

KANAWHA & HOCKING COAL & COKE CO.

IBLA 89-343

Decided March 14, 1991

Appeal from a decision of the Utah State Office, Bureau of Land Management, readjusting terms of lease and setting royalty rate for coal recovered by underground mining operations on Federal coal lease U-017354.

Set aside and remanded.

1. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

Where, in accordance with Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the Board has remanded a case to BLM for a determination of the proper royalty to be applied on coal recovered by underground mining operations from a Federal coal lease, and where BLM's subsequent decision and the accompanying case record fail to disclose a rational basis for its conclusion that conditions do not warrant a royalty rate lower than 8 percent, the decision will be set aside.

2. Coal Leases and Permits: Readjustment--Coal Leases and Permits: Royalties--Mineral Leasing Act: Royalties

BLM should provide the lessee the opportunity to submit data concerning whether conditions warrant a royalty rate of less than 8 percent for coal recovered by underground mining operations on a Federal coal lease, prior to making such determination.

APPEARANCES: John S. Kirkham, Esq., H. Michael Keller, Esq., Salt Lake City, Utah, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Kanawha & Hocking Coal & Coke Company (K & H) has appealed from a decision by the Utah State Office, Bureau of Land Management (BLM), dated March 2, 1989, readjusting the terms of Federal coal lease U-017354 to

provide for a royalty rate of 8 percent for coal recovered by underground mining operations.

This lease was issued effective September 1, 1956, to K & H's predecessor-in-interest, under the authority of section 7 of the Mineral Leasing Act of 1920 (MLA), as amended, 30 U.S.C. § 207 (1988), embracing approximately 405.93 acres of land. It was amended effective January 1, 1962, to include other lands, so that it includes approximately 1,028.47 acres in four adjacent townships in Carbon and Emery Counties, Utah. K & H has subleased a portion of the land included in the lease to Valley Camp of Utah, Inc. (Valley Camp), which has operated and (according to K & H) continues to operate an underground coal mine on lands including those within the lease. Underground mining has apparently been ongoing, if sporadic, over the last several years. Pursuant to the MLA and section 3(d) of the lease, BLM retained the right to readjust and fix royalties and other terms and conditions at the end of each 20-year term.

BLM attempted to readjust this lease after the first 20-year term which ended on September 1, 1976. But, because BLM failed to provide initial notice of its intent to readjust this lease prior to the expiration of the first 20-year term, it was held to be without authority to impose a belated readjustment on this lease. Kaiser Steel Corp., 63 IBLA 363, 367 (1982). Accordingly, on January 27 and June 9, 1983, BLM informed K & H that the Government had waived its right to readjust the terms of this lease as of September 1, 1976. The January letter advised appellant that the next readjustment date would be September 1, 1996.

However, on November 1, 1985, BLM issued a notice to K & H that the terms and conditions of the lease would be subject to readjustment as of September 1, 1986. ^{1/} On April 8, 1986, BLM provided K & H with proposed terms and conditions for the readjustment of the lease in 1986. Included in these terms were provisions requiring increased rental and royalty and special stipulations supplied by the Forest Service, U.S. Department of Agriculture. BLM also increased the lease bond. K & H thereupon filed objections, but BLM overruled them in a decision dated August 19, 1986.

K & H appealed BLM's decision to this Board, objecting to numerous provisions in the readjusted lease, including BLM's establishing a royalty of 8 percent for coal recovered by underground mining operations. On November 17, 1988, we issued an order affirming the August 19, 1986, decision, except as to the setting of the royalty rate for coal produced by underground methods. Kanawha & Hocking Coal & Coke Co., IBLA 86-1655

^{1/} BLM's decision comported with the rule that any coal lease issued prior to enactment of section 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207 (1988), whose 20-year readjustment period expired after Aug. 4, 1976, is automatically converted at that time to a 10-year readjustment interval. FMC Wyoming Corp. v. Hodel, 816 F.2d 496 (10th Cir. 1987), cert. denied, 108 S. Ct. 772 (1988); Chevron U.S.A. Inc., 108 IBLA 96 (1989).

(Order Nov. 17, 1988). ^{2/} Noting that "this lease is for underground coal" and, according to K & H, "is subject to ongoing mining operations pursuant to an approved mining plan," we set aside that portion of the decision setting the royalty for underground coal at 8 percent and remanded the case to BLM with instructions to determine whether conditions warrant a lesser royalty rate. Id. at 7.

On remand, on February 13, 1989, the Manager, Moab District Office, BLM, sent a memorandum to the Utah State Director, BLM, stating as follows:

The Belina No. 1 Mine, operated by Valley Camp of Utah, is located on this lease. It is presently idle and in an inactive state. No production is anticipated in the near future. Engineering and geologic data for this lease has been reviewed. The geologic and mining conditions associated with this lease are not unlike those encountered by other mining operations in the Book Cliffs and Wasatch coal fields. It has been determined that the available information does not provide adequate justification for reducing the royalty below 8 percent for the full term of the readjusted lease. This office recommends a continued 8 percent royalty rate until such time as the lessee has reason or information to justify a lower royalty rate.

The casefile does not contain any further evidence in support of its conclusion that no lower royalty rate was warranted. BLM did not provide an opportunity for K & H to provide any justification for reducing the royalty rate below 8 percent. Evidently solely on the basis of this memorandum, the State Director issued his decision setting the royalty rate at 8 percent, and K & H (appellant) filed its appeal.

Appellant contends that, under procedures established by applicable precedents of the courts and the Board and BLM's own procedures set forth in Instruction Memorandum (IM) No. 88-148, BLM was obligated to consider the producing status of the lease and to make an analysis of whether a lower royalty rate is appropriate. Specifically, appellant asserts that BLM should afford it the opportunity to present data in support of a determination that conditions warrant a lower royalty rate for the lease. We agree.

[1] Section 6 of the Federal Coal Leasing Amendments Act of 1976, 30 U.S.C. § 207(a) (1988), requires "payment of a royalty in such amount as the Secretary shall determine of not less than 12 1/2 per centum of the value of coal as defined by regulation, except the Secretary may determine

^{2/} K & H filed a suit in the United States District Court for the District of Utah, Central Division, for judicial review of that portion of the IBLA Order affirming the BLM decision of Aug. 19, 1986, regarding readjustment of the lease as of Sept. 1, 1986. Kanawha & Hocking Coal & Coke Co. v. Lujan, Civ. No. 89-C-172-J.

a lesser amount in the case of coal recovered by underground mining operations." Departmental regulation 43 CFR 3473.3-2(a)(3) (1989) provided that a "lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the authorized officer may determine a lesser amount, but in no case less than 5 percent if conditions warrant."

In Coastal States Energy Co. v. Hodel, 816 F.2d 502 (10th Cir. 1987), the court considered the issue of the royalty rate applicable to coal mined by underground methods. The court held that it was error to automatically fix the readjusted royalty rate at 8 percent for all underground coal, because such an approach "completely ignores the ensuing proviso in [43 CFR 3473.3-2(a)(3) 3/] that a lesser amount, but not less than 5 percent, may be set 'if conditions warrant.'" Coastal States, 816 F.2d at 507. See also Coastal States Energy Co., 105 IBLA 64 (1988); Kaiser Coal Corp., 103 IBLA 312 (1988).

As we stated in our November 17, 1988, order of remand in this matter:

Subsequent to the court's decision in Coastal States, the Board revisited the question of what readjusted royalty rate should be applied to underground mining operations. In Ark Land Co., 97 IBLA 241 (1987), there was no indication that any underground operations were presently occurring on the lease premises or that any resource recovery and protection plan (see 43 CFR 3482.1(b)) had been tendered embracing the lease. In the absence of either on-going operations or specific pending proposals to commence underground mining, the Board held that the lessee had no basis on which to establish that "conditions warrant" a royalty rate of less than 8 percent for coal removed for underground operations, and therefore, no reduction in the rate could be authorized under 43 CFR 3473.3-2(a)(3). This Ark Land decision was viewed favorably by the United States District Court for the District of Wyoming. See Ark Land Co. v. Hodel, No. C 85-313-K, slip. op. at 13 (D. Wyo. Oct. 1, 1987).

In contrast, the Board in Western Fuels-Utah, Inc., 98 IBLA 114 (1987), * * * found indications that an underground operation on the lease "was contemplated and that a resource recovery and protection plan for the operations may have been tendered." 98 IBLA at 117. Because of the possibility of pending specific proposals to commence underground mining, the Board remanded the case to BLM "in order that BLM may undertake the necessary review

^{3/} The regulations governing royalty for coal removed from an underground mine have been amended (see note 5, below). All references are to the regulations as they were prior to this amendment.

and determine whether conditions warrant a royalty rate of less than 8 percent, but not less than 5 percent." Id.

There is no indication in the record that BLM evaluated [K & H's] particular circumstances on an individual basis before adjusting the royalty rate for this underground coal. However, a review of the case file accompanying the appeal indicates that this lease is for underground coal. According to [K & H], this lease is subject to ongoing mining operations pursuant to an approved mine plan and reclamation permit * * *. Therefore, although we affirm the imposition of the 12 1/2 percent royalty rate for coal removed by surface operations, we must set aside the BLM decision to the extent that it has set an 8 percent royalty rate for coal removed by underground operations, and remand the casefiles to BLM in order that BLM may undertake the necessary review and determine whether the lease conditions warrant the imposition of a royalty rate of less than 8 percent for coal removed by underground means.

Id. at 5-6.

BLM IM No. 88-148, issued on December 18, 1987, subsequent to the Ark Land decision, provides as follows:

[A]ll State Offices are to implement the following procedure for establishing the royalty rate in readjusting Federal underground leases.

If there are no mining operations occurring or the lease is not included within an approved SMCRA [Surface Mining Control and Reclamation Act of 1977] permit area on the lease, the royalty rate for underground coal mining is to be set at 8 percent of the value of the coal.

If underground mining operations are being conducted or if the lease is within an approved SMCRA permit area, a determination of "if conditions warrant" a royalty rate of less than 8 percent but no less than 5 percent, as provided for in the regulations, is to be made. This determination shall be based on adverse geologic and engineering conditions encountered that make the underground coal economically unrecoverable at a royalty rate of 8 percent. Where it is determined that a rate between 5 percent and 8 percent is warranted, an analysis must be conducted based on data required of the lessee. The analysis shall be the basis for the royalty rate established. It should be recognized that the basis for setting a royalty rate of lower than 8 percent must reflect conditions that are projected to exist for the 10-year term of the

readjusted lease, rather than reflecting short-term conditions that can be addressed through a Section 39 royalty reduction. ^{4/}

Thus, the issue of whether conditions warranted a lower royalty rate than 8 percent only needed to be addressed if the lease is in fact subject to ongoing mining operations. If such determination is made, it must be based on evidence of adverse geologic and engineering conditions, as provided by the lessee.

Although BLM's memorandum indicates that the underground mine on the lease "is presently idle and in an inactive state," and that "[n]o production is anticipated in the near future," appellant notes that the lease is within an approved SMCRA permit area and that coal has been removed from the lease by underground methods since the September 1, 1986, readjustment date. Appellant describes the inactivity as "due to a temporary cessation of operations." Appellant refers to Solid Minerals Operations Reports filed by Valley Camp with the Minerals Management Service for the third quarter of 1986 through the first quarter of 1989 which reflect production from the lease since the beginning of the readjusted term (Statement of Reasons Exh. D). In the absence of any substantial evidence to the contrary, we accept appellant's statement that the lease contains an underground mine that is active, within the meaning of the IM, such that BLM should have made a determination of whether conditions warranted a lower royalty rate. Information submitted to BLM on remand should establish that underground operations are contemplated. Western Fuels-Utah, Inc., supra at 117.

The sum of BLM's consideration of adverse geologic and engineering conditions is the conclusory statements in the February 13, 1989, memorandum from the Moab District Manager that "engineering and geologic data for this lease has been reviewed," that "geologic and mining conditions associated with this lease are not unlike those encountered by other mining operations in the Book Cliffs and Wasatch coal fields," and that "[i]t has been determined that the available information does not provide adequate justification for reducing the royalty below 8 percent for the full term of the readjusted lease." BLM evidently did not provide appellant an opportunity to submit evidence of adverse geologic and engineering conditions.

In Kanawha & Hocking Coal & Coke Co., 112 IBLA 365 (1990), we considered an appeal similar to the one in issue. In that appeal, as here, we had remanded the case to BLM for a determination of the proper royalty to be applied to coal recovered by underground mining operations on a Federal lease. BLM had made a conclusory finding that conditions did not warrant a reduction below 8 percent, and the lessee had appealed to the Board. We held:

^{4/} Appellant points out that although this IM bears an expiration date of Sept. 30, 1988, it has not been superseded and apparently remains BLM's procedure for making determination of royalty rates on readjustment underground coal leases.

In this case, there was apparently a unilateral determination by BLM that conditions did not warrant a royalty rate lower than 8 percent; however, the record does not contain a summary document setting forth the factual data upon which BLM relied

to reach its conclusion or an analysis of such data. The determination of whether conditions warrant a royalty less than 8 percent in a specific instance must be based on the facts and circumstances of the particular lease. Certainly, the one most familiar with the circumstances surrounding the lease is the lessee. Although the Board did not specifically direct in the remand that BLM should consult with appellant before making its determination, we envisioned that BLM would provide appellant an opportunity to submit information in support of a reduction. From the record before us, we must conclude that BLM's determination was based entirely on the conclusory memorandum from the District Manager. Such a memorandum is insufficient to support BLM's conclusion. See Wayne D. Klump, 104 IBLA 164, 166 (1988); Soderberg Rawhide Ranch, 63 IBLA 260, 262 (1982). [Footnote omitted.]

Kanawha & Hocking Coal & Coke Co., *supra* at 367-68.

So it is here. BLM gave no explanation to support its conclusion that conditions did not warrant a lesser royalty rate and provided no opportunity for appellant to submit data bearing on this question. Therefore, this case must be remanded to BLM for a new determination of whether conditions warrant a royalty rate of less than 8 percent, but not less than 5 percent. In making its determination, BLM shall consider the information submitted by appellant on appeal. In addition, appellant shall have 30 days from receipt of this decision to file with BLM any further information it considers pertinent to BLM's review. Thereafter, BLM shall render a new decision setting forth with particularity the rationale for its determination. 5/

5/ BLM has promulgated a new regulation providing for a flat royalty of 8-percent of the value of coal removed from an underground mine, without regard to conditions prevailing in the mining operation. 43 CFR 3470.3-2(a)(2) (55 FR 2664 (Jan. 26, 1990)). However, under the new regulation, the royalty rate set by 43 CFR 3470.3-2(a)(2) (1990) may be applied to previously issued leases only at the time "of the next scheduled readjustment of the lease." 43 CFR 3473.3-2(b) (55 FR 2664 (Jan. 26, 1990)). It would appear that this will not be until Sept. 1, 1996. Thus, the issue of what the royalty rate should be for the period from September 1986 through August 1996 appears to remain at issue.

In sum, by successfully appealing BLM's attempt to impose the 8-percent royalty under the previous regulations without determining whether conditions warranted a lesser rate, K & H has effectively blocked the imposition of this rate, as, to date, BLM's decisions doing so have been set aside. The new regulation takes effect only as of the next readjustment. Therefore, the question of whether appellant is entitled to a reduction of the royalty rate is not mooted by the promulgation of the new regulation.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision is set aside in part and the case is remanded for action as described above.

David L. Hughes
Administrative Judge

I concur:

James L. Burski
Administrative Judge

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