

UNITED STATES

v.

PITTSBURGH PACIFIC CO.

IBLA 81-263

Decided November 22, 1982

Interlocutory appeal and cross-appeal from prehearing conference order of Administrative Law Judge John R. Rampton, Jr., limiting issues, assigning burden of proof, and rejecting Government's interrogatories in contest against mineral patent application.

Affirmed in part, reversed in part, and remanded.

1. Mining Claims: Contests -- Mining Claims: Determination of Validity
-- Mining Claims: Patent

An Administrative Law Judge in a mining contest may properly preclude testimony at a hearing on remand on issues of geology, quality, quantity, and continuity of ore, and technology of a proposed beneficiation process where findings on such issues have been made by the Judge at an earlier hearing and approved by the Board on appeal, and no offer of proof is submitted to the Board that would compel an altered finding.

2. Evidence: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity

Where the Board remands a Government contest for additional evidence needed to ascertain whether a mineral patent applicant has made a discovery, the burden of establishing a prima facie case is properly assigned to the Government.

3. Administrative Procedure: Administrative Law Judges -- Administrative Procedure: Hearings -- Mining Claims: Contests -- Rules of Practice: Hearings

An Administrative Law Judge has the authority to permit the use of interrogatories and requests for production of documents in a Government mining contest.

APPEARANCES:

Charles B. Lennahan, Esq., and Michael J. Gippert, Esq., Denver, Colorado, for the U.S. Forest Service; Roxanne Giedd, Esq., and Curtis G. Wilson, Esq., Pierre, South Dakota, for the State of South Dakota, intervenor; Horace R. Jackson, Esq., Rapid City, South Dakota, for contestee.

OPINION BY ADMINISTRATIVE JUDGE LEWIS

The U.S. Forest Service (contestant) has taken an interlocutory appeal pursuant to 43 CFR 4.28 from a prehearing conference order by Administrative Law Judge John R. Rampton, Jr. This appeal is joined by the State of South Dakota, intervenor, and the contestee, Pittsburgh Pacific Company (Pittsburgh), has filed a cross-appeal. The order was issued on December 23, 1980, pursuant to our decision in United States v. Pittsburgh Pacific Co., 30 IBLA 388, 84 I.D. 282 (1977), in which we set aside a decision dismissing

the Government's contest against Pittsburgh's mining claims and remanded the case for development of further evidence on certain issues. The 3-1/2-year delay between the issuance of our opinion and the Administrative Law Judge's prehearing order was occasioned by the intervenor's unsuccessful attempt to overturn our determination that an environmental impact statement is not necessary in a mineral patent application proceeding. South Dakota v. Andrus, 614 F.2d 1190 (8th Cir.), cert. denied, 449 U.S. 822 (1980).

The contestant and the intervenor have appealed from Judge Rampton's prehearing order because they believe that it improperly limits the issues to be considered in the hearing on remand. They further contend that the Judge has improperly assigned them the burden of making a prima facie case on these issues when they already made a prima facie case against the claims in the earlier hearing. The contestant and intervenor also appeal the Judge's rejection of their interrogatories to the contestee, and his requirement that the Government delineate its new evidence on certain issues. In its cross-appeal, the contestee challenges the Administrative Law Judge's authority to permit the use of interrogatories by the Government or to order that they be answered.

Before reviewing the particular provisions of Judge Rampton's order, it may be helpful to cite those portions of the Board's opinion that affect the scope of the proceedings on remand. After the previous hearing in this case, Judge Rampton dismissed contest proceedings against Pittsburgh's 12 iron ore lode mining claims located in the Black Hills National Forest, and held that Pittsburgh's mineral patent application for these claims should be granted. On appeal, the Board set aside the decision of Judge Rampton

and remanded the case, but also held that Judge Rampton's decision "is well reasoned, and except as modified herein, the findings and conclusions are accepted." United States v. Pittsburgh Pacific Co., 30 IBLA at 392, 84 I.D. at 284. The Board explained why further hearing in the case was necessary, as follows:

While Pittsburgh has submitted considerable evidence which indicates that a discovery has been obtained, there remain factors -- some of which may be beyond the control of Pittsburgh -- which could stand in the way of a profitable mining operation. After evaluating the evidence, we conclude that substantial questions exist with respect to adequacy and cost of water supply, additional land, financing, labor costs, and expense of compliance with environmental protection laws.

30 IBLA at 393, 84 I.D. at 285. The Board's decision concluded:

Any formal request to consider new evidence as to ore values, energy availability and costs, environmental matters, or other items of expense should be presented to the Administrative Law Judge for his ruling, prior to the rehearing, in connection with the stipulation at Tr. 865 and the problems discussed in United States v. Estate of Alvis F. Denison, 76 I.D. 233, 251-54 (1969).

On remand, the Administrative Law Judge will have discretion to entertain any other issues which he deems proper, in order to formulate the required findings and conclusions. [Footnote omitted.]

30 IBLA at 414-15, 84 I.D. at 295.

[1] We will first review Judge Rampton's order concerning the scope of the proceedings on remand. This order precludes the introduction of testimony on (1) the geology of the area on which the contested claims are

located; (2) the quality, quantity, and continuity of the iron-bearing material on the claims involved; and (3) the technology of the proposed beneficiation process, including the amenability of the ore to reduction roasting. We agree with Judge Rampton that further testimony on these subjects is unnecessary; the Judge's findings on these subjects have been set forth in detail in his March 12, 1974, decision and subsequently approved by the Board. Although 11 years have now passed since the contest hearing, there is no suggestion in the record that the geology of the area or the quality, quantity, and continuity of the iron-bearing material have changed. The technology of the proposed beneficiation process, if altered at all, has presumably been improved, and hence the Judge's finding that the ore from the claims is amenable to the proposed beneficiation process, including reduction roasting, remains valid.

In affirming Judge Rampton's refusal to allow further evidence on the three aforementioned issues, we acknowledge the holding of Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364 (9th Cir. 1976), that the Secretary has a continuing jurisdiction of the public lands until a patent issues; neither principles of res judicata nor administrative finality will estop him from correcting or reversing an erroneous decision by his subordinates or predecessors in interest. Id. at 1367-68. Had the Forest Service or intervenor submitted on appeal an offer of proof that, if established, would have compelled a reversal of Judge Rampton's findings on any of three aforementioned issues, our decision would be different. The two affidavits submitted by the Forest Service on appeal do not meet this burden. 1/ Judge

1/ We refer specifically to the affidavits of Jack A. Redden and Robert L. Bennett.

Rampton's refusal to allow testimony on these issues is an exercise of the discretion vested in an Administrative Law Judge to conduct a hearing in an orderly and judicial manner. 43 CFR 4.433. In light of the prior hearing, reflected in 1,200 pages of testimony, and the Board decision approving Judge Rampton's findings, further evidence on these issues is unnecessary.

[2] In Judge Rampton's prehearing conference order, the Forest Service and intervenor were assigned the burden of establishing at a minimum a prima facie case on all issues presented at the hearing on remand. Pittsburgh was assigned the ultimate burden of persuasion by a preponderance of the evidence. In addition to the five issues set forth in the Board's decision at 30 IBLA 393, 84 I.D. 285, i.e., water supply, additional land, financing, labor costs, and environmental costs, the order addressed the possibility that evidence on other issues would be received. The order specified that if the Forest Service or intervenor satisfied the Judge that new facts not then in the record and unavailable at the 1971 hearing or changed economic factors existed, evidence could be received on four additional issues: The economic feasibility of the reduction roasting process; the direct cost of mining and beneficiation of ore; 2/ the availability and economic feasibility of transporting the processed ore to market; and the existence of an expanding and viable market for the processed ore.

The Forest Service and the intervenor now appeal that provision of Judge Rampton's order assigning them the responsibility of establishing a prima facie case on all issues on which evidence is presented.

They argue

2/ Such costs should take into consideration the amount, availability, and cost of electric power and natural gas.

that they should not be required to make another prima facie case, having done so at the earlier hearing. They further contend that this Board's decision setting aside Judge Rampton's March 12, 1974, decision indicates that the Board found that Pittsburgh had not overcome the Government's prima facie case. In this they err. If Pittsburgh had not overcome the Government's prima facie case, no further hearing would be required; instead, the claims would have been declared null and void. See United States v. Taylor, 19 IBLA 9, 82 I.D. 68 (1975).

Judge Rampton is correct in assigning to contestee the ultimate burden of persuasion by a preponderance of the evidence for all issues offered into evidence. United States v. Taylor, supra at 23, 82 I.D. at 73. Further, as to the five issues set forth in the Board's decision at 30 IBLA 393, 84 I.D. at 285, the Judge properly assigned to the Forest Service and intervenor the burden of establishing a prima facie case. United States v. Hooker, 48 IBLA 22, 27 (1980). Where an application for a patent has been filed, it is essential for this Department to determine whether all the requisites of the law have been met before a patent may issue. If evidence has not been presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). This is why a further hearing has been necessary in this patent proceeding. United States v. Taylor, supra at 25-26, 82 I.D. at 73-74.

Judge Rampton properly assigned to the Government the burden of establishing a prima facie case on those four additional issues set forth above

in the first paragraph under [2], which the Government seeks to reopen. ^{3/} Because these issues deal with factors subject to considerable change over the past 11 years as, e.g., the cost of mining and beneficiation, these issues are properly subject to reopening. See Ideal Basic Industries, Inc. v. Morton, supra.

[3] The final issue on appeal is whether Judge Rampton properly held that the use of interrogatories and requests for production of documents was authorized in a Government contest proceeding. Having concluded that such use was authorized, Judge Rampton held that the interrogatories and requests for production submitted by the Government were "either immaterial in the light of the rulings made or so broad in scope as to the areas of inquiry on which evidence may be received as to constitute little more than a fishing expedition" (Prehearing Conference Order at 4). Rulings on interrogatories involving new or additional evidence not in the record were withheld pending submissions of more specific allegations by the Government and intervenor. While we agree with Judge Rampton that the use of interrogatories and requests for production is authorized in a Government contest proceeding, we reverse his conclusion that the Government's interrogatories and requests were, as a whole, immaterial and overly broad in scope; we further reverse his decision that rulings on interrogatories involving new or additional evidence not in the record be withheld pending submissions of more specific allegations. Our reasons follow.

^{3/} For the sake of clarity, these four issues are repeated: The economic feasibility of the reduction roasting process; the direct cost of mining and beneficiation of the ore; the availability and economic feasibility of transporting the processed ore to market; and the existence of an expanding and viable market for the processed ore.

Judge Rampton thus set forth his authority to permit discovery in Government contests at pages 3-4 of the prehearing conference order:

In my view, discovery proceedings are one of the necessary aids in the conduct of an orderly and judicious hearing. Proper use of discovery techniques enables the parties to properly present their respective evidence and arguments and ensures against the elements of surprise and consequent delay. Within certain limits imposed by statute or regulation, discovery proceedings are to be encouraged wherever the ends of justice would be served.

I have authority to permit discovery under my "general authority to conduct the hearing in an orderly and judicious manner." 43 CFR 4.433. I can also make orders on such matters as may aid in the disposition of the proceedings. 43 CFR 4.452-1(a).

While I do not have authority to issue subpoenas for discovery purposes under 43 CFR 4.452-4, contestant's interrogatories do not require subpoenas. They elicit information from parties to the proceedings and this form of discovery is distinguishable from depositions and interrogatories requested of persons who are not parties to the proceedings and for which subpoenas might be required.

I also have the power to hold prehearing conferences and obtain among other things, admissions of fact. 43 CFR 4.452-1. This authority can reasonably be construed to authorize interrogatories and documents production in lieu of a prehearing conference where subpoenas are not required.

Rulings of the Interior Board of Land Appeals in the case of United States v. Robinson, 21 IBLA 363, 388 (1975), are in point and are consistent with the above conclusions.

Contestee argues, however, that the applicable regulations preclude the use of discovery techniques such as interrogatories. Regulation 43 CFR 4.452-4 is cited by contestee as setting forth the authority of the Administrative Law Judge in mining claim contests:

§ 4.452-4 Authority of administrative law judge.

The administrative law judge is vested with general authority to conduct the hearing in an orderly and judicial manner,

including authority to subpoena witnesses and to take and cause depositions to be taken for the purpose of taking testimony but not for discovery in accordance with the act of January 31, 1903 (43 U.S.C. 102-106), to administer oaths, to call and question witnesses, and to make a decision. The issuance of subpoenas, the attendance of witnesses and the taking of depositions shall be governed by §§ 4.423 and 4.26 * * *. [Emphasis added.]

Contestee points to the complete absence of statutes or regulations authorizing the use of discovery in Government contests and maintains that 43 CFR 4.452-4 should not be viewed as a limitation on an otherwise unbridled use of discovery. Counsel carefully sets forth the authority of other Boards within the Office of Hearings and Appeals to permit discovery and to order sanctions; citations to the applicable regulations are provided. The express grant of such authority to these Boards, counsel maintains, leaves no room for the inference of similar authority in the Administrative Law Judge.

Use of discovery is uncommon in mining contests and is only infrequently litigated before the Board. In United States v. Robinson, 21 IBLA 363, 82 I.D. 414 (1975), this Board held that an Administrative Law Judge could properly issue orders providing for discovery in lieu of a prehearing conference. Robinson approved the use of interrogatories not requiring the issuance of subpoenas and held that the issuance of orders in furtherance of such interrogatories was within the statutory and regulatory authority of the Administrative Law Judge. The Board acknowledged, however, that an Administrative Law Judge lacked the authority to issue a subpoena duces tecum or to issue a subpoena directing the attendance of witnesses at the taking of depositions for purposes of discovery.

Interrogatories were employed and their answers admitted into evidence in United States v. Kaycee Bentonite Corp., 64 IBLA 183, 89 I.D. 262 (1982). Use of this discovery tool was unchallenged in Kaycee and provided the parties with a useful device to narrow and clarify issues and to ascertain information relevant to the subject matter of complex litigation.

Prior case law of the Federal courts supports Judge Rampton's view that the use of interrogatories and requests for production is authorized in an administrative hearing, despite the absence of express statutory or regulatory authority. In NLRB v. Rex Disposables, Division of DHJ Industries, Inc., 494 F.2d 588, 591-92 (5th Cir. 1974), the court held that the National Labor Relations Board (NLRB) should permit discovery when good cause is shown to the Board in order that the rights of all parties may be properly protected. The NLRB has no statute or regulation expressly authorizing discovery. NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 858 (2d Cir. 1970); Electromec Design and Development Co. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969). Similarly, in Trojan Freight Lines, Inc. v. NLRB, 356 F.2d 947, 948 (6th Cir. 1966), the court held that the denial of an application to take a deposition for discovery purposes was within the discretion of the NLRB. See also NLRB v. Wichita Television Corp., 277 F.2d 579 (10th Cir.), cert. denied, 364 U.S. 871 (1960); NLRB v. Gala-Mo Arts, Inc., 232 F.2d 102 (8th Cir. 1956). This same policy of entrusting the use of discovery to the discretion of the Administrative Law Judge is found in Artrip v. Califano, 569 F.2d 1298, 1299 (4th Cir. 1978). There, a claimant for "black lung" benefits was denied his request that interrogatories be submitted to a treating physician. The court

set forth its policy toward discovery succinctly: "The Act and regulations providing for the administration of 'black lung' claims do not provide specifically for the granting of interrogatories. Therefore, the determination of when to approve such requests was within the discretion of the Administrative Law Judge, and we perceive no abuse of discretion in his ruling." Judge Bazelon writes in Smith v. Schlesinger, 513 F.2d 462, 475 n.46 (D.C. Cir. 1975), that Professor Davis' view in favor of discovery in administrative proceedings was followed by the Administrative Conference of the United States and distinguished commentators. Finally, in McClelland v. Andrus, 606 F.2d 1278, 1286 (D.C. Cir. 1979), the circuit court held that discovery must be granted if in the particular situation a refusal to do so would so prejudice a party as to deny him due process.

We hold that the above cited cases demonstrate that Judge Rampton had ample authority to permit the use of interrogatories and requests for production of documents in the instant case. Because neither the request for answers to interrogatories nor the request for production is backed by the Department's subpoena power, 43 U.S.C. §§ 102-106 (1976), Judge Rampton's sanctions for a party's failure to obey an order compelling discovery may be guided by Rule 37(b)(2)(A)-(C) of the Federal Rules of Civil Procedure.

While we openly acknowledge that the Federal Rules of Civil Procedure are not expressly applicable to administrative hearings, McClelland v. Andrus, *supra* at 1285, we believe that the rules and the case law derived therefrom provide helpful guidance in regulating the use of discovery. Rule 26(b) limits the scope of discovery to matters, not privileged, which are relevant

to the subject matter involved in the pending action. A very similar rule was before the United States Supreme Court in Hickman v. Taylor, 329 U.S. 495, 507 (1947), occasioning Justice Murphy to remark, "No longer can the time-honored cry of 'fishing expedition' serve to preclude a party from inquiring into the facts underlying his opponent's case." (Footnote omitted.) We note that Judge Rampton found the Government interrogatories and requests for production immaterial and so broad in light of his rulings as to constitute little more than a fishing expedition. We believe the standard applied by Judge Rampton in rejecting the Government's discovery requests was incorrect. While we do not intend to rule on the propriety of each of the Government's requests, we fail to see how its inquiry into contestee's water supply, land availability, financing, labor needs, and environmental costs can be described as immaterial or broad. These are the very issues for which this Board remanded this case for hearing.

Any use of discovery to ascertain the economic feasibility of the reduction roasting process, the direct costs of mining and beneficiation, the availability and economic feasibility of transportation, and the existence of a market for processed ore should precede the submission of more specific allegations on these topics to the Judge. Such discovery should aid the Government's formulation of these allegations. Rulings on any objections to such requests must necessarily precede such submissions, contrary to the prehearing conference order.

We intentionally abstain from ruling on the propriety of any individual interrogatory or request for production. Contestee's objections and Judge Rampton's rulings lack the specificity necessary to make an informed review.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the prehearing order is affirmed in part, reversed in part, and the case remanded for further action consistent with this opinion.

Anne Poindexter Lewis
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Gail M. Frazier
Administrative Judge

