

**Editor's note: Appealed -- aff'd, Samuel v. Morton, Civ. No. 74-1112-EC (C.D. Calif. Aug. 26, 1974); dismissed, sub nom. Laatz v. Morton, Civ.No. 3266 (E.D.Mich. Feb. 20, 1975); dismissed, sub nom. Maisano v. Morton, Civ.No. 3972 (E.D.Mich. Oct. 12, 1973); dismissed, sub nom. Goad v. Morton, Civ.No. 9948 (D.N.M. Jan. 16, 1974)**

LOUIS SAMUEL, ET AL.

IBLA 72-295, etc.

Decided December 6, 1972

Appeals from various Bureau of Land Management Land Office decisions denying individual petitions for reinstatement of oil and gas leases terminated for failure to pay timely the annual rental required by the lease terms.

Affirmed.

Act of May 12, 1970 -- Oil and Gas Leases: Reinstatement

It is proper to deny a petition for reinstatement of an oil and gas lease terminated for failure to pay rental as required by section 31, Mineral Leasing Act of 1920, as amended, 30 U.S.C. § 188 (1970), where the petitioner has not shown that his failure to pay the rental on or before the anniversary date of the lease was justifiable or not due to lack of reasonable diligence, as set forth in P.L. 91-245, Act of May 12, 1970.

Act of May 12, 1970 -- Words and Phrases

"Reasonable Diligence". As used in P.L. 91-245, and in 43 CFR 3108.2-1(c)(2) "reasonable diligence" in transmitting timely a rental payment for an oil and gas lease is interpreted as meaning posting the payment through the United States mail at no later date than that on which letters mailed thereon would, despite normal delays in the collection, transmittal, and delivery of mail, be delivered to the appropriate land office on or before the due date of the rental.

Act of May 12, 1970 -- Words and Phrases

"Justifiable Delay". As used in P.L. 91-245, "justifiable delay" in making an oil and gas lease rental payment will be recognized only where sufficiently extenuating circumstances are present so as to affect the lessee's actions.

APPEARANCES: Charles E. Cole, Esq., of Fairbanks, Alaska, for appellants Roland W. Browne et al.; James J. Dillman, Esq., of Dillman, Fiedelman and Holbrook, Sheboygan, Wisconsin, for appellant James F. O'Reilly; Cecil A. Johnson, Esq., of Johnson and Ilich, Omaha, Nebraska, for appellant Harriet P. Johnson; all other appellants, pro se.

OPINION BY MR. HENRIQUES

The case of Louis Samuel, and those noted in the Appendix affixed hereto, concern the interpretation of the 1970 amendments to Section 31 of the Mineral Leasing Act, 30 U.S.C. § 188 (1970), embodied in P.L. 91-245, adopted May 12, 1970. Since this is a matter of first impressio and the remedial provisions involved have engendered an initially great influx of appeals, it would be beneficial to all concerned to set down at some length what the Board of Land Appeals considers to be the purpose and effect of the recent statutory changes. To place this discussion in its proper light, it will be necessary to put into historical perspective the development of section 31 of the Act.

Prior to 1954 the Act contained no provision for an automatic termination of an oil and gas lease, issued thereunder, for failure to pay advance rentals. Rather, the practice of the Department had been to consider the lease as still in effect in the absence of a written relinquishment provided by the lessee to the appropriate office. This practice proved unsatisfactory for a number of reasons. First of all, it worked an undue hardship on various lessees who, desirous of giving up their lease, erroneously assumed that their failure to pay the rent prior to the anniversary date of the lease resulted in its cancellation. In such cases, the Department's policy was that regardless of the intent to relinquish the leases, lessees were liable for the full payment of the amount owed. Second, from the point of view of the Department, the disorder that developed from this practice was magnified by the Department's inability to declare the lease terminated and put the land up for new lease offers.

Congress, having been apprised of these difficulties, by the Act of July 29, 1954, 68 Stat. 585, amended Section 31 of the Act, supra, to provide for the automatic termination of leases for the failure to pay the full amount of the yearly rent prior to the anniversary date of the lease. This statute, however, was couched in mandatory terms, and the Department early held that it lacked authority to waive automatic termination even in cases in which the amount lacking was nominal or when payment had arrived only one day late regardless of the individual circumstances attendant. The harshness of this rule by its nature resulted in the cancellation of leases in cases that the Department itself admitted were equitably meritorious, but felt itself constrained from acting by the clear mandatory terms of the statute. See discussion in Hunt Oil Company, A-30101 (June 23, 1964). Aggrieved lessees resorted to Congress and a number of private laws were enacted to grant relief in individual cases. Finally, Congress in 1962 enacted P.L. 87-822, 76 Stat. 943, which amended section 31 so as to allow lessees to petition the Department for reinstatement provided no subsequent leases

had issued on the lands in question, and further provided that they could prove to the Secretary's satisfaction that the failure to pay timely the advance rentals was justifiable or not due to a lack of reasonable diligence. Unfortunately, this legislation was in the nature of a curative act and it had no prospective effect. See Billy Mathis et al., A-30512 (July 6, 1966); Duncan Miller, A-30067 (March 12, 1964). Consequently, over the period of the next eight years the same difficulties which had impelled Congress to act in 1962 recurred frequently, again occasioning a number of private relief laws. Seeking a more permanent solution to the problem, Congress in 1970 enacted P.L. 91-245, 84 Stat. 206, which had both retrospective and prospective application. <sup>1/</sup>

Section 31 of the Act now provides in relevant part that in cases in which there is a:

\* \* \* failure of a lessee to pay rental on or before the anniversary date of the lease, for any lease on which there is no well capable of producing oil and gas in paying quantities, the lease shall automatically terminate by operation of law: \* \* \*  
\* Provided, That if the rental payment due under a lease is paid on or before the anniversary date, but either (1) the amount of the payment has been or is hereafter deficient and the deficiency is nominal, as determined by the Secretary by regulation, or (2) the payment was calculated in accordance \* \* \* with a bill or decision which had been rendered by him and such figure, bill, or decision is found to be in error resulting in a deficiency, such lease shall not automatically terminate unless (1) a new lease has been issued prior to May 12, 1970, or (2) the lessee fails to pay the deficiency within the period prescribed in a notice of deficiency sent to him by the Secretary. 30 U.S.C. § 188(b).

It further provides that:

(c) Where any lease has been or is hereafter terminated automatically by operation of law under this section for failure to pay on or before the anniversary date the full amount of rental due, but such rental was paid on or tendered within twenty days thereafter, and it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to a lack of reasonable

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<sup>1/</sup> Rijan Oil Company, 78 I.D. 359 (1971).

diligence on the part of the lessee, the Secretary may reinstate the lease if --

(1) a petition for reinstatement, together with the required rental, including back rental accruing from the date of termination of the lease, is filed with the Secretary; and

(2) no valid lease has been issued affecting any of the lands covered by the terminated lease prior to the filing of said petition \* \* \*. 30 U.S.C. § 188(c).

The appeals of Louis Samuel and the other appellants named in the Appendix involve late payment of the amount due, rather than nominal deficiencies. Accordingly, under the provisions of section 31 the subject lease is held to have terminated on the anniversary date and each lessee has an affirmative duty to tender the money owed and file for reinstatement within the time prescribed. Fulfillment of this requirement is the sine qua non of consideration of a request for reinstatement, but it is not determinative of the appropriateness of reinstatement. Reinstatement can only be granted when the lessee proves to the Secretary's satisfaction that the failure to timely pay the full amount of rent was either justifiable or not due to a lack of reasonable diligence on the part of the lessee.

Appellant Samuel in the case at bar was 16 days delinquent in payment of his lease rental. He timely filed an application for reinstatement which alleged that having suffered a number of financial reverses he found himself unable, despite diligent efforts on his part, to obtain the money needed to make the rental payment on the anniversary date. He admitted he was fully aware that the rental payment must be paid by the anniversary date, but argued that the circumstances of his case were in the category contemplated by Congress when it enacted P.L. 91-245. The local Land Office disagreed and refused to grant reinstatement. Appellant thereupon appealed to this Board for review.

Appellant contends first that P.L. 91-245 is remedial legislation and should, under dictates of normal statutory construction, be construed liberally. We agree. See 3 SUTHERLAND, STATUTORY CONSTRUCTION, § 5701 (1943). But while the terms used to convey Congressional intent in the statute may be liberally construed to give effect to that intent, the paramount question remains: what was the intent, what was the focus of concern which led to the enactment of P.L. 91-245? Certainly it was designed to afford relief in some of the past case situations where Congress felt that such action was warranted. See H.R. Rep. No. 91-1005, 1970 U.S. Code Cong. and Adm. News at 1451 and compare Billy Mathis et al., supra, with Priv. L.

89-365. But it is equally clear from the legislative history of the Act that Congress intended that great discretion would reside with the Secretary of the Interior. Thus, the House Interior and Insular Affairs Committee in its report of the Act noted:

A reinstatement may be made by the Secretary only after he is fully satisfied that the mistake was justifiable or not due to lack of reasonable diligence on the part of the lessee. The Committee expects the Secretary of the Interior to examine carefully each petition for reinstatement and to adjudicate favorably only those cases where it is clearly shown that the failure was, as indicated above, either justifiable or not due to a lack of reasonable diligence. \* \* \* H.R. Rep. No. 91-1005, 1970 U.S. Code Cong. and Adm. News at 1453 (Emphasis added.)

Thus, appellant has an affirmative duty to show either reasonable diligence or justification in order for the Secretary to grant relief.

Appellant contends that both the Departmental regulations promulgated under the statute and the practice of the Department as regards the "reasonable diligence" requirement violate the intent and spirit of the statute. The relevant regulation is found at 43 CFR 3108.2-1(c)(2) (1972):

Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collection, transmittal and delivery of the payment.

Appellant argues that as the whole point of the law was to provide reinstatement procedures for those who had not, in point of fact, made a timely payment, the regulation is in contradiction of the legislative statute. While at first glance there is a patina of legitimacy to this argument, deeper analysis indicates that the challenged regulation is both remedial and in accord with Congressional intent. Prior to the enactment of P.L. 91-245 the Department had interpreted section 31 of the Act to the effect that regardless of whether the rental payment was sent by mail and postmarked at a date which would ordinarily result in timely delivery, if the payment did not in fact arrive on or before the due date, the lease terminated. See Westates Petroleum Company, A-31117 (March 4, 1970); Union Texas Petroleum, A-30970 (March 5, 1969); Duncan Miller, A-30966 (October 29, 1968); M. E. Drebow, A-30723 (April 18, 1967); Harold Ladd Pierce, A-30341 (June 30, 1965). There was, therefore, no

reasonable diligence defense available to lessees, and the failures of the postal services over which the lessees exercised no control would not vitiate the effect of their failure to timely pay the rent when due. The effect of the new regulation is that when lessees can show that they mailed the payment in sufficient time so that in the normal course of events it would be received on or prior to the due date, they may be granted reinstatement provided that they make timely application as required by the statute. Seen in this light, the regulation is both remedial and comports itself to the spirit and intent of the statutory changes.

Appellant's contention that "reasonable diligence" means "that the lessee made a zealous good-faith effort to raise the money and send in a timely payment" finds no support either in the legislative history or in a reasonable interpretation of the language of the Act. Indeed, the reasonable diligence requirement is primarily an objective test dependent not upon the personal situation of the lessee, but upon what action a reasonably diligent person would take. It is not a protean standard with differing applicability to different lessees; rather it is a fixed criterion which all lessees must meet to avail themselves of the statute's remedial effects. This the appellant has not done here.

Finally, appellant contends that the statute provides alternative rationales for reinstatement noting that the language of the statute provides for reinstatement (so long as other conditions are met) if "it is shown to the satisfaction of the Secretary of the Interior that such failure was either justifiable or not due to the lack of reasonable diligence on the part of the lessee." (Emphasis added). It seems self-evident that this language provides two separate grounds for reinstatement. The term "justifiable" is not, however, defined either in the statute or in the regulations, and the legislative history is silent on this point. Appellant contends that since the word "justifiable" has an "equitable ring to it," Congress meant to allow reinstatement of any lease where "considering all of the facts of the case, \* \* \* it would be fair or right to reinstate this particular lease." We think this interpretation would go too far. If the term "justifiable" is defined so as to direct the Department to do that which would be equitable under the circumstances, then the succeeding phrase "or not due to a lack of reasonable diligence on the part of the lessee" would be surplusage of no meaning. Surely it would be inequitable to refuse reinstatement where reasonable diligence had been exercised by the lessee. The canons of construction require that statutes be construed so as to give meaning and effect to each word. The word "justifiable" may have an equitable ring to it, but the bell of its meaning is constructed of different stuff.

We believe that this term can be defined only by keeping in mind the fact that "not due to a lack of reasonable diligence" is an objective standard. It seems reasonably clear that Congress by the word "justifiable" was adverting to a limited number of cases where, owing to factors ordinarily outside of the individual's control, the reasonable diligence test could not be met. This is thus a subjective test, dependent upon the factual milieu of the individual. We believe that cases which are so covered are those where the death or illness of the lessee or member of his close family, occurring with immediate proximity to the anniversary date, have been a causative factor in his failure to exercise reasonable diligence. Coming under this rubric would be natural disasters such as floods, earthquakes and the like. 2/ Whether in the individual case these events had the sufficient proximity and causality to fall under the statute is a question in which the various components must be weighed. What is clearly not covered are cases of forgetfulness, simple inadvertence or ignorance of the regulations, or, as in the instant case, inability to pay. To allow these latter circumstances the protection of the statute would be, in effect, to repeal the requirement of timely payment -- an end which Congress could have achieved by direct action and which it chose not to mandate. To be "justifiable" within the meaning of the statute, sufficiently extenuating circumstances must be present so as to affect the lessee's actions. And it is to be emphasized that the burden of proof is upon the lessee to prove that such was, in fact, the case.

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2/ This analysis finds additional support in the original draft amendment of 43 CFR 3129 now 43 CFR 3108.2-1, intended to implement P.L. 91-245. This draft provided, inter alia, that:

"(c) The burden of showing that the failure to pay on or before the anniversary date was justifiable or not due to a lack of reasonable diligence will be on the lessee, however, failure to pay on or before the anniversary date will be considered justifiable and not due to a lack of reasonable diligence, if, (1) payment was postmarked at least three days prior to the anniversary date or (2) when such failure is due to errors in billing notices, delays in mail caused by postal work stoppages, or (3) for any other reason which the authorized officer may accept as justifiable, including sickness, accident, and natural disasters." (Emphasis added.)

While this section underwent considerable subsequent change, its relevance lies in that it shows the supportive rationale of the regulation that did result, and clearly indicates that the term "justifiable" was meant to comprehend situations such as we have indicated in the text.

The appeals in the Appendix involve various factual situations in which either the payment was mailed after or on the due date, or on a date which, considering the distances required to be covered, would not normally result in timely arrival at the proper land office. Thus, reasonable diligence was not shown.

The justifications for this failure range from instances in which the lessee was on vacation, or where the courtesy notice was mislaid, to allegations of illness which do not evince sufficient proximity or causality to be deemed "justifiable" under the meaning of section 31 of the Act as discussed supra.

Finally, there are appeals in which the mandatory appeal procedure requirements were not observed, and thus the Board is without authority to grant reinstatement.

In light of the above discussion, it is the conclusion of the Board that the appellant Samuel's request for reinstatement and those of the appellants set out in the Appendix were properly denied. Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decisions appealed from are affirmed.

Douglas E. Henriques, Member

We concur:

Newton Frishberg, Chairman

Frederick Fishman, Member.

APPENDIX

The following appeals, for the reasons stated supra are denied:

C. A. Luckey; IBLA 72-194; N 2167, N 2167a

Lessee's secretary mislaid the courtesy notice. Payment was postmarked four days late and was received six days late.

Elizabeth Ballard; IBLA 72-204; Nev. 064000-E

Lessee was ill with the flu, but did not provide sufficient information to substantiate proximity and causality requirements so as to show that the delay was justifiable. Payment was postmarked six days late and was received eight days late.

Johnnie W. Novak; IBLA 72-209; Nev. 058700-D

Lessee did not file petition for reinstatement within the required time. Payment was postmarked one day early but was received one day late -- sent from Antonia, Texas, to Reno, Nevada.

Eben B. Williams; IBLA 72-224; Nev. 058540

Lessee forgot about the payment. Payment was postmarked one day late and was received 5 days late.

Denise Grossman; IBLA 72-231; Wyo. 25971

Lessee claims to have mailed payment a couple of days early, but admits that it was posted in a rural area where daily pickups may not be guaranteed. Payment was postmarked three days late and was received seven days late.

Arnold L. Greenberg; IBLA 72-232; Wyo 090860-A, 090862-A, 090863-A,  
090866-A, 090868-A, 090869-A

Lessee was out of town at time payment was due. Payment was postmarked three days late and was received four days late.

Edward J. Hannie; IBLA 72-233; ES 01043 (La.)

Lessee's son, born on May 3, 1970, required various special medical attention. On May 26, 1970, lessee traveled to New Orleans from his residence in Lafayette, Louisiana, for orthopedic consultation. Subsequently, a Baylor University doctor was contacted. The advance rental was due on July 1, 1970. It was postmarked two days late and was received five days late. Having closely considered the

above sequence of events, we are constrained to say that they do not evince the requisite proximity and causality to be justifiable under the standard set out in the text.

Peter H. Kern; IBLA 72-235; Wyo. 15788-D, 21530-B

Lessee was on a hunting trip at the time payment was due. Payment was postmarked fourteen days late and was received sixteen days late.

William D. James; IBLA 72-236; Wyo. 18536

Lessee failed to enclose payment for rental owed with his petition for reinstatement.

William M. Prier; IBLA 72-246; Wyo. 5685

Lessee erroneously assumed posting of the payment by the due date was all that was necessary. Payment was postmarked one day early, but was received 4 days late -- sent from Granada Hills, California, to Cheyenne, Wyoming.

Robert O. Sypolt; IBLA 72-253; W 19607-A

Lessee was traveling in Europe during the month prior to the anniversary date of the lease. Payment was postmarked on the date due and was received five days late -- sent from Morgantown, West Virginia, to Cheyenne, Wyoming.

Henry George Lutgens; IBLA 72-260; Mont. 14029-A

Lessee claimed that the delay in payment resulted from an illness in his home, but has not provided sufficient information to indicate the requisite causality and proximity required. Payment arrived one day late.

James F. O'Reilly; IBLA 72-263; Utah 5043-D

Lessee sent payment postmarked on due date from Sheboygan Falls, Wisconsin, to Salt Lake City, Utah, where it arrived two days late. No explanation for this late posting was offered.

Joseph & Jean Maisano; IBLA 72-267; Wyo. 24285-A

Lessees experienced difficulty in contacting the assignor of their assigned lease, who assured them the land office would accept late payment. Payment was postmarked 2 days late, was received 5 days late and the enclosed check was dated one day before the due date.

Leonard F. Devall; IBLA 72-268; Mont. 17139-A

As a result of inadvertence the rental payment was sent on the date due and received 8 days late -- sent from Los Angeles, California, to Billings, Montana.

Gordon & Alleyne Laatz; IBLA 72-269; Wyo. 24286

Lessees suffered a number of deaths in their family. In addition, there was a lack of understanding on the lessee's part of the requirement of rental payments on non-producing leases. We have closely considered appellant's case and find that the succession of illnesses and death was not sufficiently proximate to fall within the confines of the term "justifiable" as elucidated supra.

Mary C. Mohler; IBLA 72-270; Nev. 059748-T

Lessee, through inadvertence, mailed the payment on the date due and it was received one day late.

Lulu Coup; IBLA 72-276; Wyo. 19605-H

Lessee's payment was postmarked one day late and arrived five days late.

Charles H. Favel; IBLA 72-280; Wyo. 665-A

Lessee was out of town and at some time thereafter subsequently in the hospital. Payment was received on the day after it was due (there was no postmark on the envelope) and the check was dated on the date due. Sent from Santa Monica, California to Cheyenne, Wyoming. Lessee has not provided the Board with the requisite information needed to deem this delay "justifiable."

G. I. Jack Vaughn; IBLA 72-281; Wyo. 7694

Lessee was unaware that receipt of his payment on the anniversary date, rather than its posting was required. Payment was postmarked one day early but arrived two days late -- sent from Dallas, Texas, to Cheyenne, Wyoming.

John P. Munari; IBLA 72-284; Wyo. 0215850-B

Lessee was unaware that receipt of his payment on the anniversary date, rather than its posting was required. Payment was postmarked one day early, but arrived one day late -- sent from Pasadena, California, to Cheyenne, Wyoming.

G. W. Poole; IBLA 72-294; Anch 061620-A

Lessee erroneously remitted payment to the State of Alaska rather than BLM. Payment was not tendered within 20 days of the due date at the proper office and thus the Board is without power to order reinstatement.

Hazel J. Johnson; IBLA 72-298; Wyo. 21462-O

Lessee failed to petition for reinstatement within the required time period after receipt of a notice of termination.

William Byron Ball & Florence Ball; IBLA 72-299; Riv. 1412

Payment was postmarked on due date and arrived one day late -- sent from Palmdale, California, to Riverside, California.

Charles M. Goad; IBLA 72-304; NM 10425, 10426, 10508, 10509, 10510, 10552

Lessee was in the process of selling his lease interest to another party. The check by which payment was tendered was returned by the bank as uncollectible due to a lack of sufficient funds. Lessee subsequently made payment fifteen days late.

Joseph H. Budd; IBLA 72-319; NM 2733-E

Lessee was out of town on the date due. Payment was subsequently sent eight days late and was received ten days late.

Estate of Joe Morelli; IBLA 72-321; NM 0301703

Lessee suffered a long illness and eleven months subsequent to the termination of the lease he died and his estate seeks reinstatement. Payment was postmarked three days late and was received seven days late. We have closely considered appellant's case, but cannot find in the record before us a sufficient proximity or causality to deem the failure to make timely payments justifiable.

Fred I. Shaffer, Jr.; IBLA 72-346; W-0314772

Lessee sent payment to the appropriate land office postmarked one day early and it was received one day late. The enclosed check, however, was not signed and was returned to him. Lessee subsequently returned the check after signing it, but failed to petition for reinstatement within the time required and as to the necessity of which the land office had advised him. Thus the Board is without power to order a reinstatement.

Roland Browne et al.; IBLA 72-359; AA 5778

Lessee's payment was received 29 days late. Under the statutory requirement payment must be tendered within 20 days in order to allow a lessee to invoke the reinstatement procedures. Thus, the Board is without power to grant reinstatement of the lease.

William J. Evans; IBLA 72-392; W 20461 G

Lessee erroneously thought that the rental was due on a date different from the anniversary date. Payment was postmarked four days late and was received eight days late.

A. H. Springer; IBLA 72-395; W 25079 D

Payment was postmarked one day prior to anniversary date but was received two days late -- sent from Groveland, Illinois, to Cheyenne, Wyoming.

Amanda Jones; IBLA 72-396; W 19603 O

Lessee was on vacation. Payment was telegraphed five days late.

John Zoller; IBLA 72-406; U 0147718-K

Lessee forgot about the payment. Payment was postmarked two days late and was received six days late.

Charles H. Schadt; IBLA 72-408; W 18853-I

Lessee's payment was postmarked the day before the anniversary date but arrived one day late -- sent from Catonsville, Maryland, to Cheyenne, Wyoming.

William A. Brewer; IBLA 72-427; BLM 067244

Lessee's payment was postmarked on the date due and was received two days late. Lessee's statement that a fire had occurred in his office early in the preceding month does not have the requisite specificity to enable us to say that the failure to timely pay the rental was justifiable.

Ewald Benedict; IBLA 73-57; M 8847

Payment was mailed and postmarked three days late and received four days late; the late mailing was the result of the pressures of seeding crops.

IBLA 72-295, etc.

Edward R. Donegan; IBLA 73-79; Nev. 064645-D

Payment was mailed and postmarked two days late; this late mailing was the result of inadvertence.

Lillie B. Lewis; IBLA 73-135; U 15160-O

Payment was postmarked on the date due and was received two days late. Sent from Cromwell, Connecticut to Salt Lake City, Utah.

Harriet P. Johnson; IBLA 73-171; W 14486

Payment was postmarked four days late and was received five days late.

8 IBLA 281

