

JOHN OAKASON

IBLA 73-151

Decided September 24, 1973

Appeal from decision (U-19219) of Utah State Office, Bureau of Land Management, requiring stipulations to an oil and gas lease offer.

Dismissed.

Administrative Procedure: Generally! ! Rules of Practice: Appeals:
Timely Filing

Under the regulations of the Department of the Interior, Bureau of Land Management personnel must transmit cases to the Board of Land Appeals where the notice of appeal from an adverse Bureau decision, although filed late, is filed within the ten! day grace period.

Notice! ! Rules of Practice: Appeals: Generally! ! Rules of Practice:
Appeals: Timely Filing

Constructive service of a Bureau of Land Management decision sent by certified mail to an applicant's address of record is made when the Post Office returns the decision to the Bureau stamped "unclaimed." The 30! day period for filing a notice of appeal from the decision commences at that time, and is not tolled, extended, or the constructive service vitiated, by actual personal delivery of the decision thereafter, even when the addressee claims he was out of town at the time notice of the certified mail was delivered to his address of record.

Rules of Practice: Appeals: Dismissal! ! Rules of Practice: Appeals:
Timely Filing

An appeal to the Board of Land Appeals must be summarily dismissed where the notice of appeal, although filed within the ten! day grace period, was not transmitted within the 30! day period for filing the notice of appeal.

APPEARANCES: Sheridan L. McGarry, Esq., for appellant; David C. Branand, Esq., Office of the Solicitor, for appellee, Bureau of Land Management.

OPINION BY MRS. THOMPSON

This appeal arises from a decision by the Utah State Office, Bureau of Land Management, dated July 12, 1972, requiring John Oakason to accept certain stipulations before issuance of a lease pursuant to his oil and gas lease offer U-19219. He was allowed thirty days from receipt of the decision within which to consent to the stipulations or to appeal to this Board, failing in which the case would be closed. Oakason filed a notice of appeal in accordance with 43 CFR Part 4, Subpart E, in the State Office on September 1, 1972, and filed the signed stipulations on September 13, 1972. There were subsequent communications between the State Office and Oakason; however, the determinative issue before us is whether Oakason's notice of appeal from the July 12, 1972, decision was timely filed so as to stay the effect of that decision. 1/

The Bureau of Land Management filed a motion to dismiss Oakason's appeal summarily as not being timely filed. While we do

1/ In essence, the subsequent communications pertained to the questions of whether the notice of appeal was timely filed, whether the offer remained a viable offer, whether action by the State Office in closing the case record was proper or should be rescinded and the offer reinstated with priority as of its original filing. The answer to these questions depends on the determinative issue of the timely filing of the notice of appeal.

not agree with some of the reasons advanced in that motion, we find that the appeal must be dismissed for reasons hereafter indicated.

The State Office initially refused to transmit the case record as an appeal, since the notice of appeal was filed later than thirty days from constructive service of its decision. However, as will be discussed, infra, the notice of appeal was filed within the grace period afforded by 43 CFR 4.401(a). If the notice had been filed after the grace period, it would have been proper for the State Office to close the case. However, when a notice of appeal is filed during the grace period, the case must be transmitted to this Board to determine whether summary dismissal is required or whether the delay in filing may be waived. 43 CFR 4.411(b). The initial refusal of the State Office to transmit the appeal record to this Board, therefore, was erroneous.

The essential facts are: On July 14, 1972, the State Office sent the decision with the stipulations by certified mail to Oakason's address of record, a Post Office box in Salt Lake City, Utah. On July 29, 1972, the Post Office returned the certified letter to the State Office, stamped "unclaimed." Other stamps indicated the letter had been received at the Post Office on July 14, 1972, and two notices of the certified letter had been placed in Oakason's box. Oakason states that he did not receive the mail before it was returned to the State Office because he was temporarily out of town on unrelated business. He further states that on August 7, 1972, he inquired at that Office concerning the mail. He was told he could sign for and receive the mail and he did so. He adds, "There was no conversation expressly referring to the question of what was the date of service nor the date on which stipulations were required to be returned."

Oakason contends that valid service of the decision upon him was not made until August 7, 1972, when he personally signed for the contents of the certified mail, i.e., the decision and stipulations. Therefore, he contends his notice of appeal was timely filed, suspending the time for executing the stipulations, and thereafter he complied with the requirements of the decision.

Service of Bureau decisions and appeals therefrom are governed by the regulations of this Department. General rules pertaining to

communications by mail from the Bureau are set forth at 43 CFR 1810.2. 2/

That regulation generally provides for constructive notice by mailing to a person's address of record. It has been long established under the Department's rules of practice that transmission by registered or certified mail of a decision to the address of record of an applicant and the unsuccessful attempt by the Post Office to deliver the document at that address constitutes constructive service. Cornell Shelton, A-26441 (October 17, 1952).

It may be argued from 43 CFR 1810.2 that there are several dates which might be used for determining when service by registered or certified mail has been made; namely, the date the letter is deposited in the mail, the date shown as the attempted delivery date to the addressee's address of record, and the date of the return of the undeliverable letter to the Bureau's office. The last date would afford the most time to the person charged with constructive service of the decision. It is also the date prescribed by the rules of practice pertaining to hearings and appeals within this Department, as will be shown, infra. Therefore, we hold it to be the controlling date in the circumstances of this case.

2/ This regulation states:

"§ 1810.2 Communications by mail; when mailing requirements are met.

"(a) Where the regulations in this chapter provide for communication by mail by the authorized officer, the requirement for mailing is met when the communication, addressed to the addressee at his last address of record in the appropriate office of the Bureau of Land Management, is deposited in the mail.

"(b) Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him. An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the requirements of this section where the attempt to deliver is substantiated by post office authorities."

Regulation 43 CFR 3000.4 pertaining to oil and gas leases provides that appeals from decisions by Bureau officials are governed by the rules of practice in 43 CFR Parts 1840 and 1850. These rules, Parts, which formerly contained the rules of practice, now simply make a cross reference to the special rules for appeals to this Board in 43 CFR Part 4. By 43 CFR 4.411(a) a notice of appeal to this Board

* * * must be transmitted in time to be filed in the office where it is required to be filed within 30 days after the person taking the appeal is served with the decision from which he is appealing.

Regulation 43 CFR 4.401(c) pertains to service of all documents relating to appeals to this Board. It reads:

(c) Service of documents. (1) Wherever the regulations in this subpart require that a copy of a document be served upon a person, service may be made by delivering the copy personally to him or by sending the document by registered mail or certified mail, return receipt requested, to his address of record in the Bureau.

(2) In any case service may be proved by an acknowledgment of service signed by the person to be served. Personal service may be proved by a written statement of the person who made such service. Service by registered or certified mail may be proved by a post! office return receipt showing that the document was delivered at the person's record address or showing that the document could not be delivered to such person at his record address because he had moved therefrom without leaving a forwarding address or because delivery was refused at that address or because no such address exists. Proof of service of a copy of a document should be filed in the same office in which the document is filed except that proof of service of a notice of appeal should be filed in the office of the officer to whom the appeal is made, if the proof of service is filed later than the notice of appeal.

(3) A document will be considered to have been served at the time of personal service, of delivery of a registered or certified letter, or of the return by post office of an undelivered registered or certified letter.

Oakason contends that the July 29, 1972, date which the Bureau advances as the latest day upon which service could have been effectuated, is not appropriate for two major reasons. First, he contends that as the envelope was stamped by the Post Office as "unclaimed" it does not fall within the three categories set forth in 43 CFR 4.401(c)(2) or in 43 CFR 1810.2(b); namely, nondelivery because the person at the record address had moved without leaving a forwarding address, or because delivery was refused, or because no such address exists. This argument is without merit. Paragraph (3) of 43 CFR 4.401(c) gives the time service is considered as to all undelivered registered or certified letters. This is the date of the return by the Post Office of the undelivered registered or certified letter which was sent to the address of record as prescribed in paragraph (1) of that regulation. The categories listed in paragraph (2) relate to how service may be proved. Those categories are exempli gratia and do not circumscribe other acceptable proof of proper service in accordance with that allowed in paragraph (1). Furthermore, although the Post Office stamp may have separate check offs for "refused" and "unclaimed," that does not restrict the meaning of this Department's regulations. It is within the ambit of meaning of regulations 43 CFR 1810.2(b) and 43 CFR 4.401(c)(2) referring to mail that is "refused" to encompass mail which is undeliverable because it is "unclaimed" by the addressee. Mail which has been returned as "unclaimed" has been considered as validly constructively served within the meaning of the Department's rules. E.g., Duncan Miller, A-31054 (August 21, 1969). Therefore, July 29, 1972, the date the letter was returned to the State Office, is the date service of the July 12, 1972, decision was constructively made upon Oakason.

Oakason's second contention is, in effect, that the personal delivery of the decision and stipulations to him constitute actual notice and govern the commencement of the time for the appeal period to run, rather than the return of the undelivered certified mail. Although he makes some arguments to support this position, they are not supported by any precedential authorities and are not persuasive. While the regulation sets forth alternative methods for effectuating service of a decision upon a person, this does

not mean that when constructive service has been effectuated in accordance with the regulations, the constructive service is vitiated when actual notice is given thereafter. Duncan Miller, supra. See also Arthur M. Moylan, Jr., A-28237 (March 29, 1960). The party being served does not have the right to elect the method service is to be made upon him by ignoring the fact a constructive service has already been made and thereby attempt to extend the period within which an appeal may be taken. It is no excuse that Bureau personnel did not tell him service had already been effectuated when, as a courtesy, he was given the documents at the State Office. Appellant is charged with notice of this Department's regulations and those of the Postal Service in Title 39 CFR which govern his use of the Post Office box and the conditions pertaining to the delivery and nondelivery of mail. The fact he was out of town when notice of the certified mail was delivered to his address of record does not obviate the efficacy of the service and does not toll the time period for filing an appeal. Arthur M. Moylan, Jr., supra.

It appears that Oakason was attempting to extend as long as possible the time in which he would be bound to a lease by signing the stipulations or lose his priority by failing to do so. While in the past, as he contends, the Bureau for reasons of administrative expediency, may have accepted some signed stipulations filed after the 30! day appeal period expired where there was constructive service, this affords no basis for ignoring the effect of the constructive service here. Oakason has attempted to use the appeal process as a means of gaining time for his own purposes and is in no position to complain here when he delayed too long. He had ample time after he received the decision on August 7, to appeal therefrom or to file the signed stipulations before the 30! day appeal period beginning July 29, expired August 28, 1972.

Oakason's notice of appeal was dated September 1, 1972, and filed that day. Although it was filed within the ten! day grace period prescribed in 43 CFR 4.401(a), it is apparent from its date that it was not transmitted before the End of the 30! day period for filing the notice of appeal, therefore, under that regulation the delay in filing cannot be waived. This Board must dismiss the

appeal. 43 CFR 4.411(b); Estate of Knudsen, 10 IBLA 329 (1973); Duncan Miller, 65 I.D. 380 (1958).
3/

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

Joan B. Thompson
Member

We concur:

Douglas E. Henriques
Member

Edward W. Stuebing
Member

3/ The dismissal of the appeal makes operative the consequences of the Bureau's decision, without further notice to appellant, namely, the rejection of the oil and gas lease offer and closure of the case record when it is returned to the Bureau.

