

Appeal from decision of the Eastern States Office, Bureau of Land Management, denying petition for reinstatement concerning oil and gas leases ES 12092, 12308, 12309, and 12313.

Decision reversed and cases remanded.

1. Oil and Gas Leases: Reinstatement -- Oil and Gas Leases: Rentals

An oil and gas lease terminated by operation of law for failure to pay the advance rental timely will be reinstated where it is shown that lessee's failure to pay the rental timely was not due to a lack of reasonable diligence. Evidence which establishes that the payment due on December 1, 1975, at the Eastern States Office, Bureau of Land Management, Silver Spring, Maryland, was delivered to a postal carrier on November 11, 1975, is sufficient to demonstrate due diligence despite the fact that the envelope containing the payment was postmarked December 8, 1975, and not received until December 11, 1975, where a credible explanation of the delay has been furnished by the Post Office.

APPEARANCES: Paul D. Beard, Jr., and Leon F. Scully, Jr., pro se.

OPINION BY ADMINISTRATIVE JUDGE FISHMAN

Paul D. Beard, Jr., and Leon F. Scully, Jr., appeal from a decision rendered February 4, 1976, by the Eastern States Office, Bureau of Land Management, which denied their petition for reinstatement of the oil and gas leases designated infra.

The decision of February 4, 1976, recited in part as follows:

On December 1, 1975, oil and gas leases ES 12313, ES 12309, ES 12308, and ES 12092, terminated for failure to pay annual rental in a timely manner. The envelope containing the rental for the four leases was post-marked December 8, 1975, and arrived in the Eastern States Office December 11, 1975. Lessee has petitioned for reinstatement under the provisions of 43 CFR 3108.2-1(c) claiming that the late payment of rental was not due to a lack of reasonable diligence.

Petitioner in support of his position states that on November 11, 1975, check No. 620 in the amount of \$ 174.50 (rental for all four leases) was enclosed in an envelope with sufficient postage and properly addressed to this office. It was handed to the postman who services the Midland Savings Building [in Denver, Colorado]. At the time the letter was given to the mailman, the lessee, Mr. Paul D. Beard, Jr., stated that the envelope contained an important rental that had to be in the Bureau of Land Management in Silver Spring by December 1. There is a signed statement to that effect dated January 9, 1976, signed by the postman, Mr. William Cullor, and submitted with the petition for reinstatement.

Assuming the information contained in the petition and statement is a correct recollection of what transpired 59 days earlier, there is still no suitable explanation of why a letter mailed November 11, 1975, was not postmarked until December 8, 1975, since as was stated in the statement of William Cullor, the letter was deposited at the main Central Post Office in Denver, Colorado.

Thus the Eastern States Office denied the petition on the basis of the absence of a "suitable explanation of why a letter mailed November 11, 1975, was not postmarked until December 8, 1975."

Attached to the appeal are three documents: (1) an affidavit from Beard to the effect that he handed the envelope, containing the payment, to postman William Cullor on the morning of November 11, 1975; and (2) a statement from Cullor that he received the envelope from Beard the morning of November 11, 1975, that he remembers the date because it was Armistice Day, although the holiday was the previous day, and that he dropped the letter the afternoon of November 11, 1975, "in a dispatch sack."

The third document consists of a letter to Beaird from Robert V. Moore, District Manager/Postmaster, Acting, dated March 23, 1976, and reciting as follows:

You have inquired how a letter deposited in dispatch in this office on November 11, 1976 [sic], addressed to Silver Spring, Maryland, could be postmarked December 8, 1975, some twenty-seven days later.

This office, as well as all other large post offices, has a constantly recurring problem with respect to mail remaining in sacks which presumably have been emptied. We have posted notices cautioning all employees to make certain this does not occur. A copy of one such notice is attached. Regretably [sic] it does happen, particularly in November and December when temporary personnel are hired.

The mail deposited in dispatch goes into sacks which are transported and emptied for routing and postmark. When a sack is emptied it is laid aside for future use. We have a surplus of sacks as a rule and the nearest to hand is the one used, so that it is perfectly possible that a sack might not be used again for a month. If a supposedly empty sack is found to contain mail then that mail is then routed and postmarked without any notation.

While there is no way of verifying what occurred, this is undoubtedly what happened to your letter.

We regret any inconvenience this delay may have caused you. [Emphasis supplied.]

We turn now to the case law. In W. A. Fitzhugh, 18 IBLA 94, 95 (1974), we stated as follows:

This Board has granted reinstatement in cases where the postmark demonstrates that the payment was deposited in the mails early enough to show reasonable diligence. R. G. Price, 8 IBLA 290, 292 (1972). If the postmark does not demonstrate reasonable diligence in the lessee's mailing of the payment, the Board will not go beyond it in the absence of exceptional circumstances. See

Mary White, 13 IBLA 363 (1973) (assertion that money order was mailed when purchased supported by additional probative evidence); A. Anton Frederickson, A-30793 (November 28, 1967) (affidavit of witness to mailing); John W. Monzel, A-28817 (August 31, 1961) (letter from post office detailing possibility of delay).

In the absence of credible objective or documentary evidence to the contrary, the postmark date will be deemed the date of mailing. * * *

However, that decision was reversed, W. A. Fitzhugh (On Reconsideration), 18 IBLA 323 (1975), upon submittal of affidavits establishing the true date of mailing. In John W. Monzel, *supra*, and A. Anton Frederickson, *supra*, explanatory letters from the Post Office officials concerned and other credible evidence were utilized to rebut the date of the postmark as the date of mailing.

Moreover, in the case at bar, Beard's check no. 622, written to Thomas H. Connelly on November 17, 1975, subsequent to check 620 containing the rental payment, was paid by the First National Bank of Denver on November 20, 1975. While these facts do not establish the date of mailing of check 620, they at least indicate that check 620 was prepared on or before November 17, 1975.

[1] We hold that an oil and gas lease terminated by operation of law for failure to pay the advance rental timely will be reinstated where it is shown that the lessee's failure to pay the rental timely was not due to a lack of reasonable diligence. Evidence which establishes that the payment due on December 1, 1975, at the Eastern States Office, Bureau of Land Management, Silver Spring, Maryland, was delivered to a postal carrier for mailing on November 11, 1975, is sufficient to demonstrate due diligence. This is so despite the fact that the envelope containing the payment, postmarked December 8, 1975, was not received until December 11, 1975. Here a credible explanation of the delay in postmarking has been furnished by the Post Office and other cogent evidence impelling that conclusion is of record. Considered in isolation, the explanation supplied by the Post Office might not suffice, because of its purely conjectural tenor. However, with the direct evidence provided by appellant, the explanation of the delay in postmarking is found to be worthy of credence and is accepted.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed and the cases remanded for appropriate action consistent herewith.

Frederick Fishman
Administrative Judge

We concur:

Edward W. Stuebing
Administrative Judge

Newton Frishberg
Chief Administrative Judge

