

EDWARD MALZ

IBLA 77-469

Decided November 22, 1977

Appeal from a decision of the Utah State Office denying a petition to reinstate noncompetitive oil and gas lease U-33383, which had terminated by operation of law for failure to pay annual rental on time.

Reversed and remanded.

1. Evidence: Sufficiency -- Oil and Gas Leases: Reinstatement

Ordinarily the postmark date on a letter will be deemed the date of mailing. This inference may be rebutted on showing satisfactory, circumstantial evidence to lend credibility to an earlier date. A letter from postal authorities, acknowledging that a posted pickup schedule erroneously indicated pickups on Sundays and holidays, especially where the letter is accompanied by a photograph of the posted schedule, sufficiently corroborates lessee's contention that he mailed the rental payment prior to a Sunday and Monday holiday to rebut the inference resulting from a postmark of the following Tuesday.

2. Oil and Gas Leases: Reinstatement

Reasonable diligence normally requires sending or delivering payments sufficiently in advance of the anniversary date to account for normal delays in the collections, transmittal, and delivery of the payment considering the distance involved. Where a letter is to be mailed from Brooklyn, New York, to Salt Lake City, Utah, allowing 1 day for delivery demonstrates lack of reasonable diligence, whereas allowing 3 or 4 days generally is diligent.

APPEARANCES: Edward Malz, Esq., New York, New York, pro se.

OPINION BY ADMINISTRATIVE JUDGE RITVO

Edward Malz appeals from a decision of the Utah State Office, Bureau of Land Management (BLM), dated June 21, 1977, denying his petition to reinstate noncompetitive oil and gas lease U-33383. The lease had terminated by operation of law when Malz failed to remit the annual advance rental payment on or before its due date of June 1, 1977. The BLM did not receive payment until June 2. Under 43 CFR 3108.2-1(a), implementing 30 U.S.C. § 188(b), automatic termination occurs for leases on which there is no well capable of producing oil or gas in paying quantities if the rental payment is not received on or before the anniversary date of the lease.

In his petition filed June 9, 1977, Malz claimed that he was entitled to reinstatement of the lease as provided by 43 CFR 3108.2-1(c), which permits reinstatement where failure to make payment was either justifiable or not due to lack of reasonable diligence on the part of the lessee. Malz alleged that he was reasonably diligent in that he deposited the payment check in a mailbox in Brooklyn, New York, on May 28, 1977. Any delay in the check's reaching Salt Lake City, Utah, he asserted, "was occasioned without fault of mine."

The BLM, however, noted that Malz's letter bore a postmark of May 31, 1977. Relying on the authority of Henry Carter, 24 IBLA 71 (1976), the BLM found that a postmark dated 1 day prior to the due date indicated that Malz had not allowed sufficient time for the check to be delivered. Thus, Malz had not been reasonably diligent and was not entitled to reinstatement.

Malz appealed to this Board on July 19, 1977. He offers the following explanation for the apparent discrepancy between the May 31 postmark and his claim that he mailed the check on May 28. Malz alleges that he placed the check in a mail chute in his office building on Saturday afternoon, May 28. According to a sign attached to the mail chute, mail pickups would take place Sunday at 4:30 p.m. and Monday (which was Memorial Day) at 4:25 p.m. Unbeknownst to Malz, however, the office building remained locked both Sunday and Monday and the scheduled pickups did not transpire. As a result, the check was not picked up until Tuesday, May 31 at 8:10 a.m. -- accounting for the postmark.

In support of his account, Malz offers a photograph of the mail chute in question with its posted schedule and a letter from Vincent J. Militello, Acting Manager, Delivery and Collection, United States Post Office, Brooklyn, New York, stating in pertinent part:

Investigation of circumstances disclosed that due to the fact that Monday, May 30, 1977 was a holiday, and the building was closed on both Sunday, May 29, 1977 and Monday, May 30, 1977, the collector could not gain entry to empty the mail chute. The letter you stated you deposited on Saturday, May 28, 1977, would then have been picked up on Tuesday morning, May 31, 1977 and postmarked accordingly.

Action is now being taken to preclude a recurrence of this situation. Collection schedules will be adjusted to reflect closing of building.

[1] Ordinarily, the postmark date on a letter will be deemed the date of mailing. This inference, however, may be rebutted where an appellant supplies satisfactory circumstantial evidence sufficient to lend credibility to his assertion that mailing occurred at an earlier date. Frequently, the Board has accepted as satisfactory and credible, letters from postal officials corroborating an appellant's explanation of an aberrant postmark, Paul D. Beaird, Jr., 26 IBLA 79 (1976); A. Helander, 25 IBLA 54 (1976); Francis and Shirley Anglado, 18 IBLA 162 (1974); John W. Monzel, A-28817 (August 31, 1961). We hold that Militello's letter coupled with the photograph of the mail chute be given similar effect. In the past, the Board has penalized those who failed to take cognizance of current post office schedules, Constitution Petroleum, Inc., 25 IBLA 319 (1976). It is only fair that those who do rely on posted schedules be protected. As the last paragraph of Militello's letter implicitly acknowledges, the posted schedule was potentially deceptive, and this is sufficient to make Malz's explanation credible.

[2] The question now arises, assuming that Malz did mail the check on May 28, whether he displayed reasonable diligence, as defined by 43 CFR 3108.2-2(c)(2): "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." In addition, considerations of reasonable diligence necessarily require that the distance involved be taken into account, Francis and Shirley Anglado, *supra*. The Board has examined distances comparable to that involved here on a number of occasions. As BLM correctly observed in its decision, allowing 1 day for delivery will certainly be insufficient. Adolph Muratori, 31 IBLA 39 (1977); Louis Samuel, 8 IBLA 268 (1972). Allowing 3 or 4 days, on the other hand, will generally be sufficient, Eason Oil Company, 16 IBLA 109 (1974); R. G. Price, 8 IBLA 290 (1972); *cf.*, Ray E. Bush, 19 IBLA 280 (1975). The interval between May 28 and June 1, therefore falls within the ambit of reasonable diligence. Malz's lease should, in consequence, be reinstated.

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 remanded.

Martin Ritvo  
Administrative Judge

We concur:

Joseph W. Goss  
Administrative Judge

Edward W. Stuebing  
Administrative Judge

