

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-235

Decided March 3, 1995

Appeal from a decision of Administrative Law Judge David Torbett granting temporary relief from a decision of the Acting Chief, Applicant Violator System Office, Office of Surface Mining Reclamation and Enforcement, finding an ownership and control link and refusing to delete such information from the Applicant Violator System. Hearings Division Docket No. CH 95-1-AV.

Motion for expedited briefing granted.

1. Surface Mining Control and Reclamation Act of 1977: Applicant Violator System: Ownership and Control—Surface Mining Control and Reclamation Act of 1977: Temporary Relief: Evidence

On appeal from a decision of an Administrative Law Judge granting temporary relief under 43 CFR 4.1386 from a decision by OSM finding an ownership and control link and refusing to delete such information from its Applicant Violator System, the Board may limit its review to whether the Administrative Law Judge committed an error of law or abused his discretion in granting such relief.

APPEARANCES: Stephen G. Mahoney, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Christopher B. Power, Esq., Charleston, West Virginia, for U. S. Steel Mining Company, Inc.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSM) has filed an appeal from an oral decision issued from the bench by Administrative Law Judge David Torbett on January 24, 1995, granting U. S. Steel Mining Company, Inc. (USM), temporary relief from the December 23, 1994, decision of the Acting Chief, Applicant Violator System (AVS) Office, OSM.

In that decision, the Acting Chief found that USM controlled the coal mining operations of Gary Coal Sales, Inc. (GCSI), and Gary Enterprises, Inc. (GEI); that data contained in the AVS showed that GCSI and GEI were in violation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1988), because they owed reclamation fees and state civil penalties; and that the AVS also showed that USM had an ownership and control relationship with GCSI and GEI on Permits Nos. U-58-84, U-61-84, and S-4030-89. He denied USM's request to remove such information from the AVS.

Following a hearing on the same date, Judge Torbett issued his decision essentially concluding, as required by 43 CFR 4.1386(g)(1), that USM had demonstrated a substantial likelihood of prevailing on the merits (Tr. 93-98). In addition, there was no indication that temporary relief would adversely affect public health or safety or cause significant, imminent environmental harm to land, air, or water resources (see Tr. 99-100). ^{1/}

OSM provided no grounds for appeal in its notice of appeal. However, accompanying its notice is a Motion for Expedited Briefing Schedule proposing that it file its brief "20 days after receipt of the hearing transcript," and USM file a response within 20 days of receipt of OSM's brief, with OSM having 10 days to reply. In support of that motion OSM asserts that the AVS Office "has a number of cases that involve the same or similar legal issues, therefore[,] determination of the issue is deemed critical to the efficient administration of the Applicant Violator System."

USM opposes the proposed expedited briefing schedule. First, USM speculates that OSM's motive in appealing Judge Torbett's decision is to elicit from the Board a decision on the underlying merits of the case. USM argues that appeal of Judge Torbett's temporary relief decision is not the proper vehicle for seeking a ruling on the merits. It asserts that the appropriate procedure for that is to allow the Board to address the merits following a decision on the merits by Judge Torbett. It points out that it presently has pending with Judge Torbett a motion for summary decision and that "there is good reason for the Board to temporarily delay entering an

^{1/} Under 43 CFR 4.1386(g), the Administrative Law Judge may only grant temporary relief if:

"(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

"(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

"(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm to land, air or water resources."
59 FR 54364 (Oct. 28, 1994).

expedited briefing schedule until Judge Torbett rules on USM's motion for summary decision" (Opposition at 4). In addition, USM points out that a hearing on the merits is scheduled for April 12, 1995, and under 43 CFR 4.1385, "[t]he administrative judge shall issue an initial decision within 30 days of the date the record in the hearing is closed."

We agree with USM's assessment that it appears that OSM's intention in appealing Judge Torbett's ruling is to seek a substantive ruling from the Board. However, this is not the proper time to solicit such a ruling from this Board. The appeal before this Board is from Judge Torbett's decision to grant USM temporary relief from OSM's December 23, 1994, decision. ^{2/}

In a recent case, Powderhorn Coal Co. v. OSM, 129 IBLA 22 (1994), this Board addressed an appeal by OSM of a decision granting temporary relief under 43 CFR 4.1260 from a notice of violation in a surface mining case. Therein, the question was presented whether the Administrative Law Judge had properly applied the substantial likelihood standard of 43 CFR 4.1263(b) because in making his oral ruling he had indicated that his decision on the merits "could go either way." Id. at 28. The Board discussed the term "substantial likelihood," as it appears in 43 CFR 4.1263(b), and concluded that

[w]here the balance of hardship to the parties from not granting temporary relief tips decidedly in favor of the applicant, we find that in order to justify temporary relief it is not necessary that the applicant's right to prevail on the merits of the controversy be free from doubt where he "has raised questions going to the merits so serious, substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberat[e] investigation." Hamilton Watch Co. v. Benrus, 206 F.2d 738, 740 (2nd Cir. 1953), quoted in Placid Oil Co. v. U.S. Department of the Interior, 491 F. Supp. [895] at 905 [N.D. Tex. (1980)]; Sierra Club, 108 IBLA 381, 384-85 (1989).

129 IBLA at 28. On reconsideration, the Board clarified its decision, stating that there was no intention to substitute the balance of hardship test for the substantial likelihood test and that what we had held in our original decision was that

a substantial likelihood of success may be found where applicant has raised issues on the merits of the case so "serious, substantial, difficult and doubtful" as to make them appropriate for

^{2/} As noted, that decision denied USM's request to have certain information deleted from the AVS. We presume that the granting of temporary relief does not result in the removal of such information, but merely precludes OSM from utilizing that information in a way that would adversely affect USM during the pendency of the proceeding reviewing OSM's decision.

deliberative resolution in a decision on the merits rather than a preliminary determination on application for temporary relief.

Powderhorn Coal Co. v. OSM (On Reconsideration), 132 IBLA 36, 40 (1995).

At this stage of the proceedings, we have no jurisdiction to entertain an appeal of the legal issues presented in this case, regardless of whether OSM's AVS Office "has a number of cases that involve the same or similar legal issues." In this case, the only question presented is whether Judge Torbett properly granted temporary relief. Unlike Powderhorn, in which the Administrative Law Judge expressed some uncertainty regarding who might succeed on the merits, a reading of Judge Torbett's ruling in this case leaves little doubt that to him USM had clearly demonstrated a substantial likelihood of prevailing on the merits.

[1] The question that arises in this case is what standard should the Board apply in determining whether Judge Torbett erred in granting temporary relief. The courts have stated that "[t]he issuance or dissolution of a preliminary injunction is within the sound discretion of the trial court and can be set aside only if it is based on an error of law or constitutes an abuse of discretion." Tri-State Generation and Transmission Association, Inc. v. Shoshone River Power, Inc., 805 F.2d 351, 354 (10th Cir. 1986); Kenai Oil & Gas, Inc. v. Department of Interior, 671 F.2d 383, 385 (10th Cir. 1982).

The scope of this Board's review authority over an Administrative Law Judge's decision is *de novo*, and, thus, greater than that of an appellate court reviewing the decision of a trial judge. E.g., United States v. Dunbar Stone Co., 56 IBLA 61, 67-68 (1981). ^{3/} However, despite such authority, we believe that a deferential standard of review is appropriate where an Administrative Law Judge has conducted a temporary relief hearing in which all parties have had the opportunity to participate and there-after renders a decision on such relief. In such a case, where an appeal is filed, the Board may limit its consideration to whether the decision was based on an error of law or whether the Administrative Law Judge abused his discretion. We do so in this case.

The regulations at 43 CFR 4.1386(h) require that if an appeal is filed from a decision of an Administrative Law Judge granting or denying temporary relief, "the Board shall issue an expedited briefing schedule and shall decide the appeal expeditiously." We find no merit in delaying adjudication of this appeal pending action by Judge Torbett because we have no intention of ruling on the merits of the appeal. Our adjudication will assure that the case file is returned timely to Judge Torbett for the scheduled hearing on the merits or for action on the pending motion for summary decision.

^{3/} Such authority is derived from 43 CFR 4.1 and 5 U.S.C. § 557 (1988).

Accordingly, we grant the motion for an expedited briefing schedule and establish the following schedule: OSM shall have 10 days from receipt of this decision in which to file a brief in support of its appeal. USM shall have 10 days from receipt of OSM's brief in which to file any desired response. The issue on appeal is whether Judge Torbett properly granted temporary relief. His decision will be sustained absent a showing that he committed an error of law or abused his discretion.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur.

James L. Byrnes
Chief Administrative Judge