



INTERIOR BOARD OF INDIAN APPEALS

Confederated Tribes and Bands of the Yakama Nation v. Northwest Regional Director,
Bureau of Indian Affairs

56 IBIA 176 (02/08/2013)



United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
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CONFEDERATED TRIBES AND)	Order Dismissing Appeal
BANDS OF THE YAKAMA NATION,)	
Appellant,)	
)	
v.)	
)	Docket No. IBIA 12-150
NORTHWEST REGIONAL)	
DIRECTOR, BUREAU OF INDIAN)	
AFFAIRS,)	
Appellee.)	February 8, 2013

The Confederated Tribes and Bands of the Yakama Nation (Nation) appealed to the Board of Indian Appeals (Board), from a July 13, 2012, decision (Decision) of the Northwest Regional Director (Regional Director), Bureau of Indian Affairs (BIA).¹ The threshold—and, we conclude, dispositive—issue is whether the Nation timely filed the appeal. We conclude that it did not, and therefore we dismiss the appeal.

The Board’s regulations define the date of filing as the date of mailing or the date of personal delivery. The Nation argues that it “mailed” the appeal, and thus filed it with the Board, when the Nation delivered it to the commercial courier FedEx for shipment. We disagree, reconfirming our consistent interpretation of the word “mailing” in the Board’s regulations (dating from 1981) to mean the use of an official government mail system, such as the U.S. mail, and not the use of private commercial couriers, such as FedEx. When a party uses a commercial courier to file an appeal, the date of filing is the date of delivery to the Board, and in this case the Nation’s appeal was delivered to the Board after the 30-day jurisdictional period for filing an appeal had expired. We also reject an additional argument by the Nation that the appeal period was tolled because the Regional Director’s appeal instructions were deficient.

¹ The Decision affirmed a January 31, 2012, decision by BIA’s Yakama Agency Superintendent, declining to agree to a proposed sale by the Nation of five tracts of tribal land to Delbert Wheeler, Sr. Wheeler separately and timely appealed the Decision to the Board, in Docket No. IBIA 12-149, and the Decision remains without effect. *See* 43 C.F.R. § 4.314(a). Our disposition of the Nation’s appeal does not affect Wheeler’s appeal, or the Nation’s right to participate in that appeal as an interested party.

Background

I. Facts

The facts of this case are straightforward. The Nation received the Decision on July 18, 2012. The Decision advised the Nation that it was appealable to the Board, and that a notice of appeal to the Board “*must be mailed within 30 days of the date you receive this decision.*” Decision at 10. Thirty days after July 18, 2012, was Friday, August 17, 2012.

On August 16, 2012, the Nation prepared a FedEx package for sending its appeal to the Board, and delivered it to FedEx.² FedEx delivered the Nation’s notice of appeal to the Board on Monday, August 20, 2012.³

II. Order to Show Timeliness and Nation’s Response

Because the Nation’s appeal was delivered to the Board by FedEx after the 30-day appeal period had expired, the Board ordered the Nation to show cause why its appeal should not be dismissed as untimely.

In response, the Nation argues that the Board’s regulations do not define the word “mailing” and therefore do not exclude the use of a private courier as a form of “mailing.” The Nation contends that to define the word, it is appropriate to look to Black’s Law Dictionary, the current edition of which includes, as one definition for the word, the use of a private courier service. The Nation also argues that to the extent the word “mail,” as used in the regulations, is ambiguous, the ambiguity must be resolved with a construction that favors the Nation, applying what is commonly referred to as the “Indian canon of construction.” Brief Establishing Good Cause for Yakama Nation’s Timely Notice of Appeal (Nation’s Br.), Sep. 21, 2012, at 3-8.

² The notice of appeal itself indicates, on the first page, that it is being “SENT VIA CERTIFIED MAIL,” but the only appeal received by the Board was the original notice of appeal delivered by FedEx, and the Nation does not contend that a copy was sent by certified mail.

³ The type of Express Package Service selected by the Nation was “FedEx Priority Overnight, Next business morning,” and thus it appears that the Nation expected the package to be delivered to the Board on August 17, within the 30-day deadline. On the FedEx USA Airbill, however, the Express Package Service option includes the qualifying language that “Delivery commitment may be later in some areas.”

The Nation also argues that the appeal period was tolled because the appeal instructions provided by the Regional Director were deficient by not expressly defining the word “mail” to mean “U.S. mail.” The Nation suggests that it understood and relied on those deficient instructions for believing that sending its appeal by FedEx constituted “mailing” it to the Board.

In support of its response to the order to show that its appeal is timely, the Nation submitted a declaration from one of its attorneys, R. Joseph Sexton, Esq., who states that he has personal knowledge of the facts set forth in his declaration, and that attached to his declaration is a true and correct copy of the FedEx receipt establishing that the Nation mailed its notice of appeal to the Board on August 16, 2012, by express overnight delivery. Nation’s Br., Attach. The exhibit to the declaration is a copy of the FedEx USA Airbill, described *supra* note 3. The declaration contains no other averments.

Discussion

I. Introduction

The burden is on an appellant to show that its notice of appeal was timely filed with the Board. *See Saguario Chevrolet, Inc. v. Western Regional Director*, 43 IBIA 85, 85 (2006). As discussed below, the Nation has failed to convince us that its appeal is timely.

The date-of-mailing rule that was added to the Board’s regulations created a special exception to a default date-of-receipt rule for determining when a document is filed with the Board. Read in the context in which the date-of-mailing rule was added, and in relation to BIA’s corresponding appeal regulations, it is clear that the word “mail” was intended to refer to the use of an official government mail system, and not generically to any courier service. Although the Board’s regulations do not expressly define the word “mail,” we find no ambiguity in the original intent of the regulations. And while the Nation argues that it was misled by the Regional Director’s appeal instructions, we conclude that those instructions were not facially misleading or deficient, and the Nation has submitted no evidence that it was, in fact, misled by the instructions.

II. Deadline for Filing an Appeal

Under the Board’s regulations, an administrative appeal from a BIA decision must be filed with the Board within 30 days after an appellant receives the decision being appealed. 43 C.F.R. § 4.332(a). The 30-day period is jurisdictional. *Id.* BIA’s regulations require, with an exception not relevant here, that BIA’s decisions “shall include a statement that the decision may be appealed pursuant to [25 C.F.R. Part 2], identify the official to whom it may be appealed and indicate the appeal procedures, including the 30-day time

limit for filing a notice of appeal.” 25 C.F.R. § 2.7(c). Failure by BIA to give notice of appeal rights in accordance with § 2.7(c) tolls the period for filing an appeal. *Id.* § 2.7(b).

III. What Constitutes “Filing” and What Constitutes “Mailing”

The general appeal regulations for the Department of the Interior’s Office of Hearings and Appeals (OHA), which includes the Board, provide that “[a] document is filed in the office where the filing is required only when the document is *received* in that office.” 43 C.F.R. § 4.22(a) (emphasis added). But as relevant to this appeal, the Board’s more specific regulations have, since 1981, defined the “[t]he effective date of filing . . . as the date of mailing *or* the date of personal delivery.” *Id.* § 4.310(a)(1) (emphasis added); *see* Final Rule, 46 Fed. Reg. 7334, 7335 (Jan. 23, 1981) (promulgating new § 4.310 of 43 C.F.R.); *see also* 43 C.F.R. § 4.1(b) (special rules of an appeals board govern when there is a conflict with an OHA general rule).⁴ Thus, the Board’s regulations create a special rule that, in effect, equates the date of mailing with the date of receipt by personal delivery.

Prior to 1989, BIA’s appeal regulations—like the Board’s pre-1981 regulations—provided that a document is “filed when *received* in the office of the official with whom the filing is required.” 25 C.F.R. § 2.13 (1988) (emphasis added). In 1989, however BIA revised its appeal regulations to allow the date of mailing to constitute the date of filing. Revised § 2.13 provides that an appeal document is properly filed with an official of BIA by personal delivery or “[b]y mail [to] the facility officially designated for receipt of mail addressed to the official.” 25 C.F.R. § 2.13 (1989); *see id.* § 2.13 (2011) (same). As part of the 1989 revisions, BIA added § 2.9, which provides that “[a] notice of appeal that is filed by mail is considered filed on the date that it is postmarked.” 25 C.F.R. § 2.9(a) (1989); *see id.* § 2.9(a) (2011) (same). BIA made these revisions in response to comments recommending that appeal documents be considered filed when they were mailed rather than when they were received. *See* Final Rule, 54 Fed. Reg. 6478, 6479 (Feb. 10, 1989).

In conjunction with BIA’s 1989 revisions to its appeal regulations, the Board also made several revisions in its regulations “in order to ensure compatibility between” the Board’s regulations and those of BIA. Final Rule, 54 Fed. Reg. 6483, 6483 (Feb. 10, 1989). The Board did not alter the existing language that the “effective date for filing a notice of appeal . . . with the Board . . . is the date of mailing or the date of personal delivery,” although it added to that language a special rule, not relevant here, applicable to

⁴ From 1970, when OHA appeal regulations were first promulgated, to 1981, when the Board adopted a specific regulation governing the date of filing, OHA’s general date-of-receipt rule applied by default to appeals to the Board. *See* 43 C.F.R. § 4.22(a) (1972).

motions for the Board to assume jurisdiction over certain appeals. *Compare* 43 C.F.R. § 4.310(a) (1981) *with id.* § 4.310(a) (1989).

The Nation argues that because the Board's regulations do not define the word "mailing," the word should be construed to include delivery of a package to a commercial courier as a form of "mailing." We disagree. While we agree with the Nation that a dictionary definition may serve as an appropriate aid in our interpretation, we disagree that the current edition of Black's Law Dictionary (Black's) is relevant for understanding the Department's intent in 1981.⁵ In 1981, Black's defined the word "mailed" as follows: "A letter, package, or other mailable matter is 'mailed' when it is properly addressed, stamped with the proper postage, and deposited in a proper place for receipt of mail." Black's 858 (5th ed. 1979). The definition of "mailable" refers to "the laws and postal regulations" which allow something to be sent by "mail." *Id.* Those definitions were still in Black's when BIA revised its appeal regulations in 1989. *See* Black's 952 (6th ed. 1990). The fact that the current edition of Black's provides a more expansive definition of the word "mail," to include the use of commercial couriers, is not relevant to construing the Department's intent at the time the Board's appeal regulations were promulgated.⁶

In addition, although the procedures for appeals within BIA do not apply to the Board, we find it instructive that when BIA amended its appeal regulations in 1989 to allow "filing" to include "mailing," BIA clearly meant the use of an official government mail system, as evidenced by BIA's use of the word "postmarked" for establishing the date of mailing. *See* 25 C.F.R. § 2.9; *see also* Black's 1050 (5th ed. 1979) ("postmark" defined as "[a] stamp or mark put on letters . . . at the post office."); Black's 1286 (9th ed. 2009) ("postmark" defined as "[a]n official mark put by the post office on an item of mail.")⁷ The fact that the Board did not revise its regulations in 1989 to expressly refer to a "postmark" does not, in our view, provide evidence of a different meaning for the word "mailing." To the contrary, it indicates that the Board's existing regulations were

⁵ The Nation argues that the current edition of Black's supports its argument because it defines "mail," in part, to mean "[t]o deliver (a letter, package, etc.) to a private courier service that undertakes delivery to a third person, often within a specified time." Black's 1038 (9th ed. 2009), *quoted in* Nation's Br. at 5.

⁶ Although the current edition of Black's includes a broader definition, we note that nowhere on the FedEx documents submitted to the Board does the word "mail" or "mailing" appear; instead, the documents refer to "shipment" or "delivery."

⁷ BIA's appeal regulations apply to "all appeals from decisions made by officials of [BIA]," unless any other regulation or Federal statute "provides a different administrative appeal procedure." 25 C.F.R. § 2.3.

compatible, on this issue, with the date-of-mailing rule that BIA was adding to its regulations. And the fact that the Board's regulations do not refer to the "U.S. mail" does not suggest any intent to include private couriers. It may suggest that the date-of-mailing rule might apply to the use of another country's mail system, though we need not decide that issue in this appeal.⁸

In support of its argument, the Nation cites *U.S. v. Certain Real Property and Premises Known as 63-29 Trimble Road, Woodside, N.Y.*, 812 F.Supp. 332, 334 (E.D.N.Y. 1992), and several other cases interpreting the words "mail" and "mailing" as not limited to the use of the U.S. mail, in the context of the Federal Rules of Civil Procedure and involving the issue of service of documents on other parties in litigation. Nation's Br. at 8. None of the cases involve an interpretation of the date-of-mailing rule in the Board's regulations. But to the extent the cases may be relevant by analogy, we note that the U.S. Court of Appeals for the Ninth Circuit declined to adopt the interpretation in *Trimble Road*, observing that the court in *Trimble Road* "cited no authority and provided no explanation of its reasoning." See also *Magnuson v. Video Yesteryear*, 85 F.3d 1424, 1430-31 (9th Cir. 1996) ("If there is any question of whether the term 'mail' encompasses private delivery services today, there is little doubt that 'mail' meant 'U.S. mail' in 1937, when [Fed. R. Civ. P.] 5 was adopted.").

The Board has consistently interpreted the word "mailing," as used in § 4.310, to mean that a document has been sent by U.S. mail. See *Estate of Mary Louise Medina*, 51 IBIA 255, 256 (2010) (date of filing an appeal with the Board is the date an appellant mails it to the Board, if sent by U.S. mail, or the date of personal delivery, if delivered by other means); *Castillo v. Pacific Regional Director*, 43 IBIA 9, 9 n.1 (2006) (date of filing appeal was date of delivery because it was sent by commercial courier); *Tsosie v. Acting*

⁸ Even if we found the intended meaning of the word "mailing" in the Board's regulations ambiguous, the Nation's argument that any ambiguity must be resolved in its favor would still be misplaced. The Indian canon of construction provides that ambiguities in legislation (or regulations) enacted for the benefit of Indians, should be resolved in favor of the Indians. See generally *Quinault Indian Nation v. Portland Area Director*, 33 IBIA 6, 14-15 (1998). But the Board's appeal regulations are rules of general applicability that provide appeal rights equally to Indians and non-Indians, and were not intended to afford any special benefit to Indians over non-Indians. Moreover, the Nation's interpretation of the word "mail," while favorable to the Nation in this case, could well lead to an unfavorable result for another tribe or individual Indian (or even to the Nation), in another case, in which the appellant is a non-Indian, but the facts are otherwise the same as this case. And, finally, the Nation fails to address the fact that in many appeals, interested parties on both sides of the dispute are Indian.

Navajo Regional Director, 42 IBIA 131, 131 (2006) (same). Our examination of the history of the rulemaking through which a date-of-mailing rule was added only confirms the correctness of our interpretation. Any change to the rule—whether to expand the definition of “mail” or to return to a strict date-of-receipt rule—must be left to proper notice and comment rulemaking.

In summary, when a party uses the U.S. mail (or possibly another government’s mail system) to file an appeal or other pleading with the Board, under the Board’s appeal regulations, the date of filing is the date that the document is sent by mail. When an appellant sends an appeal or other filing to the Board by commercial courier, the date-of-mailing rule does not apply, and the date of filing is the date of delivery, i.e., receipt by the Board. *Castillo*, 43 IBIA at 9 n.1 (citing 43 C.F.R. § 4.310(a)); *see also Tsoie*, 42 IBIA at 131.⁹ Accordingly, when the Nation used FedEx, the Nation did not “mail” its appeal, and thus the date of filing was the date that FedEx delivered the appeal to the Board.

IV. The Regional Director’s Appeal Instructions Did Not Toll the Appeal Period

The Nation also argues that even if the date of filing was the date that FedEx delivered the appeal to the Board, the filing deadline was tolled pursuant to 25 C.F.R. § 2.7 because the Regional Director’s Decision contained deficient appeal instructions. Nation’s Br. at 8-9. As noted earlier, § 2.7 requires that a BIA official give written notice of a decision and advise interested parties of appeal rights, and it contains a tolling provision that applies under certain circumstances. In this case, the Decision advised interested parties that notices of appeal “*must be mailed within 30 days of the date you receive this decision.*” Decision at 10.

The Nation contends that the Regional Director was required to explain the meaning of the word “mailed” as being limited to using the U.S. Postal Service. We disagree. By “including the 30-day time limit for filing a notice of appeal,” the Regional Director fulfilled the requirements of § 2.7(c). Parties are charged with knowledge of the Board’s regulations and precedent. *See Blackhawk v. Billings Area Director*, 24 IBIA 275, 280 (1993); *see also* <http://www.doi.gov/oha/ibia/How-Do-I-Appeal-a-Decision-to-the-Board.cfm#bullet7> (When is my Appeal “Filed”?) (last visited Feb. 6, 2013) (copy added to record).

⁹ The Nation attempts to distinguish *Tsoie* from its appeal. Nation’s Br. at 5-6. But in that matter, the Board clearly stated that because the appellant “sent his notice of appeal by commercial courier, . . . the date of filing was the date of delivery,” which is directly applicable to this case. *Tsoie*, 42 IBIA at 131.

We note that while the Nation submitted an affidavit to support its argument that its appeal was timely, the affidavit was limited to providing a foundation for the FedEx shipping documents. The Nation submitted no evidence to establish that it was, in fact, misled by the Regional Director's appeal instructions in any respect.¹⁰

Conclusion

In summary, the Nation has failed to show that its appeal is timely. The Nation was required to file its appeal by August 17, but the Nation did not file its appeal until August 20, when the appeal was delivered to the Board by FedEx. Accordingly, the Board must dismiss the appeal.¹¹

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Board dismisses the appeal.

I concur:

 // original signed
Steven K. Linscheid
Chief Administrative Judge

 //original signed
Thomas A. Blaser
Administrative Judge

¹⁰ Nor does the Nation explain why its notice of appeal indicates, on its face, that it was to be "SENT VIA CERTIFIED MAIL," but was then sent by FedEx instead. *See supra* note 2.

¹¹ The Nation adds an argument that dismissing its appeal would be a violation of the trust responsibility that the Department owes the Nation. Nation's Br. at 9. But the 30-day deadline for filing an appeal is jurisdictional and the Board has no authority to extend that deadline. 43 C.F.R. § 4.332(a); *Greening v. Acting Northwest Regional Director*, 54 IBIA 188, 189 (2011). The Nation offers no authority for the proposition that impartially applying a jurisdictional regulation to the Nation's action in this case violates any trust duty.