm'n, 260 U.S. 48, 59: "In creating such an administrative agency the legislature, to prevent its being a pure delegation of legislative power, must enjoin upon it a certain course of procedure and certain rules of decision in the performance of its function. It is a wholesome and necessary principle that such an agency must pursue the procedure and rules enjoined and show a substantial compliance therewith to give validity to its action. When, therefore, such an administrative agency is required as a condition precedent to an order, to make a finding of facts, the validity of the order must rest upon the needed finding. If it is lacking, the order is ineffective. * * *"

The courts have repeatedly stressed the importance of findings and conclusions if the agency is to be upheld on judicial review. In USV Pharmaceutical Corp. v. Secretary of HEW, 466 F.2d 455, 462 (D.C. Cir. 1972), the Circuit Court explained the reason for the rule:

* * * As we have frequently emphasized, findings of fact are not mere procedural niceties; they are essential to the effective review of administrative decisions. Without findings of fact a reviewing court is unable to determine whether the decision reached by an administrative agency follows as a matter of law from the facts stated as its basis, and whether the facts so found have any substantial support in the evidence. * * *

The reasons why findings are important to a reviewing court are discussed in more detail in California Motor Transport Co. v. Public Utilities Commission, 379 P.2d 324 (1963). The reasoning set forth at 327 is equally important to a reviewing quasi-judicial board, and to the parties in a proceeding before such a board:

Such findings afford a rational basis for judicial review. (See 2 Davis, Administrative Law Treatise (1958) § 16.05.) The more general the findings, the more difficult it is for the reviewing court to ascertain the principles relied upon by the administrative agency. Even when the scope of review is limited, as in this case * * * findings on material issues enable the reviewing court to determine whether the commission has acted arbitrarily. * * * The ultimate finding of public convenience and necessity is so general that without more, a reviewing court can only guess at how it was reached. * * *

Since findings on material issues indicate the basis for the decision the parties can prepare accordingly for rehearing or review. (See Barry v. O'Connell, 303 N.Y. 46, 100 N.E.2d 127, 129-130.) "Furthermore, a disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case." (2 Davis, Administrative Law Treatise (1958) § 16.05.) * * *

It is of course true that even after a hearing the Board may make its own findings. Casey Ranches, 14 IBLA 48, 55 (1973);

United States v. Middleswart, 67 I.D. 232, 234 (1960); 5 U.S.C. § 557(b) (1970). In the circumstances of this case, however, where the findings are almost totally lacking, it is believed that a remand is more appropriate. ^{1/} See Associated Drilling Company (Kephart Mine), 2 IBMA 95, 80 I.D. 317 (1973); cf. United States v. Shield, 17 IBLA 91 (1974). Otherwise, the Board is faced with a dilemma similar to that described by Justice Cardozo in United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 294 U.S. 499, 510-511 (1935):

* * * In the end we are left to spell out, to argue, to choose between conflicting inferences. * * * We must know what a decision means before the duty becomes ours to say whether it is right or wrong.

[2] An additional reason for remand is present in the question of whether Holland Livestock Ranch is properly a party in these proceedings. Service was made upon Holland Livestock Ranch by certified mail. Though the complaint does not specifically name Holland Livestock Ranch, previous trespasses committed by the Ranch are cited at page 3, paragraphs 5 and 6. Holland Livestock Ranch intervened as a party at the hearing, as is shown at Tr. 1, 2:

^{1/} A decision in compliance with 5 U.S.C. § 557 (1970) and 43 CFR 4.474(c), both supra, may be made by a successor administrative law judge under 5 U.S.C. § 554(d) (1970) without rehearing the evidence. If a party submits that the demeanor of a particular witness is important to a finding, the witness' testimony may be reheard.

MR. TUCKER: If your Honor please -- excuse me -- you asked me what the representation was, and I also wanted to indicate that insofar as this show cause order purports to affect any of the rights of Holland Livestock Ranch, a co-partnership, I am representing them also, and if the assertions in any way include Holland Livestock Ranch rights, we should be considered as an intervenor in that regard.

THE COURT: Is Holland Livestock involved here?

MR. STANLEY: Yes, they are, your Honor. They own the lands that are involved. They were served with a copy of the Order to Show Cause also. Holland Livestock owns all the base properties in the Susanville District.

THE COURT: All right. * * *

The record thus indicates Holland intervened, but the decision does not mention Holland. A ruling should be made as to whether Holland Livestock Ranch 2/ or other entity is a party to this proceeding, whether charges are involved and the disposition thereof, and the basis for said determination should be set forth.

2/ Holland Livestock Ranch is stricken from the caption of the orders issued herein. Appellee's other procedural motions are denied.

Therefore, 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 set aside and the case remanded.

Joseph W. Goss
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING DISSENTING:

I cannot agree that further action is warranted in this case.

The appropriate regulation, 43 CFR 9239.3-2(e), provides that a licensee's or permittee's grazing privileges may be reduced or eliminated because of willful, grossly negligent, or repeated trespasses. A review of the case law reveals, however, that the Department has required that several elements be present before it will order a severe reduction of a licensee's or permittee's grazing privileges. Those elements may be roughly classified as follows: 1) the trespass must be willful; 2) there must be a fairly large number of animals involved; 3) the violation should occur over a fairly long period of time, and 4) there may be a failure to take prompt remedial action upon notification. For example, in L. W. Roberts, A-29860 (April 23, 1964), the licensee was allowed to graze 5,600 sheep in the specified area. Instead, he chose to graze 8,000 sheep in the area for an entire season. For similar cases, see Eldon L. Smith, 8 IBLA 86 (1972); Mrs. R. W. Hooper, 3 IBLA 330 (1971); Alton Morrell, 72 I.D. 100 (1965); Clarence S. Miller, 67 I.D. 145 (1960); Eugene Miller, 67 I.D. 116 (1960); J. Leonard Neal, 66 I.D. 215 (1959).

In some cases where the trespass was found to be repeated but not willful, privileges have been reduced by 10 percent for a period of a year. See, e.g. Edmund Walton, A-31066 (May 27, 1969); see

also John Gribble, 4 IBLA 134 (1971), where the trespass was not willful and there was prompt remedial action, but there were no mitigating circumstances and the fences were not in good condition.

Where, however, there are extenuating circumstances, this Board has declined to impose reduction of grazing privileges. State Director, Utah v. Chynoweth Brothers, 17 IBLA 113 (1974); Lawrence F. Bradbury, 2 IBLA 116 (1971).

Judge Holt's decision is very brief, and he makes no detailed elaboration of the factors which influenced his assessment of the penalty. However, in the decision he does allude to his finding that, "The Respondent established that in this case there have been mitigating circumstances in part." The record of the hearing shows that much of the evidence adduced in defense of the charges was in mitigation and extenuation of the trespasses alleged. For example, it was asserted that a herd of wild horses had run through a division fence, and the fence was flattened; that the telephone company had torn down "quite a lot of fence;" that gates had been torn down and left open by people not employed by the respondent or the intervenor; that diligent efforts had been made to inspect and maintain fences and to prevent trespass and/or recover trespassing livestock, etc.

We cannot estimate the weight which the Administrative Law Judge accorded this evidence but, in light of his holding, it would

appear that he attached considerable importance to it. We can conclude, however, that there is sufficient evidence of mitigating circumstances in the record to withstand any allegation by appellant that the Judge's finding is not supported by the evidence. In United States v. Chartrand, 11 IBLA 194, 212, 80 I.D. 408, 417 (1973), this Board made the following declaration:

This Department has a long-standing practice of affording considerable weight to the findings of the trier of fact at an administrative hearing. The reason for this practice is because the trier of fact who presides over a hearing has an opportunity to observe the witnesses, and is in the best position to judge the weight to be accorded conflicting testimony. See Forrest B. Mulkins, A-21087 (December 8, 1937), I.G.D. 22; United States v. Humboldt Placer Mining Company, 8 IBLA 407 [79 I.D. 709, 722] (1972). We recognize that the Board of Land Appeals has authority to reverse the fact findings of a Judge; however, where, as here, the resolution of a case depends primarily upon his findings of credibility, which in turn are based upon his reaction to the demeanor of witnesses, his findings will not be lightly set aside by this Board. State Director for Utah v. Dunham, 3 IBLA 155, 78 I.D. 272 (1971), and cases cited therein.

While the evidence does not establish beyond question that all of the mitigating and extenuating circumstances described actually prevailed, or that they had the effect alleged in every instance, since Judge Holt's determination rests in large part upon his opportunity to observe and assess the credibility of the witnesses, I would not disturb his findings. In addition, as noted in the briefs of both sides, Judge Holt has heard other cases involving Casey and Holland Livestock, and he has not hesitated to impose severe penalties when, in his opinion, such penalties were warranted.

Accordingly, I would affirm the decision appealed from.

Moreover, while Judge Holt's decision is considerably less than a paradigm of quasi-judicial exposition, I cannot agree that it is so dissonant with the requirements of the Administrative Procedure Act as to constitute a nullity. The decision expressly found (1) that there was a trespass of cattle; (2) that the Respondent had been repeatedly in trespass over a period of years in California and Nevada; (3) that the specific extent of the trespass demonstrated in this case was 20 animal unit months; (4) that Respondent had established that in this case there had been mitigating circumstances in part; (5) that based upon these findings the Respondent should be assessed \$120, computed at the rate of \$6 per AUM. These are nothing more nor less than a statement of the Judge's findings and his holding. While the decision may comport only with the minimum standards of the Act, I regard it as adequate compliance.

Finally, I regard the remand for the purpose of having the case assigned to "a successor administrative law judge" to review the record and write a new opinion to be unnecessarily cumbersome, expensive and time consuming. The entire record, consisting of four volumes of testimony and 92 exhibits, is properly before us now. Procedural due process requires only that all of the testimony, exhibits, briefs and other documentary material in the record be carefully reviewed and considered by the Board. See note, Steenberg Construction Co., 79 I.D. 158, 163 (1972). We have studied

this record carefully and there is nothing preventing us from rendering a decision which would conclude the administrative process. Instead, it will be referred to someone who is totally unfamiliar with the case to undertake what I presume will be a de novo review and render a new decision which will almost certainly bring the same record back to us on appeal again, no matter how it is decided. Frankly, I fail to understand what salutary purpose the majority thinks will be served thereby. This case has already consumed an enormous amount of time, resources and money, which I regard totally disproportionate to either the seriousness of the offenses alleged or the principle involved, that principle having been fully established and well served by the proceedings already concluded.

Edward W. Stuebing
Administrative Judge

April 9, 1976

IBLA 74-196	:	Calif. 2-73-1 (SC)
	:	
UNITED STATES	:	Grazing Trespass
	:	
v.	:	
	:	
JOHN J. Casey	:	Board Decision Modified

ORDER ON RECONSIDERATION

By decision of November 14, 1975, 22 IBLA 358, 82 I.D. 546, the Board set aside the January 7, 1974, decision of the Administrative Law Judge in the above matter, and remanded the case for further proceedings. Thereafter, on March 8, 1976, appellee filed with the Board and with the Administrative Law Judge to whom the case had been assigned, a stipulation under which the parties agreed "that the matter be dismissed with prejudice and that the [1974] decision * * * be reinstated." The Administrative Law Judge returned the file to the Board.

A litigant's request for the Board to modify a decision should ordinarily be by petition for reconsideration, addressed to the Board and requesting that the Board take a particular action. While the case could well have been disposed of under the remand in accordance with the Board decision, by a stipulated new judgment or otherwise, it is in the interest of justice that the matter be concluded without further proceedings.

Accordingly, pursuant to the 43 CFR 4.1, 4.21(c) and to expedite settlement of the case, it is ordered:

1. Except as set forth hereunder, the Board's 1975 decision remains in effect as the Board's interpretation of the law and as a proper disposition of the case as of the date the decision was entered.
2. The Board decision is modified as of this date to delete the provisions which set aside the 1974 Administrative Law Judge decision and required further rulings.

3. The appeal herein is dismissed with prejudice.

Joseph W. Goss
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

For the reasons expressed in my dissenting opinion at 22 IBLA 358, 369, I concur only in the result:

Edward W. Stuebing
Administrative Judge

APPEARANCES:

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Livestock Ranch:

IBLA r/f
OHA r/f
case

