

ELLIOTT AND LEON DAVIS

IBLA 76-292

Decided July 19, 1976

Appeal from decision of the New Mexico State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas lease NM 20966, terminated by operation of law for failure to pay the annual rental on or before the due date.

Reversed.

1. Oil and Gas Leases: Reinstatement

An oil and gas lease, terminated by operation of law, 30 U.S.C. § 188(b) (1970), for failure to make timely payment of the rental on or before the anniversary date, can be reinstated only if the lessee shows that the failure was either justifiable or not due to a lack of reasonable diligence.

2. Oil and Gas Leases: Reinstatement

Where the facts of a case lend circumstantial support and credibility to lessees' assertion that they posted their rental payment sufficiently in advance of the time necessary to account for normal postal delays, the lease may be reinstated on the basis that the failure to make timely payment was not due to a lack of reasonable diligence.

APPEARANCES: Dan A. McKinnon, III, Esq., Marron and McKinnon, Albuquerque, New Mexico.

OPINION BY CHIEF ADMINISTRATIVE JUDGE FRISHBERG

Elliott and Leon Davis have appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated March 26, 1976, denying their petition for reinstatement of oil

and gas lease NM 20966. The lease was terminated by operation of law pursuant to 30 U.S.C. § 188(b) (1970), for failure to pay the annual rental on or before June 1, 1975, the anniversary date of the lease. The rental payment was not received until June 6, 1975.

Appellants filed a timely petition for reinstatement of the lease. BLM denied the petition by decision dated September 24, 1975. Appellants appealed to this Board and the case was docketed as IBLA 76-292.

By letter dated January 20, 1976, the Associate Director, BLM, requested that the Board remand the case to the New Mexico State Office to allow it to re-examine the facts and reconsider the petition for reinstatement. Pursuant to such request the Board, by order dated January 23, 1976, vacated the State Office decision of September 24, 1975, and remanded the case file for reconsideration.

The State Office again denied the petition for reinstatement by decision dated March 26, 1976.

By letter dated March 30, 1976, appellants requested that the Board reinstate the prior appeal in order to relieve appellants of the responsibility of refiling the appeal. Appellants' request is granted and the appeal will be considered under the previous docket number, IBLA 76-292.

Appellants are partners in a business known as Davis Brothers, which engages in oil and gas exploration. The business is headquartered in Tulsa, Oklahoma. The manager of the Land Department of the business, Morton G. Cohen, swore in an affidavit filed with the petition for reinstatement that he supervises the procedures for BLM lease rental payment; that on May 5, 1975, he submitted a request to the accounting department for the issuance of a check for the rental for NM 20966; that on May 9, 1975, the check was issued by the accounting department and forwarded to Elliott Davis or other appropriate representative for signature; that the request and the check were then routed to the secretarial staff, where the request was marked "PAID - May 9, 1975," and the check placed in an envelope; that the envelope was run through the office Pitney-Bowes postal meter machine and dated May 9, 1975, and, thereafter, placed in the mail for delivery.

The problem in this case arose because the envelope containing the check was not delivered to BLM until June 6, 1975. In addition to the postal meter date of May 9, 1975, the envelope was also marked with a Tulsa, Oklahoma, post office postmark dated June 3, 1975.

Mr. Cohen made the following statement concerning the postal mark discrepancies:

In an attempt to ascertain how the delay could have occurred, I have conferred with Mr. Willie Mixon, who is Manager of Requirements and Services for the United States Postal Services in Tulsa. He advises that all mail which has been run through a Pitney Bowes meter is not stamped by the United States Postal Service upon its original receipt unless such mail is received prior or subsequent to the date shown on the Pitney Bowes stamp. Mr. Mixon theorizes that the 3 June 1975 United States Postal mark could have resulted from an initial misdelivery of the envelope. He notes that upon occasions a letter will be misdelivered and the occupant at the place of delivery may simply ignore same and later redeposit it in the mails for proper delivery without any notations. In such event, it is the policy of the Postal Service to affix a United States Postal Service stamp. I am continuing to investigate this matter with Mr. Mixon and anticipate that he will either by letter or Affidavit be able to furnish additional facts pertaining to the matter.

There is no record in the file on any statement by Mr. Mixon.

Patty P. Navel, executive secretary to Elliott Davis for over 10 years, stated in an affidavit filed with the statement of reasons for appeal that she is responsible for marking the request form paid and placing the check in the envelope; that she is well aware of the importance of posting rental checks on time; and that while she could not swear that the envelope in question was in fact mailed on the day it was metered, in all her years with the company it is the first time that a lease rental check has arrived late.

Appellants have submitted copies of all the checks drawn by Davis Brothers beginning with check number 20175 dated May 1, 1975, and ending with check number 20275 dated May 14, 1975. With the exception of the check drawn to BLM, number 20229, all the checks that were mailed cleared within a few days after being deposited in the mails.

Upon remand of the case to BLM, the New Mexico State Office by letter dated February 25, 1976, inquired of the Postmaster, Tulsa, Oklahoma, whether he could provide an explanation for the discrepancy in the two dates. The reply from the Post Office, dated March 1, 1976, stated that:

The postmark date - PM, June 3, 1975, would indicate this item was received for processing at our main office after all committed mail for that date had been processed. Unfortunately, a logical explanation cannot be given for the discrepancies in these dates.

[1] The law states that an oil and gas lease on federal lands terminates automatically, with certain exceptions not applicable here, when the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1970). Reinstatement of a terminated oil and gas lease may only be allowed, assuming the lessee has tendered the money owed and filed for reinstatement within the time prescribed, if "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 diligence on the part of the lessee." 30 U.S.C. § 188(c) (1970); see Louis Samuel, 8 IBLA 268 (1972).

The requirements for reasonable diligence are set forth in 43 CFR 3108.2-1(c) (2), which reads, in part:

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 payment.

The question presented by the appeal is whether appellants' failure to pay the rental timely was justifiable or not due to a lack of reasonable diligence. In order for the justifiable test to come into play, there must be factors ordinarily outside of the individual's control which make it impossible to meet the reasonable diligence test, such as accidents, sickness or natural disasters. Louis Samuel, *supra*, at 274. No such factor was present in this case. Therefore, we must determine whether the actions taken or allegedly taken by appellants indicate that appellants were acting with reasonable diligence to make a timely payment of the rental.

Mr. Cohen's affidavit indicates that early in May 1975 he realized the rental for lease NM 20966 was due June 1, 1975. A check was issued bearing the date May 9, 1975, signed by Leon Davis. The request form for the issuance of the check also bore the indication PAID - May 9, 1975. The check was placed in an envelope bearing a Pitney Bowes postal meter date of May 9, 1975. Neither appellants nor any of their employees can swear that they actually deposited the envelope in the U.S. mail on May 9, 1975. The list of checks drawn on appellants' company filed with appellants' petition for reinstatement indicated that checks dated May 9, 1975, were mailed on May 9, May 13, May 14, and May 15. The BLM rental check is listed as having been mailed May 9.

Assuming the facts alleged by appellants to be true, it appears that reasonable diligence was exercised in the ascertainment that the rental payment was due and in the preparation of the check for mailing. The problem centers on the actual mailing of the envelope. Following the metering of the envelope, it is possible that it may have been misplaced at appellants' place of business and, upon its subsequent discovery, placed in the United States mail, resulting in the June 3 postmark. On the other hand, as theorized in Mr. Cohen's affidavit, the envelope after being metered may have been placed in the mail, subsequently misdirected or lost, and later reintroduced into the mail and postmarked June 3.

The two possible sets of circumstances are that the envelope either was not mailed by appellants until June 3, which would indicate a lack of reasonable diligence, or the envelope was mailed on May 9 and for inexplicable reasons was not delivered to BLM until June 6, indicating an exercise of reasonable diligence on the part of appellants.

While appellants cannot prove conclusively that they mailed the envelope on May 9, the standard operating procedures of the company and its business records indicate that it was mailed on such date. The rental check was drawn and dated May 9 in a sequence of other checks with the same date. The request form was marked PAID - May 9, 1975. Appellants supervise the rental payments for other BLM leases and assert that this is the first time a rental check has ever arrived late.

[2] The procedure adopted by appellants to insure timely payment of lease rentals has apparently worked without fault in the past, and in this case the drafting of the check and the metering of the envelope occurred at a time which under normal circumstances would have insured receipt of the rental payment by BLM much earlier than the June 1 anniversary date.

These factors lend circumstantial support and credibility to appellants' assertion. Under the circumstances, we are persuaded that appellants deposited the envelope in the United States mail on May 9 and for some unexplained reason the envelope was not delivered to BLM until June 6. See R. G. Price, 8 IBLA 290 (1972). Appellants' mailing of the check was sufficiently in advance of the anniversary date that the late arrival was not due to a lack of reasonable diligence on their part. Therefore, the lease should be reinstated.

Accordingly, 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 case remanded to New Mexico State Office, BLM, for action consistent herewith.

Newton Frishberg
Chief Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

Frederick Fishman
Administrative Judge

