

DONALD E. JORDAN

IBLA 78-27

Decided June 2, 1978

Appeal from the decision of the Wyoming State Office of the Bureau of Land Management, holding that appellant's oil and gas lease offer W 60393 was disqualified.

Set aside and referred for hearing.

1. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: First Qualified Applicant -- Oil and Gas Leases: Rentals

When, in a drawing of simultaneously filed oil and gas lease offers, the first-drawn offeror is notified to submit the advance rental, that rental must be received by the proper office within the prescribed 15 days. Automatic disqualification may not be avoided by allegations that delivery was delayed by the postal service, as the rule is that the postal authorities are the agents of the sender in such cases.

2. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: First Qualified Applicant -- Evidence: Presumptions -- Oil and Gas Leases: Rentals

Where BLM records show that the first-drawn applicant for an oil and gas lease paid his rental 1 day late, and is therefore disqualified, there is a legal presumption of regularity which supports the official acts of public officers and the proper discharge of their official duties.

3. Oil and Gas Leases: Applications: Generally -- Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: First Qualified Applicant -- Evidence: Presumptions -- Oil and Gas Leases: Rentals

Where a first-drawn oil and gas applicant offers evidence to show that his first year's advance rental was mailed sufficiently in advance so that, even if delayed, it would have arrived within the prescribed time, a legal presumption is raised that the payment was timely delivered.

4. Administrative Procedure: Adjudication -- Evidence: Presumptions -- Hearings

Where the evidence in an administrative appeal raises countervailing legal presumptions of equal probative worth, a fact-finding hearing may be ordered pursuant to 43 CFR 4.415.

5. Administrative Procedure: Administrative Review -- Appeals -- Regulations: Validity

The Boards of Appeal of the Department of the Interior have no authority to declare invalid a regulation of this Department.

6. Oil and Gas Leases: Applications: Drawings -- Oil and Gas Leases: First Qualified Applicant -- Oil and Gas Leases: Rentals

Where, in a drawing of simultaneously filed oil and gas lease offers, the first-drawn applicant fails to submit his advance rental within 15 days after notice, as prescribed by 43 CFR 3112.4-1, disqualification is automatic, and no excuse may be considered, no discretion exercised, no grace period invoked, and the right of the next drawee to receive first consideration attaches eo instante.

7. Oil and Gas Leases: Applications: Generally

The filing or drawing of an oil and gas lease offer, even though it has first priority, creates no vested rights in the

offeror which are constitutionally protected, and where such offer is rejected for any legally cognizable reason, it does not work a forfeiture of the offeror's interest, which amounts only to a hope or an expectation rather than a claim.

APPEARANCES: Dickenson Thatcher, Esq., Van Nuys, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

In the drawing of simultaneously filed oil and gas lease offers conducted by the Wyoming State Office (BLM) in July 1977, Donald E. Jordan's offer was first drawn for parcel WY-31, thus entitling him to priority to receive the lease.

On August 17, 1977, BLM sent him notice to this effect and advised him that he had 15 days from receipt of the notice to pay the first year's annual advance rental. The notice further advised him, emphatically, that such rental "must be received in this office within 15 days from receipt of this Notice. If rental is not paid within the time allowed, you will be automatically disqualified to receive the lease," citing 43 CFR 3112.4-1.

The return receipt from the mailing of this notice indicates that it was received at Jordan's address of record by an authorized agent 1/ on August 22, 1977. According to BLM records, payment was not received in the Wyoming State Office until September 7, 1977, or one day late. 2/

On September 15, 1977, the Wyoming State Office notified Jordan that his offer was disqualified for that reason.

Jordan filed a timely notice of appeal and statement of reasons. It is the principal allegation of the appeal that the rental payment was in fact placed in the BLM's post office box, No. 1828, in Cheyenne, Wyoming, not later than Sunday, September 4, 1977. The next day being Labor Day, the Wyoming State Office was next open for business on Tuesday, September 6.

1/ The signatory, who marked the return receipt card to indicate that he was an "authorized agent" of the addressee, was "R. D. Weston," identified elsewhere in the record as Richard D. Weston, President, North American Oil and Gas Leasing Service, Inc.

2/ This method of calculating the lapse of 15 days properly did not include the date the notice was received.

The BLM record which fixed the date of receipt of the payment as September 7 is the stamp of the "receipting and validating machine" on Form 1370-20 (Called an "accounting advice"), and on the face of the remittance. ^{3/}

The appeal carefully analyzes the course the letter would have taken from the time it was allegedly deposited in the Osborne Road Post Office in Scottsdale, Arizona, through various motor vehicle pick ups, airline carriers, etc. Provision is made in this analysis for missed deliveries or pick ups at each point along the way, and the later alternative flights or motor vehicle pick ups are indicated. This analysis indicates that even if delayed en route, the letter should have been deposited in the BLM box in Cheyenne on September 4.

[1] It is critical to appellant's case that he establish that notwithstanding the receipt stamp of the Wyoming State Office, the letter was actually delivered prior to close of public business on September 6, 1977. It will avail nothing to show that although mailed well in advance, delivery was delayed by the postal service past that time. In the recent case, Mobil Oil Co., 35 IBLA 365 (1978), this Board cited Lehay v. United States, 10 F.2d 617 (D. Mont. 1926), and Kerr v. United States, 108 F.2d 585, 586 (D.C. Cir. 1939), the latter opinion stating:

Neither of these conditions, in our opinion, is satisfied by the mailing of a money order, unless the payee has consented to make the post office his agent to receive payment. The act of mailing does not amount either to a tender or to a payment until the actual receipt of the letter by the addressee. The rule in such cases is that the postal authorities are the agents of the sender.

Moreover, this Board has specifically and repeatedly rejected arguments that the late payment of the initial rental in such circumstances should be excused when the delay was caused by, or attributed to, the Postal Service. Edgar C. Bennington, 28 IBLA 355 (1977); Frank DeJong, 26 IBLA 327 (1976); John Paul Pratt, 24 IBLA 110 (1976); Mar-Win Development Corp., 20 IBLA 383 (1975). Therefore, in order to prevail, appellant must show that the payment was actually received timely by the Wyoming State Office, and not that delivery was delayed by the postal service beyond the due date.

[2] There is a legal presumption of regularity which supports the official acts of public officers, and in the absence of clear

^{3/} The remittance is not part of the record. Presumably it was returned in due course to appellant.

evidence to the contrary, it will be presumed that they have properly discharged their official duties. United States v. Chemical Foundation, 272 U.S. 1, 14-15 (1926). See W. J. Langley, 32 IBLA 118 (1977); David F. Owen, 31 IBLA 24 (1977) (Ritvo, A. J., dissenting); A. G. Golden, 22 IBLA 261 (1975). This presumption supports the accuracy of the BLM records concerning the delivery date in this case.

[3] However, there is another legal presumption that mail matter, properly addressed, stamped, and deposited in an appropriate receptacle, is duly delivered. This presumption, it has recently been held, "is predicated on fixed methods and systematic operation of the postal service." Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976) (Famy, J., dissenting). This presumption supports appellant's contention that payment was received timely by BLM.

[4] What transpires when these two presumptions of law are not in harmony is discussed in Legille v. Dann, *supra*. That case is closely analogous to the one before us. It involved the critical question of the timely delivery of mail to the United States Patent Office. The Court, noting that such presumptions are rebuttable by evidence, held that they are mere procedural devices, incapable of waging war among themselves, or, as stated in the syllabus:

Presumption that mail matter properly addressed, stamped and deposited in an appropriate receptacle is duly delivered is predicated on fixed methods and systematic operation of the postal service; likewise, presumption of regularity of patent office's handling of incoming mail rests on the same phenomena; hence, absent any suggestion that methodology buttressing the one was more foolproof than that underpinning the other or that public policy required that one presumption be favored there was no reason for preferring the former in determining whether applications for United States patents were filed within 12 months of filing of applications for foreign patents.

Having so held, the Court remanded the case to the District Court for a trial of the question on its merits.

The law of Legille v. Dann, *supra*, is clearly the law of this case. Accordingly, the issue will be referred to the Hearings Division for assignment to an administrative law judge who will conduct an evidentiary hearing pursuant to 43 CFR 4.415, and render a decision.

The issues shall be limited to a determination of whether or not the lease rental payment by appellant was received timely by BLM, or if public policy requires that one of the evidentiary presumptions be favored. It should be noted that appellant alleges that

the envelope containing the payment was marked "Special Delivery," bore \$1.38 postage, and was deposited in the special delivery slot at the post office. Evidence should be adduced to indicate whether such mail is normally placed in the BLM post office box in Cheyenne, or hand delivered to the office by the postal service. BLM's evidence should include a full description of its procedures at that time for receiving and noting delivery of such payments. Appellant's evidence must support the allegations in his statement of reasons regarding the mailing and delivery of the letter.

[5] Appellant's attack upon the validity of the regulations is summarily rejected. The Boards of Appeal of this Department have no authority to declare a regulation invalid. Buffalo Mining Co., 80 I.D. 630 (1973); State of Alaska, 19 IBLA 178 (1975); Colleen J. Bedford, 1 TETON 54 (1977).

[6] Appellant's contention based on the arguendo assumption that if the payment did arrive late the authorized officer could nevertheless have accepted it and issued the lease to appellant is without merit. The regulation, 43 CFR 3112.4-1, plainly states, "The drawee failing to submit payment within the time allowed will be automatically disqualified to receive the lease, and consideration will be given to the entry of the drawee having the next highest priority in the drawing" (Emphasis added). The disqualification, being automatic, thus affords no latitude for any exercise of discretion. Moreover, this automatic disqualification advances the priority of the next drawee and precludes implementation of 43 CFR 1821.2-2(g), because the rights of a third party have intervened eo instante, upon the failure of the first drawee to submit payment timely. Robert D. Nininger, 16 IBLA 200 (1974), aff'd, Nininger v. Morton, Civ. Action No. 74-1246 (D.D.C. filed March 25, 1975), wherein the Court stated the following conclusion of law: "* * * The regulations 1810.2(b) and 3112.4-1, Title 43, Code of Federal Regulations, are mandatory and apply to the plaintiff. Said regulations do not permit the consideration of excuses for failure to remit payment." (Emphasis added.)

[7] Appellant's contention that the proviso for automatic disqualification represents a forfeiture has been advanced in other cases. The short answer to that assertion is that no forfeiture has occurred. The mere filing or drawing of an offer for a noncompetitive lease creates no vested rights in the offeror. Donald Reese, 15 IBLA 101 (1974); C. Burglin, 21 IBLA 234 (1975), aff'd, Burglin v. Secretary of the Interior, Civ. No. A 75-113 (D. Alaska, filed Dec. 29, 1976); Burglin v. Morton, 527 F.2d 486 (9th Cir. 1976). "An application for a lease, even though first in time * * * is a hope, or perhaps an expectation, rather than a claim." Schraier v. Hickel, 419 F.2d 663, 666 (9th Cir. 1969). Therefore, where such an application is rejected for any legally cognizable reason, no constitutional issues are raised.

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 set aside and the case is referred for an evidentiary hearing on the issues described herein.

Edward W. Stuebing
Administrative Judge

We concur:

Martin Ritvo
Administrative Judge

Newton Frishberg
Chief Administrative Judge

