

DONALD E. JORDAN (SUPP.)

IBLA 79-186

Decided May 31, 1979

Appeal from decision of Wyoming State Office, Bureau of Land Management, disqualifying oil and gas lease offer W 60393 for failure to pay timely first year advance annual rental.

Proposed findings of fact adopted; affirmed.

1. Oil and Gas Leases: Rentals

Under 43 CFR 3312.4-1, a successful drawee who fails to submit the first year's advance rental within 15 days of his receipt of notice that it is due is automatically disqualified to receive the lease.

APPEARANCES: Dickinson Thatcher, Esq., Van Nuys, California, and Bert T. Ahlstrom, Esq., Cheyenne, Wyoming, for appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, Denver, Colorado, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

This matter has returned to this Board for further action, following its referral on June 2, 1978, to an administrative law judge for a hearing into questions of fact essential to its resolution. Donald E. Jordan, 35 IBLA 290 (1978). The facts, also set out in Donald E. Jordan, *supra*, are that Jordan's simultaneous noncompetitive oil and gas lease offer card was drawn with first priority in the July 1977 drawing for parcel WY-31 by the Wyoming State Office, Bureau of Land Management (BLM). BLM notified Jordan that annual rental was due on this lease within 15 days of his receipt of this notice. Jordan's agent received this notice on August 22, 1977, so that payment was due on or before September 6, 1977. On September 15, 1977, BLM issued a decision disqualifying Jordan's offer because, it alleged, this payment had not been received until September 7, 1977, one day late.

In Donald E. Jordan, supra, we reviewed the case file and concluded that it was appropriate to refer the matter to an administrative law judge for a hearing pursuant to 43 CFR 4.415. On November 3, 1978, a hearing was held in Cheyenne, Wyoming, before Administrative Law Judge Robert W. Mesch. Both parties appeared and presented evidence concerning the time of filing of the payment. On January 30, 1979, Judge Mesch issued his proposed findings of fact, which he transmitted to this Board along with the entire record.

Judge Mesch found that it could not be presumed from the material presented by Jordan that his rental check arrived at BLM prior to the time the BLM office was closed to public business on September 6, 1977. Proposed Findings of Fact, pp. 5 and 6. He concluded on the basis of this and other findings that Jordan's lease rental payment was not timely filed.

[1] We hereby adopt Judge Mesch's proposed findings of fact, a copy of which is attached hereto, and his conclusion that Jordan's payment arrived at BLM after the deadline for its submission. We hold that BLM therefore properly rejected his offer, as, under 43 CFR 3312.4-1, a drawee who fails to submit the first year's advance rental within 15 days of his receipt of notice that it is due will be automatically disqualified to receive the lease. This Board has consistently upheld strict enforcement of this provision. Gavino San Diego, 36 IBLA 300 (1978), and cases cited.

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 affirmed.

Edward W. Stuebing
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Newton Frishberg
Chief Administrative Judge.

January 30, 1979

DONALD E. JORDAN, : WYOMING 60393
: :
Appellant : Oil and Gas Lease Offer
: :
v. : :
: :
BUREAU OF LAND MANAGEMENT, : :
: :
Respondent :

PROPOSED FINDINGS OF FACT

Appearances: Dickinson Thatcher, Esq., Van Nuys, California, and Bert T. Ahlstrom, Jr., Esq., Cheyenne, Wyoming, for the appellant;

Lyle K. Rising, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado, for the respondent.

Before: Administrative Law Judge Mesch

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

By a notice dated August 17, 1977, the Wyoming State Office advised Jordan that he was entitled to a lease. The notice also advised Jordan that, in accordance with 43 CFR 3112.4-1, if the first year's rental was not received in

the Wyoming State Office within fifteen days from receipt of the notice, he would be automatically disqualified to receive the lease.

The return receipt from the mailing of the notice shows that it was received at Jordan's address of record by an authorized agent on August 22, 1977. The agent was Richard D. Weston, President, North American Oil and Gas Leasing Service, Inc. According to BLM records, payment was not received in the Wyoming State Office until September 7, 1977, or one day late.

On September 15, 1977, the Wyoming State Office advised Jordan that his offer was disqualified because the rental was not timely received. Jordan appealed to the Interior Board of Land Appeals. He contended that the rental payment had been deposited in the mail on September 2, 1977, in Scottsdale, Arizona, by Richard D. Weston, and in the normal course of events would have been placed in BLM's post office box in Cheyenne, Wyoming, no later than Sunday, September 4, 1977. The next day was Labor Day and the Wyoming State Office was not open for business until Tuesday, September 6. Jordan further asserted that the rental payment was or should have been picked up from BLM's post office box in the ordinary course of business on September 6 and appropriately noted as received by the Wyoming State Office on that date rather than September 7.

In a decision dated June 2, 1978, Donald E. Jordan, 35 IBLA 290, the Board of Land Appeals noted that "[t]here is a legal presumption of regularity which supports the official acts of public officers, and in the absence of clear evidence to the contrary, it will be presumed that they have properly discharged their official duties." The Board concluded that "[t]his presumption supports the accuracy of the BLM records concerning the delivery date in this case." The decision also noted that "there is another legal presumption that mail matter, properly addressed, stamped, and deposited in an appropriate receptacle, is duly delivered," and concluded that "[t]his presumption supports appellant's contention that payment was received timely by BLM." The Board relied on the case of Legille v. Dann, 544 F.2d 1 (D.C. Cir. 1976), which involved a question of the timely receipt of mail by the United States Patent Office, and referred the case to the Hearings Division for an evidentiary hearing pursuant to 43 CFR 4.415. The Board stated:

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

The case was transferred to this office on August 21, 1978. A notice of hearing was issued on September 11, 1978. The notice stated in part:

In arriving at a decision in this proceeding, I do not intend to consider anything other than the testimony and documentary evidence received at the hearing and briefs that might be submitted following that hearing. Accordingly, if there is anything in the present administrative record that the parties believe should be received in evidence in this proceeding, they should be prepared to offer such material at the hearing. The parties are cautioned, however, that evidence may not be considered reliable and probative if it is not subject to cross-examination.

A hearing was held on November 3, 1978, at Cheyenne, Wyoming. The appellant did not call any witnesses. He simply presented the same documents that had been submitted to the Board of Land Appeals in support of his allegations concerning the mailing and delivery of the rental payment. These consisted of:

1. A photocopy of an affidavit of Richard D. Weston, President of North American Oil and Gas Leasing

Service, Inc., attesting, among other things, that he prepared an envelope addressed to BLM at its post office box in Cheyenne, Wyoming; marked the envelope "Special Delivery"; affixed postage in a designated amount on the envelope; inserted the rental payment check in the envelope; and deposited the envelope "in the Special Delivery slot located within the Osborn Road Post Office, in Scottsdale, Arizona" some time between 5:00 and 5:30 p.m. on Friday, September 2, 1977. (Emphasis added) This document was received in evidence over the objection of BLM and with the caveat that it might not be accorded any probative value.

2. A photocopy of a letter signed by George Davis, Office of Mail Distribution, United States Post Office, Phoenix, Arizona, responding to a telephone request from one of the appellant's attorneys. This letter sets forth "the routing of a special delivery letter from the street box at the Osborn Station in Scottsdale" to Cheyenne, Wyoming. (Emphasis added) It gives the various times, by hours and minutes, at which a letter deposited in the Scottsdale box by 5:30 p.m. would be picked up, arrive at the Phoenix Post Office, leave the Phoenix Post Office, arrive at the Air Transfer Office, be given to Frontier Airlines, depart on a Frontier flight, be transferred at Denver, Colorado, to another Frontier flight, and arrive (presumably at the airport) in Cheyenne. It concluded that such a letter would arrive in Cheyenne on the afternoon of Saturday, September 3, 1977. The letter also

states that the same flight schedule would apply for Sunday, September 4. This document was received in evidence without objection.

3. A photocopy of an affidavit of Robert Nab, District Manager of the United States Postal Service, Cheyenne, Wyoming, attesting, among other things, that envelopes of all special delivery mail are stamped with the date and hour of receipt; a special delivery envelope would normally be processed to the box section within three hours after the arrival time; and special delivery mail addressed to BLM is placed in its post office box. The affidavit does not mention when mail would normally be picked up at the Cheyenne airport. This document was received in evidence without objection.

BLM called three witnesses. They were (1) the adjudicator in the Wyoming State Office who determined that the appellant's rental check had been received one day late on the basis of a document designated "Accounting Advice" which was prepared in the receiving room of the State Office; (2) the supervisor in the receiving room who prepared the "Accounting Advice" showing the appellant's rental check was received on September 7, 1977; and (3) the supervisor in the mail room of the State Office who is responsible for the mail pickup at the Post Office, the opening of the mail, the processing of the mail and the delivery of incoming first year rental payment checks to the receiving room for preparation of the "Accounting Advice" showing the date received. The last witness was not employed in the mail room in 1977 and presumably testified only as to the operations in the mail room at the present time.

I am not willing to accept the affidavit of Richard D. Weston as proof of the facts that the rental check was placed in an envelope marked "Special Delivery" and deposited in an appropriate receptacle at the Post Office in Scottsdale, Arizona, sometime between 5:00 and 5:30 p.m. on Friday, September 2, 1977. Without proof of these foundation facts, a presumption does not arise that the rental

check arrived in the due course of the mails rather than on the receipt date shown by BLM's records.

Appellant's counsel submitted the Weston affidavit with the assertions that (1) "Mr. Weston is not available this morning for the reason that he is no longer an officer, to wit, president of that corporation, that he is somewhere believed to be in California, address unknown" (Tr. 19); and (2) "as I understand the subpoena power of [the] Court, even if we could have located Mr. Weston he would not have been subject to the subpoena power of this Court due to the one-hundred-mile radius limit" (Tr. 19, 20). No explanation was offered as to what efforts, if any, had been made to locate Mr. Weston between the time of the Board's decision on June 2, 1978, and the hearing on November 3, 1978, and no request was made at any time for a continuance of the hearing because of the alleged unavailability of Mr. Weston. Insofar as the second assertion is concerned, appellant's counsel recognized at the hearing that the testimony of Mr. Weston could have been taken by deposition in the county of his residence pursuant to a subpoena issued in accordance with 43 CFR 4.423 and 4.433.

While BLM's evidence did not include a full description of its procedures in September 1977 for receiving and noting delivery of first year rental payments, it did establish that the rental payment was not received in the Wyoming State Office until September 7, 1977, or one day late. This is sufficient to raise the legal presumption of regularity which supports the official acts of public officers. Since there is no evidence rebutting the presumption of regularity, it must be concluded, in the absence of other factors, that the rental payment was not received by BLM until the date shown on the "Accounting Advice."

The appellant asserts two other points in support of his contention that a finding should be made that the rental payment was timely received by BLM. These relate to the destruction of the envelope containing the rental check and BLM's practice in picking up mail at the Post Office.

If the envelope containing the rental check had been mailed Special Delivery, it would have been stamped with the date and hour of receipt by the Post Office in Cheyenne and normally would have been processed to BLM's post office box within three hours after arrival. If the envelope showed that it was received in the Post Office in Cheyenne at any

time up to the early morning hours of September 6, it might be concluded that it was placed in BLM's box prior to BLM's mail pick ups at 8:00 and 10:00 a.m. on September 6. Under this reasoning, the rental check would or should have been timely received by BLM prior to the close of business on September 6. Unfortunately the envelope is not available. It was not BLM's practice at the time to retain such envelopes.

The appellant argues that the failure of BLM to retain the envelope amounts to wrong doing; that all things are presumed against a wrong doer; and this presumption gives to the appellant's evidence the strongest construction in his favor that such evidence will reasonably bear. The short answer to this contention is (1) that the failure to retain the envelope was not the result of bad faith for the purpose of suppressing evidence, but an innocent action without fault on the part of BLM; and (2) that the appellant produced no credible evidence that can be given a strong construction in his favor.

At the present time, and presumably in September 1977, BLM retrieves mail from its post office box at approximately 8:00 a.m., 10:00 a.m. and 4:00 p.m. The two morning deliveries are, and apparently were, processed and noted as received on the day of pick up. The 4:00 p.m. pick up arrives at the BLM office at approximately 4:15 p.m. and is placed in a locked vault until the following day when it is processed and noted as received. This is done because the office is not open for the receipt of documents after 4:00 p.m. See 43 CFR 1821.2-1.

The appellant argues that the above practice precludes BLM from timely receiving any mail that is placed in its post office box after the 10:00 a.m. pick up; results in a requirement that any remittance must arrive at the post office box before the 10:00 a.m. pick up on the last day of the fifteen-day period; effectively reduces the time to pay first year rentals from fifteen days to fourteen days; and amounts to a violation of the regulation setting a fifteen day time limit.

Again, I find no merit to this contention. The notice of rental due received by the appellant's agent showed only BLM's post office box, and it might be a natural reaction to mail the remittance to that address. Nevertheless, the appellant, through North American Oil and Gas Leasing Service, Inc., could have mailed the rental payment to the

office address for the Wyoming State Office. This address was shown on the envelope that contained the notice of rental due and was published at 43 CFR 1821.2-1. If the rental had been mailed to the office address, and if it arrived any time prior to the 4:00 p.m. closing, it would have been noted as received on the day delivered. The appellant is charged with notice of the requirement in 43 CFR 3112.4-1 that "[r]ental must be received in the proper office of the Bureau of Land Management within fifteen (15) days from the date of receipt of notice that such payment is due."

For the reasons stated, I find that the lease rental payment was not timely received by BLM.

Robert W. Mesch
Administrative Law Judge

