COMMONWEALTH OF PENNSYLVANIA

SHANE BEEGLE, t/d/b/a JUNIATA HARDWOODS	:	BEFORE THE BOARD OF CLAIMS
VS.	:	
COMMONWEALTH OF PENNSYLVANIA, PENNSYLVANIA GAME COMMISSION	:	DOCKET NO. 2095

FINDINGS OF FACT

1. The Claimant is Shane Beegle, t/d/b/a Juniata Hardwoods. (Record)

2. The Defendant is the Commonwealth of Pennsylvania, Pennsylvania Game Commission. (Record)

3. The Claimant entered into two (2) timber sale agreements dated June 8, 1994 to purchase timber on State Game Lands in Somerset County. (Def. Ex. 1, 2)

4. Agreement No. 104-94-1 is entitled "Savage Run" and included three (3) blocks totaling 933,200 board feet of saw logs and 730 tons of pulp wood for which Claimant was to pay $250,000. (Def. Ex. 1)

5. Agreement No. 104-94-2 is entitled "Bearwallow Mtn." and contained nine (9) blocks totaling 1,702,000 board feet of saw logs and 5,260 tons of pulp wood for which Claimant was to pay $350,000. (Def. Ex. 2)

6. Both Agreements state clearly "Volume estimates and/or percentages are not guaranteed and no volume adjustments will be made." (Def. Ex. 1, 2)

7. Both Agreements state "Payment in full must be made for the timber on the block/strip or blocks/strips where the Buyer will start logging operations. Before logging operations may be started on any of the remaining cutting blocks/strips the timber on the block/strip must be paid for in full and logging operations including clean-up must be completed to the satisfaction of the officer in charge on one cutting area before operations may be started in another. Payment to be made to the officer in charge." (Def. Ex. 1, 2, pg. 2, para. 3)

8. Mr. Marshall Trowbridge was the Regional Forester for the South Central Region for the Game Commission and was the officer in charge. (N.T. 92; Def. Ex. 1, 2, pg. 4)

9. Mr. Tom Lewis was the Assistant Regional Forester for the South Central Region of the Game Commission. (N.T. 128)

10. Pursuant to Agreement No. 104-94-1 "Savage Run", the Claimant provided Defendant with a letter of credit in the amount of $15,000 as a guarantee of faithful performance of the conditions in the Contract. (Def. Ex. 1, pg. 11, para. 32)

11. Pursuant to Agreement No. 104-94-2 "Bearwallow Mtn.", the Claimant posted security in the amount of $20,000 as guarantee of faithful performance of the conditions in the Contract. (Def. Ex. 2, pg. 11, para. 32)

12. Paragraph 32, Page 12 of the Contract states that the contract may only be changed by a memorandum signed by all parties. (Def's Ex. 1, 2, pg. 12, para.32)

13. On June 9, 1994, Claimant forwarded payment for Block 3 of the Savage Run Contract to Defendant and commenced logging operations. (N.T. 51, 52; Pltf. Ex. A)

14. On July 29, 1994, Claimant forwarded payment to the Defendant for Block 2 of the Savage Run job, and proceeded with logging operations. (N.T. 51, 52; Pltf. Ex. A)

15. Sometime after Claimant completed Block 3, and paid for Block 2, a discussion was had with Mr. Trowbridge regarding Claimant's contention that the board feet taken from this job was approximately 25% less than that specified in the Contract, and that maybe Defendant made a mistake with regard to its estimates. (N.T. 63, 64)

16. During the time that Claimant was cutting Block 2, he again indicated to Mr. Trowbridge that the board feet being removed didn't seem to coincide with the amount set forth in the Contract. (N.T. 63, 64)

17. Concurrently, Claimant informed Mr. Trowbridge that there were two (2) days of cutting remaining on Block 2 and that he was going to start on Block 1. (N.T. 64, 65)

18. On August 31, 1994, after Claimant had cut a portion of Block 1 of the Savage Run job, and had moved on to the Bearwallow Mtn. job, in order to clear a road, Mr. Trowbridge told Claimant that he had to pay for half of Block 1 within a couple of days with the balance due within a week to ten (10) days. (N.T. 67, 117)

19. Mr. Trowbridge further told Claimant that he would have to "eat it or take the loss" between the estimates in the Contract and the amount of timber actually being removed. (N.T. 66)

20. Claimant threatened to forfeit the bond on the Savage Run job rather than finish cutting it. (N.T. 66)

21. Mr. Trowbridge responded "No, I'll find someway to shut you down." (N.T. 66)

22. Claimant further indicated that he would put a check in the mail in the morning or have all of his equipment moved off of Block 1 of the Savage Run job. (N.T. 67)

23. The August 31, 1994 conversation took place on Bearwallow Mtn. where the Claimant had begun logging operations. (N.T. 65-67, 117)

24. On Thursday, September 1, 1994, Claimant testified that his wife placed a check in the mail for the amount of $48,500, representing one-half of the payment for Block 1. (N.T. 68-70; Pltf. Ex. E)

25. Claimant did not move his equipment off the Savage Run job, but rather returned to Block 1 and continued cutting for another four and one-half days. (N.T. 72)

26. Labor Day, a national holiday, was Monday, September 5, 1994. (Pltf. Ex. F)

27. Mr. Trowbridge "assumed the authority" as Administrator of the Contract and authorized his assistant, Mr. Lewis, to remove Mr. Beegle from the Savage Run job due to lack of payment. (N.T. 111, 112, 114)

28. On September 8, 1994, Mr. Tom Lewis, the Chief Game Warden, and two Pennsylvania State Police cars went to Block 1 of the Savage Run job in order to escort the Claimant off of the Pennsylvania Game Commission property due to not having received partial payment. (N.T. 74)

29. At that time, Claimant indicated to Mr. Lewis and the others present that the check had been mailed and he offered to stop cutting until Defendant received the check. Mr. Lewis responded in the negative and escorted Claimant and his equipment off the property. (N.T. 74, 75)

30. Paragraph twenty-five (25) of both the Savage Run and Bearwallow Contracts state "Upon receipt of authority from the Executive Director, the officer in charge may immediately suspend, in writing, all operations on the sale area, to include the use of DER roads and the removal of felled DER timber, removal of cut Commission material, if the conditions contained herein shall be disregarded. Failure to comply with any of said conditions and requirements shall be sufficient cause for the termination of this agreement upon written notice by the Executive Director. In the event of such termination, the Buyer shall be liable for all damages sustained by the Commission and DER arising from the Buyer's operations hereunder." (Def's Ex. 1, 2, pg 7, para.25)

31. Subparagraph D of the Agreements state "All or any part of the operation on the sale area including the removal of felled timber may be suspended upon written notice by the officer in charge if any condition or requirement cited in this plan is disregarded by the operator." (Def. Ex. 1, 2, pg. 10, subpara. D)

32. Paragraph thirty-two (32) of both Contracts state "Failure to comply with any of the conditions of the contract herein mentioned shall result in cancellation of the agreement and forfeiture of the performance bond to cover damages sustained by the Commission and the Commission may declare the Buyer ineligible to purchase State Game Lands timber." (Def. Ex. 1, 2; Para. 32, pg 12)

33. Mr. Don Madl was Executive Director at all times relevant to this litigation. (N.T. 110)

34. There was no testimony that Mr. Madl ever gave authority to Mr. Trowbridge to suspend operations. Instead, Mr. Trowbridge stated that "As the officer in charge of the sale and the administrator of the contract, I assumed the authority. And I believe I'm given that, you know, that freedom to, you know, to administer the sale contract." (N.T. 111, 112)

35. Mr. Lewis, in his testimony, stated that he had the authority to suspend the operations without written authority if the situation requires an immediate remedy. (N.T. 136)

36. Prior to his eviction from the Savage Run job, Claimant did not receive a suspension notice in writing. (N.T. 111)

37. On September 9, 1994, Mr. Trowbridge wrote a letter to the Claimant suspending Claimant's operations on Savage Run and Bearwallow. The letter set forth that if payment in full for Block 1 of Savage Run and Block 7 of Bearwallow was not made within thirty (30) days, the Contract would be terminated and legal action would be initiated to recover sustained damages. (Def. Ex. 7)

38. Mr. Trowbridge testified that he "believes" that he received a check for half of Block 1 on September 12, 1994. (N.T. 115)

39. On September 10, 1994, the Claimant contacted his bank to stop payment on the check representing payment for half of Block 1. (N.T. 76)

40. Claimant and Defendant had conversations with regard to resumption of operations of Savage Run and Bearwallow. Claimant indicated he had no intention of returning to the job. (N.T. 99, 100)

41. On May 30, 1995, John A. Byerly, Chief of the Division of Forestry, wrote to Claimant and stated that Claimant had removed $109,000 worth of timber without paying and that he had breached the Contract and that the Department intended to rebid both Contracts. (Def. Ex. 10)

42. Mr. Byerly testified that the May 30, 1995 correspondence did not terminate the Savage Run or Bearwallow Contract. (N.T. 148)

43. At the time Claimant was removed from Block 1 of Savage Run, he had cut for nine and a half days, but not all of the wood that was cut was removed, since Claimant was evicted while in the process of cutting. (N.T. 65, 72)

44. Based on Mr. Lewis' calculations, Claimant removed approximately 14,430 board feet from Block 7 of Bearwallow. (N.T. 140)

45. The Bearwallow job was ultimately rebid by the Leydig Lumber Company for $115,000. (N.T. 101, 102; Def. Ex. 12)

46. The Claimant initially brought this action in Somerset County Court of Common Pleas asking for an injunction to prohibit the Defendant from securing the letters of credit. The case was subsequently transferred to the Board of Claims where Respondent counterclaimed for a loss of $297,500. (Record)

CONCLUSIONS OF LAW

1. Any contract may be modified with the consent of both parties.

2. A written Contract prohibiting a non-written modification may nevertheless be modified by a subsequent oral, agreement; however, there must first be an intent to waive the Contract requirement that amendments be in writing.

3. Mr. Trowbridge's permission for Claimant to begin cutting Block 1 of the Savage Run job and Claimant's commencement of logging operations on the Bearwallow job amounted to an intention to waive the Contract requirements that amendments be in writing and was an oral modification of the Contract.

4. Defendant materially breached both Contracts by improperly suspending Claimant's logging operations.

5. Defendant could not recover damages under Paragraph 25 of the Agreement since it did not properly terminate the Claimant.

6. Claimant's performance bond in the amount of $15,000 on the Savage Run job was properly forfeited to Defendant.

7. Claimant's performance bond in the amount of $20,000 for the Bearwallow Mtn. job was properly forfeited to Defendant.

OPINION

This matter was called to hearing before a Panel of the Board of Claims, composed of Frederick D. Giles, Esquire, Attorney Member, and Charles A. Kline, Jr., P.E., Engineer Member. The Panel Report has been submitted and reviewed.

Claimant, Shane Beegle, t/d/b/a Juniata Hardwoods, entered into two Contracts with the Defendant, Commonwealth of Pennsylvania, Pennsylvania Game Commission, to cut and remove timber from two areas of State Game Lands, Savage Run and Bearwallow Mtn. The total price, under these two Contracts, was worth $600,000. (Def. Ex. 1, 2) Of the $600,000, Defendant received a total of $302,500 from the following sources, $152,500 in payments from Claimant, $35,000 from Claimant's forfeited letters of credit, and $115,000 from the rebid of the Contract on Bearwallow Mtn.

Claimant initially sought an injunction in Somerset County Court to prevent the forfeiture of the two letters of credit. The matter was transferred to the Board of Claims and the Defendant counterclaimed for $297,500, the difference between the original contract amounts and the amounts received by Respondent as explained above. (Record).

Both the Savage Run and Bearwallow Mtn. Contracts state “Payment in full must be made for the timber on the block/strip or blocks/strips where the Buyer will start logging operations. Before logging operations may be started on any of the remaining cutting blocks/strips the timber on the block/strip must be paid for in full and logging operations including clean-up must be completed to the satisfaction of the officer in charge on one cutting area before operations may be started in another. Payment to be made to the officer in charge.” (Def’s Ex. 1, 2, pg. 2, para. 3)

Claimant is alleging that the Contract was modified based on conversation that took place between Claimant and the officer in charge, Marshall Trowbridge, on August 31, 1994.

Claimant's position is predicated upon the right to verbally amend a written agreement which contained a provision stating that it can only be amended in writing. Contracts prohibiting a non-written modification may, nevertheless, be modified by a subsequent oral agreement; however, there must first be an intent to waive the contract requirement that amendments be in writing. Douglas vs. Benson, 294 Pa. Super. 119, 439 A.2d 779 (1982). Further, a party, by his or her conduct, may modify a written agreement without writing if and when his or her conduct clearly shows an intent to waive the provision prohibiting non-written modification. Schwoyer v. Fenster Macher, 251 Pa. Super. 243, 380 A.2d 468 (1977). It is clear from the conduct of both parties that they intended to waive the provisions of the Contract prohibiting non-written modification and orally modified the Contract to allow Claimant to commence cutting Block 1 of the Savage Run job and to commence logging operations on the Bearwallow job without pre-payment.

A review of the testimony surrounding this August 31, 1994 conversation shows that Mr. Trowbridge was aware that Claimant had begun cutting Block 1 of the Savage Run job and began logging operations on the Bearwallow Mtn. job without fully paying for them as set forth on Page 2, Paragraph 3 of the Agreements. (N.T. 65, 66, 117). Mr. Trowbridge told the Claimant that he could pay for half of Block 1 within a couple of days and pay the balance within a week to ten days. (N.T. 65, 66, 117). At that point, the Contract was orally modified, allowing Claimant to commence cutting Block 1 of the Savage Run job and commence logging operations on the Bearwallow job without pre-payment. The Claimant testified, in a credible fashion, that his wife placed a check in the mail on Thursday, September 1, 1994, in the amount of $48,500, representing one half of the payment for Block 1. (N.T. 68-70; Pltf's Ex. E) Claimant continued work on the Savage Run job until September 8, 1994, when Mr. Tom Lewis, Chief Game Warden, and two Pennsylvania State Police cars went to Block 1 of the Savage Run job in order to escort the Claimant

and all of his equipment off of the Pennsylvania Game Commission property, due to not having received the partial payment. (N.T. 74)

Paragraph twenty-five (25) of both contracts state: "Upon receipt of authority from the Executive Director, the officer in charge may immediately suspend, in writing, all operations on the sale area, to include the use of DER roads and the removal of felled DER timber, removal of cut Commission material, if the conditions contained herein shall be disregarded." (Def's Ex. 1, 2, pg. 7, para. 25) Further, subparagraph D of the Agreement states: "All or any part of the operation on this sale area including the removal of felled timber may be suspended upon written notice by the officer in charge if any condition or requirement cited in this plan is disregarded by the operator." (Def's Ex. 1, 2; subpara. D, pg. 10) A review of the testimony surrounding the September 8, 1994 removal of the Claimant reveals that Mr. Tom Lewis, Chief Game Warden, was acting upon the instructions of Mr. Trowbridge. (N.T. 114) The testimony revealed that Mr. Trowbridge did not notify the Claimant in writing that his logging operations were going to be suspended. (N.T. 114) Further, there was no testimony that Mr. Don Madl, the Executive Director, ever gave Mr. Trowbridge authority to suspend Claimant's operations. In fact, Mr. Trowbridge stated that "as officer in charge of the sale, and as the administrator of the contract, I assumed the authority." (N.T. 111, 112) It wasn't until September 9, 1994, that the Claimant was notified in writing that his logging operations were going to be suspended. (N.T. 114) The Claimant's ability to cut and remove timber was a material element of the above-referenced Contracts that the Defendant breached.

The Claimant is attempting to recover the $15,000 performance bond from the Savage Run Contract and the $20,000 performance bond from the Bearwallow Contract, that Defendant seized. Defendant has counterclaimed for $297,500, which was the difference between the original

Contract amount and the amounts paid to Defendant by the Claimant, the seized letters of credit and $115,000 from a rebid of the Bearwallow Contract.

Defendant is relying on Paragraph 25 of the Agreements which state: "Upon receipt of authority from the Executive Director, the officer in charge may immediately suspend, in writing, all operations on the sale area, to include the use of DER roads and the removal of felled DER timber, removal of cut Commission material, if the conditions contained herein shall be disregarded. Failure to comply with any of said conditions and requirements shall be sufficient cause for the termination of this agreement upon written notice by the Executive Director. In the event of such termination, the Buyer shall be liable for all damages sustained by the Commission and DER arising from the Buyer's operations hereunder."

The Claimant is relying on Paragraph 32 of the Contracts which state: "Failure to comply with any of the conditions of the contract herein mentioned shall result in cancellation of the agreement and forfeiture of the performance bond to cover damages sustained by the Commission and the Commission may declare the Buyer ineligible to purchase State Game Lands timber.

When the words of a certain contract are in themselves distinct or unambiguous, the intent of the parties can be found in the explicit language of the contract itself. G.E. Marcinak v. Southeastern Greene School District, 375 Pa. Super. 486, 544 A.2d 1025 (1988). Previous law established that words of a contract should be given their normal, usual, plain and ordinary meaning. Dubrook, Inc. v. Dept. of Transportation, Board of Claims' Docket No. 1011 (1992) at page 42.

Utilizing those principles, it is clear that the Defendant can not recover against the Claimant under Paragraph 25 due to the fact that Defendant breached the Contract when Claimant's

logging operations were improperly suspended. The only remedy the Defendant has, under the Contracts, is the performance bonds as set forth in Paragraph 32 of the Agreements.

Such a result is not inequitable to Claimant since credible testimony reveals that a substantial amount of timber was removed by Claimant, without payment, from both the Savage Run and Bearwallow tracts. (N.T. 91, 97, 137, 138)

ORDER

AND NOW, this 17th day of February, 2000, after hearing the above-referenced matter, it is hereby **ORDERED** and **DECREED** that the Board finds against the Claimant on his claim for recovery of the letters of credit in the amount of Thirty-Five Thousand Dollars ($35,000). Further, the Board finds against the Respondent in its Counterclaim for Two Hundred Ninety-Seven Thousand Five Hundred Dollars ($297,500).

Each party to bear their own costs and attorney fees.

BOARD OF CLAIMS

_____
David C. Clipper
Chief Administrative Judge

_____
Louis G. O'Brien, P.E.
Engineer Member

_____
James W. Harris
Citizen Member

February 17, 2000