1986

S. H. Bennion v. Gulf Oil Corporation, A Pennsylvania Corporation and the Utah State Board of Oil, Gas And Mining, An Agency of the State of Utah : Reply To Petition For Rehearing

IN THE SUPREME COURT OF THE STATE OF UTAH

S. H. BENNION,	:	
Plaintiff/Appellant,	:	
vs.	:	
GULF OIL CORPORATION, a Pennsylvania corporation, and THE UTAH STATE BOARD OF OIL, GAS AND MINING, a agency of the State of Utah,	:	Case No. 19144
Defendants/ Respondents.	:	

REPLY TO PETITION FOR REHEARING

PETITION FOR REHEARING OF
THE APPEAL FROM A JUDGMENT OF THE THIRD JUDICIAL DISTRICT COURT
THE HONORABLE TIMOTHY R. HANSON

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STATEMENT OF THE NATURE OF THE CASE

Respondents, the Utah State Board of Oil, Gas and Mining (hereinafter "Board") and Gulf Oil Corp. (hereinafter "Gulf"), filed a petition to rehear the matter decided by this Court in Bennion v. Gulf, No. 19144, filed on August 19, 1985. This matter was an appeal of a Summary Judgment granted in favor of Gulf and the Board holding that the Board had proceeded and acted within its authority in allowing a test well to be redesignated as a production well within a 640 acre drilling unit. On appeal, this Court reversed the lower court, vacated the Board's earlier Order and remanded the case to the Board with the instruction to enter an Order that the second well drilled by Gulf in the 640 acre unit of Section 8, Township 3 South, Range 5 West, Duchesne County, Utah, is and has been producing in violation of Utah Code Ann. Section 40-6-6(e) (1953). Further, this Court relieved Bennion of all obligations to share in the cost of drilling the second well.

In addition to the Board's lack of statutory authority, this Court found that there was insufficient evidence to demonstrate that it was more equitable and reasonable to shut in the first well and redesignate the second well as the production well. Subsequent to that decision, Gulf and the Board both filed petitions for rehearing in this Court.

ARGUMENT

I. THE PROPER STANDARD IN DETERMINING WHETHER TO GRANT A PETITION FOR REHEARING IS WHETHER THE COURT HAS OVERLOOKED OR MISAPPREHENDED SOME MATERIAL MATTER OF LAW OR FACT WHICH HAD IT BEEN GIVEN CONSIDERATION, WOULD LIKELY HAVE BROUGHT ABOUT A DIFFERENT RESULT.

Gulf and the Board each respectively filed a petition for rehearing with this Court after this Court had handed down its decision reversing the District Court and vacating the Board's previous order. Rule 35 of the Utah Rules of Appellate Procedure, which governs a petition for rehearing, states that the petition shall state with particularity the points of law or fact which the petitioner claims the Court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner so desires.

> The purpose of a petition for rehearing...is to direct the court's attention to some material matter of law or fact which it has overlooked in deciding a case, and which, had it been given consideration, would probably have brought about a different result.

National Labor Relations Board v. Brown and Root, 206 F.2d 73, 74 (8th Cir. 1953). See also, Anderson v. Knox, 300 F.2d 296 (9th Cir. 1962). A petition for rehearing should be allowed only in rare instances. Western Pacific Railroad Corp. v. Western Pacific Railroad Co., 345 U.S. 247, 270 (1953).

In addition, the petition for rehearing should not present arguments on the merits, but rather, arguments in favor of the petition for rehearing. The petition is merely seeking leave to argue and should confine itself to a statement of the points overlooked. Gershenhorn v. Walter R. Stutz Enterprises, 306 P.2d 121 (Nev. 1957).

> It should be brief and it should not be argumentative; it should point to the conflict created by or the controlling matter overlooked in the original decision. It should not be expected to also serve the role of persuading the court how the conflict or error should be resolved. That is the object of resubmission. The object of the petition is only to show that the petitioner is entitled to a rehearing, not that he is entitled to a different decision on the merits.

Id., 306 P.2d at 121.

Counsel should not be permitted to argue their cases in a piecemeal fashion. Moreover, where counsel has merely failed to previously argue a point in their briefs or their oral argument, such argument will not be considered when raised in the petition for rehearing. Smith v. Crocker First National Bank of San Francisco, 152 Cal. App. 2d 832, 314 P.2d 237 (1957).

Gulf and the Board, for the reasons stated below have failed to show that this Court overlooked or misapprehended any

material law or fact which would have changed the outcome of it decision and their petition for rehearing should be denied.

II. THE BOARD HAS NO BASIS TO CLAIM THAT THE COURT OVERLOOKED MATERIAL LAW OR FACTS WHERE IT NEITHER FILED A BRIEF NOR ARGUED ORALLY.

The Board and Gulf had ample opportunity during the hearing before this Court to set forth the facts and arguments which they deemed important in consideration of the merits of their case. However, the Board did not file a brief with this Court nor did it participate in oral argument before this Court. Rather, the Board's first participation in this appeal was in the form of a petition for rehearing after this Court had already heard and decided the matter.

The court in Carr v. Federal Trade Commission, 302 F.2d 688 (1st Cir. 1962), in facts analogous to the case at bar, found that an agency would not be granted a rehearing where it had opportunity to argue from agency orders but failed to bring those orders to the attention of the Court. The court stated:

> But a court cannot be expected to rummage among administrative writings and consent orders sua sponte when the party most directly involved and knowledgeable makes no suggestion that anything would be found there. For a governmental agency best familiar with its own practice with respect to a matter directly in issue, and now said to be of paramount importance, to make no mention of the subject until after it had

> lost a case on another ground, if deliberate, is a breach of duty to the court, if inadvertent, is still inexcusable. The Commission's petition for rehearing raising this allegedly vital point contains no mention of why it was first developed at this late date, let alone any apology for doing so.

Id. 302 F.2d at 692.

No reason is given by the Board for its failure to file a brief or argue orally before the Court any of its assertions contained in its petition for rehearing. The Board's delay in making any argument at all should preclude the Board from now arguing in the petition for rehearing.

III. THE COURT DID NOT OVERLOOK OR MISAPPREHEND ANY MATERIAL FACTS PRESENTED AT THE INITIAL HEARING AND PETITIONERS ARE NOT ENTITLED TO A REHEARING.

Gulf and the Board claim that this Court misapprehended the following statement in the record by Gulf's witness, Mr. Mark Anthony.

> We have no idea what the extent of the reservoir is. We can't know that at this time. We realize that this whole field is -- apparently the reservoir due to the geological structure of the thing -- it's almost impossible to determine what's going to happen from one well to the next as far as correlating sands and production.

(Bennion Reply Brief at p. 10.)

Gulf and the Board claim that Mr. Anthony's statement was referring to another well, the Josephine Voda No. 2 well, rather than the Albert Smith No. 2 well, which is the subject of this action.

Bennion did not misstate the record. The Albert Smith No. 2 well was the subject matter of the hearing where the statement was made. Mr. Anthony's statement pertains to the geological structure of the entire reservoir and not just one well. Mr. Anthony states that due to the geological structure of the field it is almost impossible to predict the production from one well to the next. This statement would apply to the Albert Smith No. 2, the Josephine Voda No. 2 well and any other well drilled within the field (the Albert Smith No. 2 well, although not adjacent to the Josephine Voda No. 2 well, is only one section away and is clearly within the same field). Mr. Anthony's statement merely indicates that the Board had insufficient evidence to demonstrate that it was more equitable or reasonable to shut in the Albert Smith No. 1 well and redesignate the Albert Smith No. 2 well as the production well due to the uncertainty regarding the field and underlying reservoir. This is further illustrated by the fact that at the time of the hearing in the District Court, the Albert Smith No. 2 well was producing an average of only 640 barrels per month compared to the 850 barrels per month that was previously being

produced by the Albert Smith No. 1 well. (Reply Brief of Bennion at p. 9.) This Court's determination that the Board had insufficient evidence to determine that the Albert Smith No. 2 well should be designated as the production well for Section 8 is easily substantiated by the record.

Moreover, the alleged misconstrued quote was included in Bennion's reply brief. (Reply Brief of Bennion at p. 10.) Gulf and the Board had ample opportunity to argue the applicability of the quote at oral argument. The fact that they chose not to do so is not grounds for rehearing, but merely indicates Gulf and the Board's attempt to reargue the issues already resolved by this Court.

This Court found that the evidence was not sufficient to support the Board's action in determining that the Albert Smith No. 2 well should become the production well for Section 8. In addition, this Court stated that its decision would be the same regardless of whether the Board found that the Albert Smith No. 2 well could be a commercial well for reasons stated in Argument IV.

Petitioners claim that this Court overlooked the protection being afforded to Mr. Bennion's correlative rights is again improper in the petition for rehearing and is without merit. Gulf, in its original brief filed with this Court, argued that the correlative rights of Mr. Bennion were being

protected. Gulf and the Board, in their petitions for rehearing, again argue that Bennion's correlative rights were being protected, and further attempted to show this Court that Mr. Bennion would be receiving greater returns from the Albert Smith No. 2 well than he was previously receiving from the Albert Smith No. 1 well. Gulf and the Board are merely attempting to reargue their case on the merits.

Under the Board's order, Mr. Bennion's correlative rights were not protected as evidenced by the failure of the Board to follow the express statutory mandates of Utah law. Those mandates were adopted in order to provide for the efficient extraction of the minerals and oils and to provide for the protection of interest owner's correlative rights. Utah Code Ann. §40-6-6(d) (1953). This is further indicated by the fact that prior to "shutting in" the Albert Smith No. 1 well, Mr. Bennion was receiving 100% of his interest in that well. In the Albert Smith No. 2 Well, Bennion would receive only an one-eighth royal interest for a substantial period of time due to the Board's order that Gulf recoup its drilling costs for this second well from 7/8ths of Bennion's interest.

Gulf and the Board's claim that this Court misunderstood the statement by Mr. Anthony and the facts presented in the case, is merely an attempt by Gulf and the Board to reargue the merits of the case and is improper in a petition for rehearing.

This Court has not overlooked or misapprehended the evidence presented in the initial hearing and no grounds for rehearing exist in this matter. The petition for rehearing filed in this case should therefore be denied.

IV. THIS COURT DID NOT OVERLOOK OR MISAPPREHEND THE BOARD'S PLAN OR FINDINGS OF FACT, BUT RATHER, FOUND THAT THE BOARD'S ACTIONS DID NOT COMPLY WITH UTAH'S STATUTES.

Gulf and the Board, in their petitions for rehearing, argue that this Court overlooked and failed to perceive the Board's statutory authority under Section 40-6-6(d) to authorize the drilling of additional wells pursuant to a "reasonably uniform plan in the pool or any zone thereof". This argument by petitioners is incorrect and does not justify Gulf and the Board's motion for rehearing.

This Court, in deciding the case, not only recognized the authority granted in Section 40-6-6(d), but even cited that section in its decision. After citing the section, this Court found that the Board's order "did not authorize the drilling of additional wells on a uniform plan in the pool or any zone thereof". Gulf and the Board's claim that this Court overlooked the above section is clearly unfounded as evidenced by this Court's citation and consideration of Section 40-6-6(d) in the Court's opinion itself.

Gulf and the Board further allege that the Board was acting pursuant to a plan and that this Court failed to perceive the Board's plan. This claim by Gulf and the Board is again incorrect and improper in this petition for rehearing. Gulf and the Board had every opportunity to present their argument to this Court. Their claim is that the Board acted pursuant to a plan in authorizing for drilling and designating the Albert Smith No. 2 Well as the producing well for the unit. As previously noted, the Board declined to file any brief with this Court or to make any argument regarding any matter when given the opportunity before this Court. Gulf, in its brief, did not argue that the Board was acting pursuant to statutory authority and pursuant to a reasonably uniform plan. As stated above, issues which were not raised in the brief or in oral argument are not properly brought up for the first time in a motion for rehearing.

Gulf and the Board, by claiming in their petition for rehearing, that the Board was acting pursuant to a plan and that the Court failed to perceive such plan, are simply trying to reargue the merits of the case, rather than to show that this Court has overlooked some material law or fact which would change the outcome of the case. In addition, Gulf and the Board's claim that the Board was acting pursuant to a reasonably uniform plan is without merit.

Gulf and the Board claim that the Board was acting pursuant to a plan which was evidenced by the orders entered by the Board regarding Section 8. Petitioners would have this Court believe that the Board's actions regarding Section 8, only one of many sections within the Altamont Bluebell Region, constitutes the Board's reasonably uniform plan in the pool or any zone thereof. Petitioners, in making such an argument, seem to be placing the horse before the cart. The statutory authority granted in Section 40-6-6(d) states that the Board may "authorize the drilling of additional wells if done pursuant to a reasonable uniform plan in the pool or zone thereof". The statute contemplates the existence of a plan prior to the drilling of additional wells. In this case, the Board authorized the drilling of an additional well prior to any formulation or adoption by way of modification of the Board's original order in 139-8 which had adopted a uniform plan for the drilling of only one well per section.

Gulf and the Board's characterization of the Board's actions as being the plan itself, is not in harmony with the mandates of Section 40-6-6(d) and does not support the Board's actions in this matter. That was exactly the finding by this Court where it stated in its opinion that the Board's order did not authorize the drilling of additional wells on a "uniform plan in the pool or any zone thereof".

This Court has not [illegible] the statutory authority or which plan adopted by the Board, but rather, has considered such statutory authority in determining that the Board failed to act pursuant to a reasonably uniform plan. Gulf and the Board claim that this Court overlooked the statutory authority and failed to perceive the Board's plan. This is simply an attempt by petitioner to reargue its case and is not in harmony with the purposes of Rule 35 of the Utah Rules of Appellate Procedure. Accordingly, petitioners' motion for rehearing should be denied.

DATED this 14 day of March, 1986.

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By [signature]
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CERTIFICATE OF SERVICE

I hereby certify that I caused to be hand delivered a true and correct copy of the foregoing Reply to Petition for Rehearing this 14th day of March, 1986 to the following:

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