

ASTON'S MINING LAW CASE REVIEWS™

by R. Lee Aston



*Ph.D., D. Eng., J.D. LL.M., Attorney,
Mining & Geological Engineer
Aston Mineral Law & Engineering Div.,
Aston Law Offices-Ga., Va., Ind., Mont.,-Attorneys-at-Law,
P.O. Box 34, Elberton, Georgia 30635 USA
E-mail: leeaston@negia.net*

Jurisdiction- United States

Complimentary Example Case Review # 2

UNDEVELOPED PHOSPHATE PROPERTY OWNER BRINGS ANTI-TRUST SUIT AGAINST COMPETITION

In *Ashley Creek Phosphate Co. v. Chevron et al*, 129 F. Supp. 2d 1299, (U.S. Dist. Utah, Central Div., 2000), Ashley Creek Phosphate Company (hereafter, Ashley Creek) had purchased mining rights to phosphate deposits in the Vernal Field from the State of Utah in 1974. According to Ashley Creek, the marketability and mine development of its phosphate deposits depended on transportation costs from its future Vernal mine to a rail junction at Rock Springs, Wyoming, some 90 miles distant. This anti-trust claim pertained to Ashley Creek's efforts to use a pipeline (hereafter, the Pipeline) to carry phosphate rock, used primarily in the manufacture of phosphate fertilizer, from the Vernal deposits to a rail junction in Rock Springs. The producing phosphate deposits in Vernal were presently owned by Farmland Industries, Inc., J.R. Simplot Company, SF Phosphates Limited Company, SF Pipeline Limited Company, and FS, Inc. (hereafter, collectively called the "SF Defendants"). The SF Defendants purchased its phosphate fields from Chevron in 1992 and the State of Utah.

Background Facts

The Pipeline was owned and controlled by Chevron at the time it began operating in 1986. Chevron obtained the rights-of-way necessary to construct the Pipeline by assuring various federal agencies that it would operate the line as a common carrier. However, once the Pipeline was built, Chevron refused to publish a tariff until it was ordered to do so in 1989 by the Interstate Commerce Commission (hereafter, ICC), which was acting in response to a complaint filed by Ashley Creek. [*Ashley Creek v. Chevron*, 129 F. Supp. 2d 1299, 1300, (U.S. Dist. Utah, Central Div., 2000)].

Ashley Creek responded to the tariff by filing this antitrust lawsuit, alleging, *inter alia* (among other things), that the tariff was outrageous and violated the essential facilities doctrine of Sections 1 and 2 of the Sherman Act. The reasonableness of Chevron's rates was referred to the ICC by the district court. On April 17, 1992, while the ICC proceeding was still pending, Chevron sold its Vernal phosphate fields, its Rock Springs plant, and the Pipeline to entities formed by J.R. Simplot Company and Farmland

Industries, Inc., the "SF Defendants". The SF Defendants continued the tariff and were joined as defendants in this action. (Id.@ 1302.)

In 1996, the Surface Transportation Board, (hereafter, STB), successor to the ICC, issued a ruling, finding that the tariff was unreasonable at many volumes. Specifically, the STB ruling set forth a formula that enabled the SF Defendants, as the owners of the Pipeline, to recover the cost of constructing (\$35 million) and operating the Pipeline, plus a reasonable rate of return. The formula allowed the SF Defendants to recover the construction costs on a flat rate per ton, as opposed to an accelerated rate of depreciation, as the SF Defendants advocated, or a flat rate per year, as Ashley Creek advocated. For this reason, it was impossible to determine whether the tariff "over-recovers" until the total volume of phosphate shipped during the life of the Pipeline is known or assumed. Once the total volume is known or assumed, the depreciation per ton can be determined and a calculation made of a specific amount recovered for each month, depending on that month's known or assumed volume. The STB applied the formula to two different hypothetical sets of volumes and concluded that the tariff over-recovered, that is, was unreasonable, at many volumes.

After the STB issued its decision, the SF Defendants moved to dismiss Ashley Creek's lawsuit on the grounds that, assuming Ashley Creek shipped its projected quantities, there would be no over-recovery during the 14-year period that the SF Defendants owned the Pipeline. The judge denied the motion, primarily on the ground that a 20-year period must be utilized.

The SF Defendants then established a new tariff (effective January 1, 1999), which they claimed resulted in a net under-collection of \$3.3 to \$5.4 million over the Pipeline's 20-year life. The SF Defendants claim that the new tariff provides only for recovery of operating and fixed costs and does not recover the \$ 35 million construction costs

The Court's Analysis

The SF Defendants moved for Summary Judgement (dismissal of the case claiming there are no genuine issues of material fact in dispute and the moving party is entitled to judgement as a matter of law. If the movant carries this initial burden, the burden shifts to the non-movant to make a showing sufficient to establish that there is a genuine issue of material fact regarding the existence of that element.)

The SF Defendants sought summary judgement on all of Ashley Creek's claims directed toward them. First, they moved for summary judgement on Counts I through IX of the antitrust claims on two independent grounds. The SF Defendants claimed that, as a matter of law, Ashley Creek did not have standing to bring antitrust claims for two reasons : (1) Ashley Creek could not show that it was prepared to enter any of the phosphate markets identified, and (2) Ashley Creek had admitted that the tariff in place during the SF Defendants' involvement with the Pipeline was not the reason for Ashley Creek's failure to develop its property. Consequently, as a matter of law, there was no

causal nexus between the alleged violation and any alleged damage to business or property under the antitrust laws.

As a second independent basis for summary judgement, the SF Defendants contended that the tariff charged by them was, as a matter of law, reasonable, and could not be the basis for exclusionary conduct.

The SF Defendants also moved for summary judgement on Counts X and XII. Both of these claims were based on the SF Defendants' obligation under the Federal Land Policy and Management Act (hereafter, FLPMA). According to the SF Defendants, the Tenth Circuit has recognized that no private cause of action exists under FLPMA for Ashley Creek, and there was no evidence that the tariff had affected any alleged easement by necessity in favor of Ashley Creek.

Finally, the SF Defendants moved for summary judgement on Count XI, which is a state law nuisance claim. Because there was no resident diversity between Ashley Creek and the SF Defendants, if the federal claims are dismissed, the SF Defendants argued that the state law claim should also be dismissed.

Ashley Creek did not refer the court to any material facts claimed to be in dispute. It simply submitted its own statement of undisputed facts, which does not comport with the requirements of DUCivR 56-1(b). Technically, under DUCivR 56-1(c), all of the SF Defendants' facts should be deemed admitted for purposes of summary judgement. However, in conducting its analysis, the court attempted to evaluate whether Ashley Creek created a genuine issue regarding any material facts.

The Court explained that , “ The non-movant ‘must do more than simply show that there is some metaphysical doubt as to the material facts’. While the non-movant is entitled to the benefit of whatever reasonable inferences there are in its favor, the reasonableness of those inferences is scrutinized in light of the undisputed facts. A genuine dispute exists only if ‘the evidence is such that a reasonable jury could return a verdict for the non-moving party.’ By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgement; the requirement is that there is no genuine issue of material fact.” (Citations omitted)

Questions of law discussed by the Court :

1) Does Ashley Creek have “standing” to bring Anti-Trust Claims ?

The Court noted that ”To have standing to bring such anti-trust claims, Ashley Creek must satisfy a two-pronged test: it must have an anti-trust injury, and there must be a direct causal connection between that injury and the alleged violation of the antitrust laws. [*See Sports Racing Serv. Inc. v. Sports Car Club of Amer., Inc.*, 131 F.3d 874, 882 (10th Cir. 1997)]. Ashley Creek is not, and has never been, in the business of either (1) mining and selling phosphate concentrate or (2) manufacturing and selling phosphate

fertilizer. Thus, to have an "antitrust injury," a plaintiff not already in the allegedly injured market must have both "manifested an intention to enter" *and* "demonstrated a preparedness to do so. ... The Tenth Circuit has identified four "key elements" in evaluating preparedness: (1) ability to finance, (2) consummation of contracts, (3) affirmative action to enter the market, and (4) background and experience in the particular business. ... the courts have held that a potential competitor cannot achieve standing merely by demonstrating his intention to enter a field; he must also demonstrate his preparedness to do so."

2) Was Ashley Creek prepared to enter the relevant markets ?

"The testimony of John Archer (hereafter, Archer), Ashley Creek's president and principal shareholder, as well as its mining engineer, shows that Ashley Creek not only fails all four tests, but it has failed to determine whether there is a market for phosphate rock concentrate at the price that Ashley Creek would have to charge to cover its costs." The Court commented that Ashley Creek had done nothing more than "consider" constructing a fertilizer plant.

3) Was there a nexus between the alleged injury and the alleged violation of Anti-Trust laws ?

The Court stated, "Ashley Creek cannot satisfy the second prong of the standing requirement because its own admissions make it impossible to show a causal nexus between the alleged violation (an unreasonable tariff) and the alleged injury (exclusion from the market). ... First, Ashley Creek does not know (1) the amount by which the tariff is unreasonable, (2) the price any customer would pay, (3) the freight from Rock Springs, or (4) at what tariff rate, if any, Ashley Creek could profitably ship and sell its concentrate. Moreover, Archer testified that whatever the tariff, he will not go forward with his project until he obtains an equity interest in the Pipeline. Thus, he has testified that the tariff did not make any difference. Accordingly, the court finds that there is no causal nexus between the alleged violation and the alleged injury, and Ashley Creek's antitrust claims are dismissed on that basis."

4) Does Ashley Creek have "standing" based on alleged injury to its leases ?

Ashley Creek argued that it has standing because Section 4 of the Clayton Act provides standing to anyone "injured in their business or **property** by reason of anything forbidden in the antitrust laws." Ashley Creek argued that "Defendants' failure to provide plaintiff's leaseholds with the access to market to which they were statutorily entitled decreased the value of the leaseholds, and that, as a result, plaintiff has standing to assert the injury to its property." (emphasis added)

"The court disagrees that Ashley Creek has standing solely by virtue of its mineral leases. The mineral leases (for which Archer or Ashley Creek now pays a little over \$11,000 per year) is only one minor component in the development of a project that Ashley Creek admits would have cost \$67 million in capital in 1990. Because Ashley

Creek has not established the necessary steps to show its viability in that market, it would be too speculative and remote to recognize the leasehold interest as being injured. The mineral leases only hold value if the minerals can be economically mined, milled, and sold. Without showing that its leases could be developed economically, Ashley Creek can only speculate on the leases' value. Accordingly, Ashley Creek does not have standing to bring antitrust claims on the basis of an alleged injury to its leases.”

5) Were the SF Tariffs reasonable and non-exclusionary ?

The Court concluded, “that the tariffs were reasonable under the STB methodology, and therefore, as matter of law, did not deny Ashley Creek access to the Pipeline. In addition, the court finds that the reasonable tariff was not discriminatory. Thus, there is no antitrust liability on the part of the SF Defendants based on its tariffs.”

6) Should Creek’s complaint counts X and XII be dismissed ?

In Count XII, Ashley Creek argued that Chevron and the SF Defendants violated their obligations under the FLPMA. Ashley Creek asserted that the federal right-of-way permit granted for the pipeline requires SF Pipeline to grant Ashley Creek access on a "non discriminatory and reasonable" basis. “ The Tenth Circuit Court has expressly held that the FLPMA does not provide for a private cause of action. [See *State of Utah v. Babbitt*, 137 F.3d 1193, 1203 (10th Cir. 1998)].

“With regard to Count X involving a "federal right of way," the SF Defendants claim that Count X is premised on the same FLPMA claim and should be dismissed for the same reasons, i.e., that Ashley Creek does not, and cannot, allege that the SF Defendants denied Ashley Creek physical access to the property, or that Ashley Creek has been denied access to the Pipeline. Ashley Creek counter-argues only that the tariff was too high. Ashley Creek cites no authority for the proposition that a common law right of an easement by implication can be converted and extended to a federal right to have the federal courts determine whether a common carrier tariff is too high. Ashley Creek does not dispute the SF Defendants' argument that Ashley Creek's claim for a federal easement, which was asserted in 1998, is rendered moot by the 1997 SITLA agreement, which guarantees access at a rate that only covers fixed and variable cost--a rate lower than an owner would need to recover its investment.

The court agreed that Counts X and XII of Ashley Creek's Second Amended Complaint should be dismissed. (Id. @ 1310.)

7) Should Ashley Creek's Count XI based on State nuisance laws be dismissed ?

The SF Defendants argued that Ashley Creek's claim based on state nuisance laws should be dismissed if the federal claims are dismissed. Pendent state law claims should be dismissed if the federal claims are dismissed before trial. The Court noted that in *Bauchman v. West High School*, 132 F.3d 542, 549 (10th Cir. 1997), "If federal claims

are dismissed before trial, leaving only issues of state law, the federal court should decline the exercise of jurisdiction by dismissing the case without prejudice".

This court agreed that Count XI of Ashley Creek's Second Amended Complaint should be dismissed without prejudice.

The Court's Decision:

SF Defendants' Motion for Summary Judgment was granted; Counts I-X and XII were dismissed with prejudice, and Count XI was dismissed without prejudice. The previous Order in this case, dated June 27, 2000, was vacated.
