



INTERIOR BOARD OF INDIAN APPEALS

Saguaro Chevrolet, Inc. v. Western Regional Director, Bureau of Indian Affairs

43 IBIA 85 (05/30/2006)

Judicial Review of this case:

Saguaro Chevrolet, Inc. v. U.S. Department of the Interior,
CV06-01656 PCT/DKD, Dismissed (D. Ariz. May 26, 2009)

Related Federal case:

Saguaro Chevrolet, Inc. v. United States, 77 Fed.Cl. 572 (2007)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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SAGUARO CHEVROLET, INC.,	:	Order Docketing and Dismissing
Appellant,	:	Appeal
	:	
v.	:	
	:	Docket No. IBIA 06-27-A
WESTERN REGIONAL DIRECTOR,	:	
BUREAU OF INDIAN AFFAIRS,	:	
Appellee.	:	May 30, 2006

On December 19, 2005, the Board of Indian Appeals (Board) received, by Federal Express delivery, a copy of a notice of appeal to the Board from Saguario Chevrolet, Inc. (Appellant), through Jack Daniel Klausner, Esq. of Warner Angle Hallam Jackson & Formanek PLC (the Firm). The appeal, which had not previously been received by the Board, is from a June 15, 2004 decision of the Western Regional Director, Bureau of Indian Affairs (Regional Director; BIA), cancelling Lease No. B-549-CR between the Colorado River Indian Tribes (Tribe) as lessor and Appellant as lessee. In a cover letter transmitting the notice of appeal and accompanied by an affidavit, Appellant asserts that the notice of appeal was mailed to the Board on July 14, 2004, and should therefore be considered timely. For the reasons discussed below, the Board concludes that Appellant has failed to satisfy its burden to show that the appeal was timely, and therefore the Board dismisses the appeal.

A notice of appeal from a decision of a BIA Regional Director must be filed with the Board within 30 days after receipt by the appellant of the decision from which the appeal is taken. 43 C.F.R. § 4.332(a). The effective date for filing a notice of appeal with the Board is the date of mailing or the date of personal delivery, if not mailed. See id. § 4.310(a)(1). When an appellant has been given the correct appeal instructions by the BIA deciding official but fails to file a timely notice of appeal with the Board, the Board must dismiss the appeal for lack of jurisdiction. American Land Development Corp. v. Acting Phoenix Area Director, 25 IBIA 120, 121, recon. denied, 25 IBIA 197 (1994), and cases cited therein. The burden is on the appellant to show that the notice was timely filed with the Board at the correct address. Id.

Appellant's December 19, 2005 filing was captioned as a "Proof of Mailing" of the notice of appeal on July 14, 2004, and in addition to enclosing a copy of the notice of

appeal and the Regional Director's decision, included an affidavit from paralegal Sandra L. Ames of the Firm to support the contention of timely filing.

By order dated December 20, 2005, the Board afforded Appellant the opportunity to submit additional evidence and to file a brief in support of its contention that the appeal was timely filed. In order to assist Appellant, the Board identified several Board decisions on the issue, including Addison v. Acting Great Plains Regional Director, 39 IBIA 216 (2003); Estate of Theresa Jeanette Covers Up Yapuncich, 38 IBIA 240 (2002); Howard Crow Flies High v. Rocky Mountain Regional Director, 38 IBIA 3, recon. denied, 38 IBIA 41 (2002); Cole v. Billings Area Director, 28 IBIA 193 (1995); and American Land Development Corp. v. Acting Phoenix Area Director, 25 IBIA 120.

Appellant filed a brief, accompanied by five affidavits from partners or employees of the Firm, including a copy of the Ames affidavit. No other party filed a brief.

In her affidavit, Ames declares that she prepared a draft notice of appeal under the direction and supervision of Klausner. Ames states that she "personally prepared the envelopes for mailing the original Notice of Appeal to the [Board] and copies to the other parties required to receive notice." Ames Affidavit ¶ 9. Ames "specifically recall[s]" using the Quincy Street address "to prepare the envelope to mail the original Notice of Appeal to the [Board]." Id. Ames further states that "[t]he [Regional Director's decision] stated that the Notice of Appeal had to be filed by mailing it within thirty (30) days of the date [of receipt]. Thus, the Notice of Appeal was mailed to the [Board] on Quincy Street in Arlington, Virginia on July 14, 2004." Id. ¶ 10.

Klausner's affidavit states that the deadline for filing by mail for the notice of appeal to the Board was docketed on his calendar for July 14, 2004. Klausner Affidavit ¶ 2. Klausner was not in the office on July 14, 2004, but states that he requested that his partner, James Valletta, "review and sign the [notice of] Appeal and accompanying mailing envelopes and/or mailing labels which I had instructed Ms. Ames to prepare." Id. ¶ 4. Klausner notes that he approved the use of regular mail for filing the notice of appeal because he could not hand-deliver the appeal due to the Board's location and "[t]he Rules did not indicate that proof of mailing would be required." Id. ¶ 8. Klausner also states that he instructed Ames to use the Board's Quincy Street address as provided in the Regional Director's decision.

James Valletta, a partner in the Firm, states in his affidavit that Klausner asked him to sign the notice of appeal so it could be mailed no later than July 14, 2004. Valletta Affidavit ¶ 3. Valletta declares that when he reviewed the appeal, it "had all requisite mailing envelopes and/or mailing labels." Id. ¶ 5. Valletta states that he signed the notice

of appeal and the mailing certificate on July 14, 2004. Id. ¶ 7. He further states that he instructed Klausner's legal assistant, Judi Hackett, to "make the necessary copies and mail them out on July 14, 2004 using the envelopes and/or mailing labels attached, as prepared by Ms. Ames." Id. ¶ 8.

Hackett, a legal assistant in the Firm since 1966 and Klausner's legal assistant since 1989, attests in relevant part as follows:

2. I recall that Mr. Valletta gave me the signed IBIA Appeal and instructed me to make the necessary copies and mail them out on July 14, 2004 using the mailing envelopes and/or mailing labels attached to the IBIA Appeal as prepared by Ms. Ames.
3. I made the necessary copies and placed them into the mailing envelopes as prepared by Ms. Ames or placed them in mailing envelopes and affixed the mailing labels as prepared by Ms. Ames.
4. Since certified mail cards were not included with the mailing envelopes and/or mailing labels attached to the IBIA Appeal as prepared by Ms. Ames, the IBIA appeal was filed and served by regular mail.
5. After sealing the envelopes, I then placed all items for mail in the central mail room for mailing on July 14, 2004.
6. I have no recollection of any returned mail items from the IBIA or any of the other interested parties in this case.
7. I have personally reviewed the file for this matter and it does not contain any returned mail items from the IBIA or any of the other interested parties in this case.

Hackett Affidavit.

Yolanda Abinet-Mattice is the Firm's administrator. Abinet-Mattice states in her affidavit that she was "at all times responsible for establishing and implementing procedural policies for all of the Firm's outgoing and incoming mail through the U.S. Postal Service." Abinet-Mattice Affidavit ¶ 1. Abinet-Mattice describes the Firm's mail system as follows:

2. The Firm's standard procedure directs that all outgoing mail be deposited in a central mail room, where each item is weighed and proper postage is affixed. Each week day at approximately 11:15 a.m. and again at approximately 3:30 p.m., all accumulated outgoing mail is taken from the mail room and deposited in the U.S. Postal Service Mail Box situated in the lobby of the office building in which the Firm is located. Any mail accumulated in the Firm's mail room after the

final mail box drop at 3:30 p.m. is delivered each day at 4:45 p.m. directly to the local Phoenix U.S. Post Office.

3. Any mail item returned by the U.S. Postal Service as undeliverable is given to me to personally open, review and distribute to the appropriate sender. In the case of undeliverable mail for a client matter for which Jack Daniel Klausner, Esq., was responsible, the returned mail would be distributed to Mr. Klausner's legal assistant Judi Hackett.

Id.

Discussion

The Regional Director's decision provided correct appeal instructions.^{1/} Appellant contends that it filed its notice of appeal by mailing it to the Board on July 14, 2004, but the Board did not receive Appellant's notice of appeal until December 19, 2005 — 18 months after the Regional Director's decision — when the copy sent by Federal Express was filed.^{2/} That filing, of course, was untimely, and Appellant does not contend otherwise. Therefore, the only issue concerning timeliness is whether the evidence, including the affidavits described above, is sufficient to satisfy Appellant's burden of proof to show that it mailed the notice of appeal to the Board on July 14, 2004.

^{1/} The Ames Affidavit states that the copy of the appeal regulations enclosed with the Regional Director's decision provided a different address (Wilson Boulevard) than the one provided in the decision itself (801 N. Quincy Street). It appears that the Regional Director may have given Appellant an outdated version of 43 C.F.R. § 4.332. But because Appellant contends that it mailed the notice of appeal to the Quincy Street address, which is the correct current address for the Board, enclosing the outdated version of the regulations would be harmless error. However, even if Appellant claimed to have relied on the incorrect address, it would still have to show that it that it timely mailed the appeal in compliance with the instructions on which it relied. See Hendry County v. Eastern Regional Director, 40 IBIA 135, 136 (2004).

^{2/} Appellant states that it did not realize that the Board may not have received its notice of appeal until December 6, 2005, when it received a telephone call from an employee of the Regional office requesting proof of mailing of the notice of appeal to the Board. The employee stated that she had received a copy of the notice of appeal by mail and by fax. Following this phone call, Appellant sent the copy of the appeal that the Board received on December 19, 2005.

We begin by noting several facts that are undisputed. First, the Board never received the notice of appeal that Appellant claims to have mailed to the Board on July 14, 2004. Second, the copy of the notice of appeal received by the Board on December 19, 2005 is captioned as a notice of appeal to the Board, but does not include any address for the Board. The only addresses included on the first page of the appeal are one for Appellant and another for the Tribe in care of the Acting Superintendent of the Colorado River Agency, BIA. Third, the certificate of service for the notice of appeal does not include the Board, and there is no contemporaneous certification on the notice of appeal that it was mailed to the Board.

Appellant contends that the above facts are not dispositive to show that the notice of appeal was not mailed on July 14, 2004. We agree, to the extent that they do not create an irrebuttable presumption of non-mailing, although arguably one or more of the above facts could give rise to a rebuttable presumption of non-mailing. But even if we assume that Appellant's evidence is sufficient to rebut, and thereby negate, any presumption of non-mailing created by one or more of the above facts, those facts remain evidence that the Board must consider along with Appellant's evidence. See Nunley v. City of Los Angeles, 52 F.3d 792, 796 (9th Cir. 1995) (even if a presumption disappears when rebutted by evidence, the factual question still remains and the party charged with the burden of proof must still satisfy that burden to establish the underlying factual question; the factsgiving rise to the presumption often give rise to an inference that remains for consideration by the factfinder).

Appellant contends that we should find that the appeal was timely mailed to the Board "based upon the affidavits detailing the office custom and practice for filing and service by mail, and the careful compliance with office custom and practice here." Brief Regarding Timeliness at 7.

The Board has repeatedly held that a self-serving statement that an individual remembers preparing a notice of appeal and mailing it to the Board, without some corroboration, is insufficient to demonstrate that the notice of appeal was mailed to the Board. See Addison, 39 IBIA at 217; Howard Crow Flies High, 38 IBIA at 5; see also Estate of Yapuncich, 38 IBIA at 241 (holding that appellant's counsel's statements that he had signed the notice of appeal, that the notice of appeal was mailed to the Board and the fact that the Board's correct mailing address was shown on the document were insufficient to support a conclusion that the notice of appeal was actually mailed to the Board). In the present case, Appellant has not even provided such a statement. None of Appellant's affiants state that they placed the original notice of appeal in an envelope correctly addressed to the Board, and placed it in the central mail room for mailing.

Ames makes the conclusory statement that, because the Regional Director's decision stated that a notice of appeal had to be filed by mailing it within 30 days of the date the decision was received, the notice of appeal "was mailed" to the Board on July 14, 2004. She states that she specifically recalls preparing an envelope correctly addressed to the Board. But that recollection is uncorroborated — no other affiant recalls seeing an envelope specifically addressed to the Board. Valletta makes the general assertion that at the time of his review, the appeal "had all requisite mailing envelopes and/or mailing labels." Valletta Affidavit ¶ 5. But in the absence of the Board's address anywhere on the notice of appeal or in the certification of service, we cannot determine, or even infer, on what basis Valletta concluded that all "requisite" envelopes were there.

Valletta's and Hackett's affidavits are limited to descriptions about mailing the copies of the notice of appeal, not mailing the original. Valletta stated that he signed the original notice of appeal, and directed Hackett to "make the necessary copies and mail them out * * * using the envelopes and/or mailing labels * * * prepared by Ames." Valletta Affidavit ¶ 8. Hackett recalled being instructed to make "the necessary copies and mail them out," and that she "made the necessary copies and placed them into the mailing envelopes as prepared by Ms. Ames." Hackett Affidavit ¶ 3. She then sealed the envelopes and placed all items for mail in the central mail room for mailing. There is no assertion in Hackett's affidavit that she received instructions concerning the original, or that she placed the original (or even a copy) in an envelope addressed to the Board, or that she even saw an envelope addressed to the Board. 3/

Abinet-Mattice does not state that she saw an envelope addressed to the Board. In fact she does not even state that she was in the office on July 14, 2004 or that she personally delivered outgoing mail on that day to the U.S. Postal Service.

Even assuming that the affidavits are sufficient to show that the Firm has a standardized office practice and custom and that the practice and custom were followed on

3/ In this respect, we note that the recollections of Hackett and Valletta are consistent in referring only to instructions about copies of the notice of appeal, and not referring to any instructions about the original. Considering the evident care that the Firm took in preparing affidavits to prove that the original was mailed to the Board on July 14, 2004, we are not prepared to assume that all references in the affidavits to "copies" were intended to also refer to the original, particularly in light of the obvious distinction between remembering making and mailing "copies" generally, and specifically placing the original in the envelope addressed to the Board, placing that envelope in the mail room, and depositing the mail in a U.S. Postal receptacle on July 14, 2004.

July 14, 2004 with respect to copies of the appeal for parties listed on the certificate of service, the evidence is insufficient to draw the necessary inferences or otherwise establish that the original notice of appeal was in fact placed into an envelope properly addressed to the Board, which was then subject to the office's normal procedures for out-going mail.^{4/}

Appellant points out that the Regional Director received a copy of the notice of appeal, and suggests that this supports its assertion that its notice of appeal was timely mailed to the Board. However, Ms. Hackett stated that she remembered mailing the copies of the notice of appeal, and the Regional Director's address was included in the service list for Appellant's notice of appeal. Thus, the fact that the Regional Director received a copy of the notice of appeal is of little or no probative value to demonstrate that Appellant mailed the appeal to the Board.

Appellant devotes a considerable portion of its brief to distinguishing the facts of the present case from those in American Land Development Corp., 25 IBIA 120, in which the Board found unpersuasive evidence submitted in support of an allegation that a notice of appeal had been timely filed. In that case, the Board rejected appellant's evidence as insufficient in part because counsel's secretary and counsel provided inconsistent statements about the actual mailing of the notice of appeal to the Board, and the statements conflicted with evidence about the office's mailing custom and practice. We agree that those particular factors are not present here, but showing that this case is factually distinguishable from American Land Development Corp. is not the same as demonstrating that the facts in this case are sufficient to satisfy Appellant's burden of proof.

^{4/} Even for the copies, it is questionable whether the Firm's evidence of custom would be sufficient to give rise to a presumption of mailing. See generally Ludington, Proof of Mailing by Evidence of Business or Office Custom, 45 A.L.R. 4th 476 (1986). For example, the Firm provided no affidavit from the individual personally responsible for placing the proper amount of postage on outgoing mail and for placing outgoing mail in a U.S. Postal Service receptacle.

Even if we were to treat the Firm's evidence of office procedures as sufficient to create a presumption of mailing, we would also find that the Board's non-receipt of the notice of appeal would be sufficient to rebut that presumption, leaving Appellants without the benefit of any presumption and still with the burden to prove mailing. And we do not think that the evidentiary value of inferences that could still be drawn from the facts concerning Appellant's office procedures would outweigh the evidentiary value of inferences that could be drawn from the U.S. Postal Service's customs and procedures for handling properly deposited mail.

We conclude that the Firm's evidence of office custom and practice surrounding the preparation and mailing of copies of the notice of appeal, including the uncorroborated recollection of Ames that she prepared an envelope addressed to the Board, does not outweigh the undisputed evidence of non-mailing: the lack of receipt by the Board, the absence of the Board's address on the notice of appeal, and no mention of the Board in the contemporaneous certificate of service. Appellant has produced no evidence that anyone recalls placing the notice of appeal in an envelope addressed to the Board or placing an envelope addressed to the Board in the mail. Under these circumstances, the Board holds that Appellant has failed to carry its burden of proving that its notice of appeal was timely filed with the Board.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, this appeal from the Regional Director's June 15, 2004 decision is docketed but dismissed as untimely.

I concur:

// original signed
Steven K. Linscheid
Chief Administrative Judge

// original signed
Amy B. Sosin
Acting Administrative Judge