

## FEDERAL CIVIL PROCEDURE: TRANSFER FOR IMPROPER VENUE BY COURT OF APPEALS BASED ON INHERENT POWER

ALTHOUGH the jurisdiction and power of lower federal courts has been rested solely upon statutory authority,<sup>1</sup> in the interests of justice and effective judicial administration, federal courts have at times exercised inherent powers outside statutory bounds.<sup>2</sup> This power has been invoked to transfer proceedings between courts of appeals in cases where the transferee court had exclusive jurisdiction.<sup>3</sup> In *Panhandle E. Pipe Line Co. v. FPC*,<sup>4</sup> the Tenth Circuit expanded the concept of inherent power to allow transfer for improper venue.

Panhandle filed a petition for review of a Federal Power Commission order pursuant to section 19 (b) of the Natural Gas Act.<sup>5</sup> This act, which vests jurisdiction in any circuit for direct review, also provides the aggrieved party with three choices of venue: the circuit where he is *located*; the circuit where he has his principal place of business; or the District of Columbia Circuit.<sup>6</sup> Panhandle,

---

<sup>1</sup> *E.g.*, *Concord Cas. & Sur. Co. v. United States*, 69 F.2d 78, 80 (2d Cir. 1934); *United Mine Workers v. Chafin*, 286 Fed. 959, 962 (S.D. W. Va. 1923); *cf.* *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33-34 (1812).

<sup>2</sup> See *United States v. Morgan*, 307 U.S. 183, 197-98 (1939) (inherent power to stay disposition of funds); *Ex parte Peterson*, 253 U.S. 300, 312-13 (1920) (inherent power to appoint persons to aid judge); *Griffin v. Thompson*, 43 U.S. (2 How.) 244, 257 (1844) (inherent power to supervise conduct of officers of the court); *Ex parte United States*, 101 F.2d 870, 875-78 (7th Cir. 1939), *aff'd mem. by an equally divided Court sub nom.* *United States v. Stone*, 308 U.S. 519 (1939) (inherent power to determine sufficiency of evidence); *United States v. Shipp*, 203 U.S. 563, 572-73 (1906) (inherent power to stay proceedings) (dictum).

<sup>3</sup> See *Pacific Gas & Elec. Co. v. FPC*, 272 F.2d 510, 511 (D.C. Cir.), *transferred from* 253 F.2d 536, 541-42 (9th Cir. 1958); *Central W. Util. Co. v. FPC*, 247 F.2d 306, 308 (3d Cir. 1957); *L. J. Marquis & Co. v. SEC*, 134 F.2d 822 (3d Cir.), *transferred from* 134 F.2d 335 (2d Cir. 1943); *American Power & Light Co. v. SEC*, 325 U.S. 385, 391 (1945) (dictum); *Far East Conference v. Maritime Comm'n*, 337 F.2d 146, 148 n.1 (D.C. Cir. 1964) (dictum).

<sup>4</sup> 337 F.2d 249 (10th Cir. 1964), *aff'd*, 343 F.2d 905 (8th Cir. 1965). While the Eighth Circuit's decision is chronologically the final determination of the subject matter of this casenote, the opinion quotes extensively from the Tenth Circuit's decision and summarily discusses the exhaustive treatment of the subject by that court. Thus, this note considers the Tenth Circuit opinion as the principal case and subsequent citations will be to that opinion only.

<sup>5</sup> 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r (b) (1964).

<sup>6</sup> *Ibid.* Review provisions of this nature are common in the administrative field. See, *e.g.*, *Federal Power Act* § 313 (b), 49 Stat. 860 (1935), as amended, 16 U.S.C.

a corporation with its principal place of business in the Eighth Circuit, filed in the Tenth Circuit in reliance on that court's interpretation of the phrase "is located."<sup>7</sup> The Supreme Court subsequently overruled this interpretation,<sup>8</sup> rendering venue improper in the Tenth Circuit, and Panhandle moved to transfer the proceeding to the Eighth Circuit.<sup>9</sup> The sixty-day period for filing had lapsed,<sup>10</sup> hence Panhandle would have been without a means of review in the absence of transfer.<sup>11</sup> The Tenth Circuit transferred to the Eighth Circuit as a function of its inherent power<sup>12</sup> on the ground that it was in the interest of justice and based on sound principles of judicial administration.

Traditionally, the federal *district courts* have considered themselves without power to transfer for improper venue unless such power is provided by statute.<sup>13</sup> Therefore, a timely objection based on improper venue led to mandatory dismissal<sup>14</sup> until Congress adopted section 1406 to permit transfer for improper venue between district courts.<sup>15</sup> The transfer provisions for courts of appeals do not

---

§ 8251(b) (1964); Public Utility Holding Company Act § 24(a), 49 Stat. 834 (1935), as amended, 15 U.S.C. § 79x(a) (1964).

<sup>7</sup> In *Texaco, Inc. v. FPC*, 317 F.2d 796 (10th Cir. 1963), *rev'd*, 337 U.S. 33 (1964), the Tenth Circuit had held that "is located" referred to that circuit in which the substantial activities of the natural gas company, to which the FPC order related, were conducted. 317 F.2d at 820. Panhandle's reliance on *Texaco* was vindicated by the Tenth Circuit's denial of the initial motion to dismiss for improper venue. 337 F.2d at 250.

<sup>8</sup> In *FPC v. Texaco, Inc.*, 377 U.S. 33, 37-39 (1964), the Supreme Court held that "is located" referred to the state of incorporation only.

<sup>9</sup> Motion of Petitioner for Transfer of Proceedings, April 23, 1964, p. 1. Under § 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b) (1964), as interpreted by the Supreme Court in *FPC v. Texaco, Inc.*, *supra* note 8, venue was proper in the Eighth Circuit (Panhandle's principal place of business), the Third Circuit (Panhandle's state of incorporation being Delaware), or the District of Columbia Circuit. See Motion of Respondent to Dismiss, Feb. 4, 1964, p. 2.

<sup>10</sup> Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended, 15 U.S.C. § 717r(b) (1964), requires that the review petition be filed within sixty days of the administrative denial of rehearing. Though Panhandle had filed well within this period, the Supreme Court decision in *FPC v. Texaco, Inc.*, *supra* note 8, was handed down after the sixty-day period for filing had lapsed.

<sup>11</sup> See *Michigan Consol. Gas Co. v. FPC*, 167 F.2d 264 (D.C. Cir. 1948); *cf.* *Blume & George, Limitations and the Federal Courts*, 49 MICH. L. REV. 937, 960 (1951).

<sup>12</sup> 337 F.2d at 251.

<sup>13</sup> See, *e.g.*, *United States v. 74 Cases*, 55 F. Supp. 745, 747 (W.D.S.C. 1944).

<sup>14</sup> See *Ibid.*; *Billings Utility Co. v. Federal Reserve Bank*, 40 F. Supp. 309 (D. Mont. 1941); *cf.* *Brown v. Heinen*, 61 F. Supp. 563 (D. Minn. 1945).

<sup>15</sup> "The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a) (1964).

contain a corresponding provision. Express statutory authority for transfer from a court of appeals is found only in two statutes,<sup>16</sup> neither of which relates to venue problems.

Whether courts of appeals have inherent power to transfer for improper venue has been expressly considered in only one case besides *Panhandle*, in which the Fifth Circuit in *Gulf Oil Corp. v. FPC* reached a contrary result.<sup>17</sup> The Fifth Circuit based its refusal to allow transfer on the lack of case authority providing for transfer for improper venue pursuant to inherent power, and Congress' failure to include a specific provision for courts of appeals in section 1406.<sup>18</sup>

*Panhandle's* rejection of these arguments<sup>19</sup> would appear to be sound for several reasons. Authority for the concept of inherent power exists in a series of federal cases allowing both transfer<sup>20</sup>

---

<sup>16</sup> 28 U.S.C. § 2112 (a) (1964) provides that if review petitions are filed in two or more circuits, and the agency has filed the record in one circuit, thereby giving it exclusive jurisdiction, the other circuit(s) may transfer to that circuit. This part of the statute reflects a codification of certain cases in which inherent power had been invoked to authorize transfer. *E.g.*, *L. J. Marquis & Co. v. SEC*, 134 F.2d 822 (3d Cir.), transferred from 134 F.2d 335 (2d Cir. 1943). Thereafter, the transferee circuit may in turn transfer the proceedings for the convenience of the parties or in the interest of justice to any other court of appeals. 28 U.S.C. § 2112 (a) (1964). This amendment was necessitated by the fact that, since all review statutes provide for exclusive jurisdiction in the circuit wherein the agency filed the record, the agency was in effect determining which court shall have jurisdiction. S. REP. NO. 2129, 85th Cong., 2d Sess. 4 (1958).

The second statute, 64 Stat. 1130 (1950), as amended, 5 U.S.C. § 1037 (b) (1964) provides for transfer of a review petition to a district court for determination of findings of fact if no administrative hearing was required and a material issue of fact is presented on review.

<sup>17</sup> 330 F.2d 824 (5th Cir. 1964).

<sup>18</sup> *Id.* at 825.

<sup>19</sup> 337 F.2d at 252. The Government also made another contention which was not discussed by the court. Knowing that *Texaco, Inc. v. FPC*, 317 F.2d 796 (10th Cir. 1963), *rev'd*, 337 U.S. 333 (1964), was being appealed, see notes 7-8 *supra*, the Government argued that *Panhandle* should have foreseen reversal on the venue question and protected itself by filing in another proper circuit. Respondent's Opposition to Transfer and Motion to Dismiss, May 27, 1964, pp. 8-9. But, as the Government itself conceded: "It is possible, however, that the Supreme Court may not reach the venue issue, because the merits of the case are also presented in *Superior Oil Corp. v. FPC* . . . . There is no venue question in that case." Motion of Respondent to Dismiss, Feb. 4, 1964, p. 1.

<sup>20</sup> See cases cited note 3 *supra*. In *Pacific Gas & Elec. Co. v. FPC*, 272 F.2d 510 (D.C. Cir. 1958), the transferee circuit court retained jurisdiction of a case even though it recognized that transfer was predicated upon an erroneous construction of a jurisdictional statute. *Id.* at 511. The decision can be explained only on the basis of inherent power because a transferee court of appeals has the power to review the propriety of transfer. See note 41 *infra* and accompanying text.

and other appropriate acts.<sup>21</sup> The criteria to be drawn from these cases is that inherent power may be used to facilitate the orderly and expeditious disposition of actions<sup>22</sup> or for equitable relief.<sup>23</sup> Though the Tenth Circuit refers solely to the first criterion,<sup>24</sup> it seems that *Panhandle* may be properly classified a judicial transfer to avoid the inequity of dismissal.<sup>25</sup>

Secondly, although Congress in 1948 was aware of the problem of transfer for improper venue in district courts when it adopted section 1406, the similar problem in courts of appeals was not presented until 1964 in *Panhandle* and the Fifth Circuit decision. In the absence of legislation, the policy of section 1406<sup>26</sup> would appear to apply to courts of appeals cases as well as to district court cases.<sup>27</sup> The Tenth Circuit did not indiscriminately apply the inherent power principle, but brought it within, and limited it to, the "interest of justice" philosophy of section 1406 (a).<sup>28</sup> Under section 1406 (a), "interest of justice" has been interpreted to limit transfer to those situations where the petitions are filed in good faith and dismissal would be inequitable.<sup>29</sup> In *Panhandle*, the petitioner had acted in good faith by relying on the Tenth Circuit's previous interpretation of the venue provision, and dismissal would preclude a hearing on the merits because the sixty-day period for filing petitions had lapsed. Thus, one apparent distinction between the Fifth Circuit case of *Gulf Oil* and *Panhandle* was that *Panhandle* filed in the Tenth Circuit in reliance on *that* court's interpretation,

---

<sup>21</sup> See cases cited note 2 *supra*.

<sup>22</sup> *E.g.*, *Ex parte* Peterson, 253 U.S. 300, 312-13 (1920) (inherent power to appoint persons to aid judge); *United States v. Shipp*, 203 U.S. 563, 572-73 (1906) (inherent power to stay proceedings) (dictum).

<sup>23</sup> *E.g.*, *United States v. Morgan*, 307 U.S. 183, 190-91, 197-98 (1939) (inherent power to stay disposition of funds).

<sup>24</sup> 337 F.2d at 252.

<sup>25</sup> See text following note 29 *infra*.

<sup>26</sup> Under § 1406 (a) a district court may transfer for improper venue if the transferor court had jurisdiction of the subject matter, *e.g.*, *First Nat'l Bank v. United Air Lines*, 190 F.2d 493, 496 (7th Cir. 1951), *rev'd on other grounds*, 342 U.S. 396 (1952); the transferee forum is a forum where venue is proper, *e.g.*, *Blackman v. Guerre*, 190 F.2d 427 (5th Cir. 1951), *aff'd*, 342 U.S. 512 (1952); the interests of justice will be served thereby, *e.g.*, *Clark Transp. Co. v. ICC*, 228 F. Supp. 236 (D. Minn. 1963); *Gold v. Griffith*, 190 F. Supp. 482 (N.D. Ind. 1960).

<sup>27</sup> As is the case under § 1406 (a), transfer by the court of appeals in *Panhandle* is a transfer by the first court of Article III jurisdiction to entertain the case.

<sup>28</sup> See 28 U.S.C. § 1406 (a) (1964).

<sup>29</sup> *Clark Transp. Co. v. ICC*, 228 F. Supp. 236 (D. Minn. 1963); *Gold v. Griffith*, 190 F. Supp. 482 (N.D. Ind. 1960).

whereas in *Gulf Oil* the Fifth Circuit had not yet construed the venue provision.

Thirdly, although inherent power to transfer for equitable and convenience purposes was first employed in 1943,<sup>30</sup> Congress did not codify transfer under these particular circumstances in the 1948 Judicial Code, but waited until 1958.<sup>31</sup> Thus, transfer pursuant to inherent power was employed for fifteen years without legislative disapproval, and ultimate legislative codification tends to imply that this residual power has been used properly.<sup>32</sup>

The use of the inherent power principle, however, should be limited in scope. All administrative review statutes provide several circuits where venue is clearly proper.<sup>33</sup> Where a petitioner files in a circuit where venue is not clearly proper, his choice may have been motivated by one of several reasons, such as convenience. The choice may be predicated upon a calculated judgment that the questionable circuit will be more favorable to him in resolving questions of substantive law. Mere forum-shopping<sup>34</sup> should not be sufficient for a court to invoke its inherent power to transfer for improper venue. Thus, when the case of first impression upon which *Panhandle* had relied for venue<sup>35</sup> was appealed to the Supreme

<sup>30</sup> See *L. J. Marquis & Co. v. SEC*, 134 F.2d 335 (2d Cir. 1943).

<sup>31</sup> 28 U.S.C. § 2112 (a) (1964); see note 16 *supra*.

<sup>32</sup> The power to stay proceedings and transfer in certain non-venue situations has been codified. See 28 U.S.C. § 2551 (1964) (power to order stay) and 28 U.S.C. § 2112 (a) (1964) (power to transfer). The latter is discussed in note 16 *supra*. However, other uses of inherent power, such as inherent power to stay disposition of funds and inherent power to appoint persons to aid the judge, remain uncoded. It is possible, of course, that either could be construed as a function of the courts' power to make rules under 28 U.S.C. § 2071 (1964).

<sup>33</sup> Most of the statutes are listed in 1 MOORE, FEDERAL PRACTICE ¶ 0.144[17], at 1679-86 (2d ed. 1964), and in the Reviser's Notes to 28 U.S.C. § 1292 (1964).

<sup>34</sup> The Government contended that *Panhandle's* presence in the Tenth Circuit was the result of forum-shopping. Motion of Respondent to Dismiss (Eighth Circuit), p. 14. *Panhandle* denied this contention. Answer to Motion to Dismiss (Eighth Circuit), Dec. 1, 1964, pp. 3-4. It cannot, however, be shown that a decision on substantive law would be more favorable in the Tenth Circuit since there has been no interpretation of the substantive law in question, the Helium Act Amendment, 74 Stat. 922 (1960), 50 U.S.C. § 167 (1964).

The forum-shopping problem would, however, exist in many other cases appealed pursuant to administrative review statutes with unclear venue provisions. See, e.g., Commodity Exchange Act § 6 (b), 42 Stat. 1001 (1922), as amended, 7 U.S.C. § 9 (1964); Federal Trade Act § 45 (c), 28 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (c) (1964); Federal Power Act § 313 (b), 49 Stat. 860 (1935), as amended, 16 U.S.C. § 8251 (b) (1964).

<sup>35</sup> *Texaco, Inc. v. FPC*, 317 F.2d 796 (10th Cir. 1963), *rev'd*, 337 U.S. 33 (1964); see note 7 *supra*.

Court,<sup>36</sup> the Court denied motions to transfer,<sup>37</sup> and remanded to the Tenth Circuit with directions to dismiss.<sup>38</sup> Although that case was distinguishable from *Panhandle* on other grounds,<sup>39</sup> a critical difference would appear to be *Panhandle's* good faith reliance on the Tenth Circuit's previous determination that venue was proper.<sup>40</sup> Another limitation upon inherent power to transfer is the power of the *transferee* court to review the propriety of transfer.<sup>41</sup>

Limited to the existing fact situation, *Panhandle* reflects a justifiable use of inherent power. Transfer for improper venue based on inherent power should only be used as a last alternative where there has been a good faith filing and dismissal would operate as a bar to a hearing on the merits.<sup>42</sup> Otherwise, transfer in courts of appeals should be left to Congress, and legislation might be enacted similar to that available in section 1406 (a) in district courts.<sup>43</sup> As an alternative, Congress might provide that where a petition has been filed in good faith in a forum of improper venue, the limitation period for the filing shall be revived. In any event, *Panhandle's* treatment of inherent power should not be made the basis for unlimited expansion of the principle.

---

<sup>36</sup> See note 8 *supra*.

<sup>37</sup> The petitioner in *Texaco* moved to remand to the Third Circuit, or to remand to the Tenth Circuit with orders to transfer to the Third Circuit. The Supreme Court denied both motions. *FPC v. Texaco, Inc.*, 377 U.S. 974 (1964).

<sup>38</sup> Upon remand to the Tenth Circuit, the court of appeals stated that "we would grant transfer in this case if it were not for the direction of the Supreme Court [to dismiss]." *Texaco, Inc. v. FPC*, 337 F.2d 253 (10th Cir. 1964).

<sup>39</sup> *Texaco* had reached the Supreme Court with a companion case, *Superior Oil Co. v. FPC*, 322 F.2d 601 (9th Cir. 1963), due to a conflict between the two circuits on matters of substantive law. After disposing of the preliminary issue of venue in *Texaco*, the Court upheld the substantive law interpretation advanced in *Superior*. Thus, dismissal in *Texaco* was distinguishable from transfer in *Panhandle* on the ground that the former case had already been decided on its merits by the Supreme Court.

<sup>40</sup> This is also a basis for distinguishing *Panhandle* from the Fifth Circuit's decision in *Gulf Oil*. See text following note 29 *supra*.

<sup>41</sup> See *Goldlawr, Inc. v. Heiman*, 288 F.2d 579, 581 (2d Cir. 1961), *rev'd on other grounds*, 369 U.S. 463 (1962); *Wilson v. Kansas City So. Ry.*, 101 F. Supp. 56, 60-61 (W.D. Mo. 1951). However, the decision of the transferor court should not be set aside unless there is apparent abuse of discretion. *Nicol v. Koscinski*, 188 F.2d 537 (6th Cir. 1951).

<sup>42</sup> As additional justification, there appears to be some basis for the view that limited federal jurisdiction and power is the result of the federal-state conflict. See WRIGHT, *FEDERAL COURTS* § 1, at 2 (1963). In the situation of direct review of federal administrative orders in federal courts, that conflict is not present since there is no encroachment on state power.

<sup>43</sup> Even though a statutory remedy similar to § 1406 (a) may seem appropriate, it may be easier to clarify the small number of unclear venue provisions in administrative review statutes. See note 34 *supra*.