

CESAR AND ROBERT SIARD

IBLA 76-293

Decided July 8, 1976

Appeal from decision Nev. 020-3-067(SC) of Administrative Law Judge Dean F. Ratzman assessing damages for willful trespass and reducing grazing privileges.

Affirmed.

1. Grazing Permits and Licenses: Trespass -- Trespass: Generally --
Grazing Permits and Licenses: Generally

Where the number of cattle grazing on the Federal range exceeds the number allowed by license and such excess is attributable solely to appellants' lack of control over their cattle and their lack of diligence in taking corrective action after being informed by the Bureau that the excess existed, a finding of willful trespass is warranted.

2. Administrative Procedure: Substantial Evidence -- Evidence:
Admissibility -- Grazing Permits and Licenses: Trespass

Where, in an effort to negotiate a compromise settlement of an alleged grazing trespass, a rancher concedes that the trespass occurred to the extent of a specific number of animal unit months of forage, but the proposed settlement is not consummated and the case goes to a hearing on its merits, evidence of the purported admissions made by the party during such negotiations must be excluded as not competent to show either the fact or the extent of the trespass alleged.

3. Grazing Permits and Licenses: Trespass -- Trespass: Measure of Damages

Where it has been determined that a grazing trespass on the Federal range is clearly willful, the value of the forage consumed shall be computed and assessed at \$ 4 per animal-unit month, or twice the commercial rate if such amount is higher. Where the commercial rate is \$ 4.90, the assessment of damages shall be at the rate of \$ 9.80 per animal-unit month.

Appearances: Raymond B. Little, Esq., Stewart & Horton, Ltd., Reno, Nevada, for appellants. Otto Aho, Field Solicitor, Department of the Interior, Reno, Nevada, for Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Cesar and Robert Siard, d/b/a Siard Ranches, appeal from a decision of Administrative Law Judge Dean F. Ratzman, restricting appellants' licenses or permits to 90 percent of their authorized active use for a period of 3 years and assessing appellants \$ 18,718 in damages for willful trespass on the Federal range allegedly committed during the 1974-1975 grazing season in violation of 43 CFR 4112.3-1(a) and (b). 1/

Appellants held a license to graze cattle in the Pleasant Valley Allotment from March 1, 1974, through February 28, 1975. The number of cattle permitted on the Federal range varied throughout the grazing year, but the maximum number was allowed from May 16 through August 14, 1975, when 440 cattle over 6 months of age were permitted. This figure included 380 cattle on a regular license basis and 60 cattle on an exchange-of-use basis.

In an attempt to control the number of livestock within the allotment and thereby reduce overgrazing, the Bureau proposed

1/ The regulation provides that the following acts are prohibited on the Federal range:

"(a) Grazing livestock upon, allowing livestock to drift and graze on, or driving livestock across the Federal range, * * * without an appropriate license or permit, regular or free-use * * *.

"(b) Grazing livestock upon or driving livestock across the Federal range, * * * in violation of the terms of a license or permit, either by exceeding the number of livestock permitted, or by allowing livestock to be on the Federal range in an area or at a time different from that designated, or in any other manner."

an ear tagging program. An alternative program, agreed upon by the allotment users and the Bureau, provided that the users would gather all animals on the base properties except those on winter license. At this time livestock counts were to be made. If the counts showed that the number of cattle was in excess of that allowed by license, the excess must then be explained. The owners of excess cattle were then required to show evidence, such as shipping receipts or lease agreements, as to the disposition of the excess (Tr. 8).

Pursuant to this agreement, a base property count was taken on February 15, 1975, by Robert D. Cordell, Acting Area Manager, Sonoma-Gerlach Resource Area and Earl McKinney, range conservationist from the Resource Area, accompanied by one of the owners, Cesar Siard. The count revealed that there were 497 animal units on the Siard Ranch (Tr. 10). Appellants estimated that there were a maximum of 75 animals left on the Federal range. Assuming that this estimate was correct, the total number of animals belonging to appellants was 572, or 467 animal units in excess of the number allowed at the time the count was made (Tr. 10). 2/

Having completed the base property count, the Bureau next conducted counts on the Federal range and found appellants' estimate of 75 cattle to be grossly deficient. Three ground counts were made in three different locations within the allotment. Cordell made the first count on February 24, 1975, identifying 12 animals belonging to appellants (Tr. 12). On February 26, 1975, Cordell and McKinney, riding horseback, counted 89 more of appellants' animals (Tr. 12, 13). On February 27, 1975, they saw an additional 77 head belonging to appellants (Tr. 13). They thus identified 178 adult cattle, rather than the estimated 75. They were able to make positive identification of these 178 cattle because they were in close enough proximity to the animals to recognize appellants' "Heart J" brand and ear mark on the cattle (Tr. 13). These 178 cattle added to the 497 cattle counted on the base property total 675 animals belonging to appellants. Another base property count was conducted on February 28, 1975, and 563 cattle were identified as belonging

2/ The trespass computation was made using 440 as the figure representing the number of cattle allowed by license. This was the maximum number of cattle allowed from May 16, 1974, to August 15, 1974. However, this count was made in February 1975 and the license permitted only 105 cattle on the Federal range during February. Based on this figure, appellants would have had 467 animal units over the number allowed at the time the tally was made. The reference to the maximum is significant because the charge relates to the extent of trespass over the entire year.

to appellants (Tr. 15). ^{3/} A third count was made on March 6, 1975, at which time 653 adult cattle were counted (Tr. 16-17). ^{4/}

On February 28, 1975, appellants were served with a notice of trespass which allowed them 5 days in which to remove excess animals and 10 days in which to appear at the Winnemucca District Office to negotiate settlement of the alleged trespass.

Cesar Siard signed a settlement of trespass obligation offer for 1,910 AUM's on March 11, 1975. Cordell testified that this was the lowest figure he felt he could accept (Tr. 28). The settlement offer contained the following statement made by Cesar Siard:

I Cesar Siard, for Siard Ranches, offer trespass on 1910 A.U.M.s.

Monetary settlement will be settled when B.L.M. discloses that fee.

The trespass is admitted not willfully as we were not aware that there were this number of animals in excess.

This settlement offer was not accepted by the Bureau. On April 15, 1975, the Nevada State Director, Bureau of Land Management, issued a Notice of Violation and Order to Show Cause charging appellants with willful and repeated grazing trespasses during the 1974-1975 grazing season. The Director charged that appellants had grazed 130 cattle in trespass for 12 months amounting to 1,560 AUM's and 70 excess cattle for 5 months, ^{5/} amounting to 350 AUM's or a total of 1,910 AUM's, the amount tentatively agreed upon in the settlement negotiations. However, he further charged that the trespass was willful and, in accordance with 43 CFR 9239.3-2(c)(2), ^{6/}

^{3/} These 563 animals counted on the base property, plus the 178 animals identified on the Federal range, total 741 animals belonging to appellants as of February 28, 1975 (Tr. 18).

^{4/} The total number of animals identified as appellants' cattle as of March 6, 1975, was higher yet -- 831 animals (653 from the base property count and 178 from the Federal range count).

^{5/} The 70 cattle are the calves which became 6 months of age during the grazing year. 43 CFR 4115.2-1(k)(1)(v).

^{6/} 43 CFR 9239.3-(c)(2) states in part:

"* * * Where the trespass grazing is not deemed to be clearly willful the forage value shall be computed at the rate of \$ 2 per animal unit month, or at the commercial rate if such rate is the higher; if the district manager deems the trespass grazing to be clearly willful, grossly negligent, or repeated he shall compute

the damages were computed at twice the commercial forage value rate of \$ 5.41 per AUM or \$ 10.82 per AUM or \$ 20,666.20 for 1,910 AUM's.

A hearing was held on June 10, 1975, in Winnemucca, Nevada. The Bureau offered evidence to show that \$ 5.41 per AUM is a reasonable commercial rate for forage consumed. District Manager Chester E. Conard of the Winnemucca District proposed that appellants be required to post a 5-year \$ 10,000 bond, and that their privileges be reduced by 20 percent for a 3-year period (Tr. 74-75). Appellants denied that the trespass was willful and argued that the \$ 5.41 was too high a rate for forage.

The Administrative Law Judge rendered a decision in which he found that the acts of trespass were willful violations and that the Bureau sustained its charge that livestock owned by appellants were responsible for a trespass amounting to at least 1,910 AUM's during the 1974-1975 grazing year. Taking into account all the testimony concerning the proper commercial rate of forage to be paid by appellants, he concluded that \$ 4.90 per AUM was a fair and reasonable commercial rate. Accordingly, he determined that appellants' obligation resulting from this willful trespass was $1,910 \times \$ 4.90 \times 2$, a total of \$ 18,718. The Judge found that the Bureau's recommended 20 percent reduction of a license and a 5-year bond was too stringent. He ordered instead that no license or permit authorizing the grazing of appellants' cattle shall be issued until damages are paid, and that for a period of 3 years appellants shall receive licenses or permits restricted to 90 percent of their authorized active use.

Appellants present two contentions in their statement of reasons:

1. The Bureau failed to establish that the trespass of the Siard's livestock was clearly willful under 43 CFR 9239.3-2(c)(2).
2. The Bureau failed to establish with reliable, probative and substantial evidence that the settlement offer figure of 1,910 AUM's accurately reflected the extent of trespass by Siard livestock.

[1] The facts in this case necessitate a finding that the trespass was willful. Appellants knew the number of cattle permitted by their license, and were aware of the requirements of the regulations and the Bureau's policy concerning trespass.

fn. 6 (continued)

the forage value at \$ 4 per animal unit month, or at twice the commercial rate if such amount is the higher."

The Bureau had suspected since 1973 that appellants were grazing an excessive number of cattle and appellants had been informed of this suspicion (Tr. 31). At a meeting held January 28, 1975, the District Manager made it explicitly clear that the Bureau intended "to bring in line livestock numbers with the available resource," and that a lack of cooperation on part of the users would be considered as willful (Tr. 26).

Appellant testified that they did bring animals to their base property so as not to exceed the number allowed by their license on the Federal range. The weight of the testimony, however, proves that appellants made no real effort to control the number of cattle on the Federal range. They apparently had no system for determining whether the number of cattle exceeded that allowed by license. Their policy was "turn them loose and they more or less drift the four corners of the world" (Tr. 89). About the only time appellants knew the number of cattle grazing and their whereabouts was when there was a roundup for sale purposes (Tr. 89). In 1972 appellants had paid \$ 472 for 236 AUM's of forage consumed in trespass.

The duty is upon appellants to comply with the grazing regulations. The fact that there was an excessive number of appellants' cattle on the Federal range is attributable solely to appellants' lack of control of the situation. This is not a case in which the trespass occurs due to or because of extenuating circumstances which might mitigate the offense committed by the grazing licensee. State Director For Utah v. Chynoweth Brothers, 17 IBLA 113 (1974). The repetitive nature of the violations, the large number of animals in trespass, and appellants' demonstrated lack of diligence in taking corrective action warrants a finding of willfulness in their conduct. See Eldon Brinkerhoff, 24 IBLA 324, 83 I.D. 185 (1976); John E. Walton, 8 IBLA 237 (1972).

[2] The second issue involves the settlement offer of 1,910 AUM's and whether that figure is reliable, probative and substantial evidence accurately reflecting the extent of trespass by appellants' livestock. The fact that appellants agreed in a nonadversary settlement negotiation to the figure of 1,910 AUM's is not controlling when the negotiations fail and the case is brought to a hearing in an adversary proceeding.

A proposition made by way of settlement or compromise of a claim, unless accepted as made, is not binding on either party. It does not even operate as an admission of liability, and the rights of the parties are not affected thereby. 15A C.J.S. Compromise and Settlement § 7(1) (1967). Indeed, the Administrative Law Judge stated that the weight of the settlement offer (Exhibit 4) would be considerably reduced because it did have the element of being a compromise offer, and that the witnesses' testimony with respect to the numbers counted, particularly in the presence

of one of the partners, would carry a great deal more weight than an offer partially in compromise (Tr. 29-30). However, in the opinion of this Board, it was error for the Administrative Law Judge to receive any evidence concerning the purported admissions or agreements made by appellants in the course of attempting to negotiate a settlement and thereby avoid a hearing. In an administrative proceeding an offer in settlement is ordinarily not admissible to establish either the fact that the alleged event occurred or the extent thereof. Sternberger v. United States, 401 F.2d 1012, 1017 (Ct. Cl. 1968); Edmund Walton, A-31066 (May 27, 1969). Accordingly, this Board must disregard all evidence relating to the aborted settlement negotiations.

Nevertheless, we are of the opinion that the hearing produced ample evidence which was competent, credible, substantial and material to entitle the Administrative Law Judge to reach the conclusion that the charges had been proven, regardless of whatever weight he may have assigned to the admission recited in the settlement offer.

The Judge heard testimony that Bureau officials had identified as many as 741 adult animals as belonging to appellants (Tr. 18, 22). This testimony was reliable evidence and was virtually uncontradicted by appellants' submission of evidence. Appellants offered only vague statements to the effect that they had not realized they owned so many cattle (Tr. 84). Robert Siard did not disagree with the BLM count at the hearing (Tr. 84, 87, 88). Cesar Siard admitted that they owned as many as 700, counting calves which reached the age of 6 months after they were turned out on the range, or were left there (Tr. 98, 99). Appellants failed to supply evidence which could establish that the total accountable number of their cattle over the one-year term amounted to any less than the number of AUM's calculated by the BLM as a minimum. To the contrary, from most of appellants' own evidence it would appear that the conditions discovered by the Bureau existed at least in the amounts and for the periods specified in the charge.

[3] As of March 11, 1975, the Bureau was confident it had strong evidence that the Siards had run approximately 300 animals in trespass for more than 1 year. The AUM computation would be 300 animals x 12 months = 3,600 AUM's (Tr. 19-20). Therefore, it is beneficial to appellants that the 1,910 AUM figure was the amount charged by the Bureau in its Notice of Violation, and the figure used by the Judge to compute the damages. While we find that the evidence convincing to support the fact that appellants were liable for at least 1,910 AUM's, we recognize that the Administrative Law Judge could not hold them liable for any amount over 1,910 AUM's, as that was the figure charged in the Notice of Violation. We find that number to have been well substantiated by probative evidence adduced at the hearing, and that it is not dependent upon the compromise settlement offer.

The commercial forage rate of \$ 4.90 which was used by the Judge in computing the damages per AUM was not contested on appeal. Having determined that a grazing trespass on the Federal range is clearly willful, the value of the forage consumed shall be computed and assessed at \$ 4 per animal-unit month, or twice the commercial rate if such amount is higher. Where the commercial rate is \$ 4.90, the assessment of damages shall be at the rate of \$ 9.80 per animal-unit month, or 1,910 x \$ 4.90 x 2, a total of \$ 18,718. See John Gribble, 4 IBLA 134 (1971). In light of the facts presented in this case, we find no reason to conclude that \$ 18,718 damages for willful trespass on the Federal range is excessive or not warranted by the evidence. Nor do we consider the restrictions on appellants' future privileges to be an unfair penalty.

Counsel for appellants has urged that they be granted a rehearing as to "whether any trespass by their livestock was wilful and, if so, to what extent." This was the object of the hearing already conducted. The record made then was reflective of sufficient evidence to indicate clearly that the trespass was in fact willful. Moreover, appellants have made no offer of any further evidence which, is proven, would alter the conclusion. Accordingly, the request for rehearing is 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 affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

Joseph W. Goss
Administrative Judge

Joan B. Thompson
Administrative Judge

