

THOMAS H. WILSON

IBLA 81-395

Decided February 2, 1982

Appeal from decision of Montana State Office, Bureau of Land Management, denying petition for reinstatement of oil and gas leases M 32704 and M 32713.

Affirmed.

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

A lease terminated automatically for untimely payment of annual rental may be reinstated only upon proof that reasonable diligence was exercised, or that the failure to make timely payment was "justifiable." In the absence of such proof, a petition for reinstatement is properly denied.

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

Reasonable diligence requires mailing the rental payment sufficiently in advance of the anniversary date to account for normal delays in collection, transmittal, and delivery of the mail. Mailing the rental in San Rafael, California, 2 days before it is due in Billings, Montana, does not constitute reasonable diligence.

3. Oil and Gas Leases: Reinstatement--Oil and Gas Leases: Termination

A late rental payment may be justifiable if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected

actions in paying the rental fee. The fact that lessee's employee, responsible for submitting the rental payment, was home 1 day with his ill wife and was overburdened with extraordinary business matters, does not justify reinstatement.

APPEARANCES: Stephen H. Schadlich, Esq., and Walter Edwin Thomas, Esq., Oakland, California, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

Thomas H. Wilson appeals from a decision of the Montana State Office, Bureau of Land Management (BLM), dated February 2, 1981, denying his petition for reinstatement of oil and gas leases M 32704 and M 32713 which terminated by operation of law on January 1, 1981, for failure to pay timely the annual rental. In its decision BLM found that appellant had not exercised reasonable diligence in mailing the rental payments 2 days prior to the due date. The rent was due on January 2, since the BLM office was closed on January 1, but was not received until January 5, 1981.

As his first point in his statement of reasons appellant asserts that he acted with reasonable diligence in mailing his payment from San Rafael, California, to Billings, Montana, on December 31, 1980, during business hours and in time to be collected by the post office on a business day 2 days before the due date. 1/ In support of this contention appellant refers to several cases in which the Board held that reasonable diligence had been exercised by a lessee who mailed his payment 2 days before the due date. 2/ Appellant also attempts to distinguish his case from cases in which the Board ruled that mailing the payment 2 days before the due date does not constitute reasonable diligence. He refers to Louis Samuel, 8 IBLA 268 (1972), in which the Board discussed the applicable statute (30 U.S.C. § 188(c) (1976)) and the regulation (43 CFR 3108.2-1(c)(2)) and set forth the standard for reasonable diligence as follows:

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1/ We note that the date payment was due was actually January 1, 1981, the day after the posting of payment. We are assuming, arguendo, in this opinion that a lessee may properly consider days beyond the due date, when the State Office was not opened, as counting toward the reasonable diligence test. We expressly reserve judgment on that question.

2/ R. G. Price, 8 IBLA 290 (1972) and the following cases included in the appendix to R. G. Price: A. G. Andrikopoulos (IBLA 72-310); Mary Lou Gebhard (IBLA 72-360); James W. Austin (IBLA 72-641); Francis Anglado, 18 IBLA 162 (1974); Sharon Rae Cook, 15 IBLA 424 (1974); Inexco Oil Co., 15 IBLA 422 (1974).

The effect of the new regulation is that when lessees can show that they mailed the payment in sufficient time so that in the normal course of events it would be received on or prior to the due date, they may be granted reinstatement provided that they make timely application as required by the statute. Samuel, supra, 8 IBLA at 273. [Emphasis supplied.]

Appellant urges this Board not to adopt or apply to this case a rule requiring lessee to allow for mail delivery times which exceed the norm because such an interpretation is contrary to legislative intent.

Appellant's second assertion is based on the alternative ground that his failure to pay the rent by the anniversary date of the lease was justifiable. Appellant explains that he delegated the payment responsibilities to his employee, Mr. Elias. He states that the delay in payment would not have occurred but for the unfortunate interplay of two entirely unrelated and unpredictable events; the illness of Elias' wife and the sudden sale of appellant's restaurant and bookstore businesses, which unexpectedly required Elias' services at another office. These events, according to appellant, conspired by the precise sequence of their timing to keep Elias away from the office until the afternoon of December 31, 1980, when the rental payment was mailed. Appellant contends that these events have the essential qualities to constitute justification for late payment because they were outside the ordinary control of the lessee and they had the requisite proximity and causality to affect the lessee's actions. Accompanying his statement of reasons were the affidavits of appellant and appellant's attorney to verify his contentions.

[1] An oil and gas lease on which there is no well capable of producing oil and gas in paying quantities automatically terminates if the lessee fails to pay the annual rental on or before the anniversary date of the lease. 30 U.S.C. § 188(b) (1976); 43 CFR 3108.2-1(a). A terminated lease can be reinstated only if, among other requirements, the lessee shows that the failure to pay on time was either justifiable or not due to lack of reasonable diligence. 30 U.S.C. § 188(c) (1976); 43 CFR 3108.2-1(c).

[2] Reasonable diligence requires mailing the rental payment sufficiently in advance of the due date to account for normal delays in the collection, transmittal, and delivery of the mail. 43 CFR 3108.2-1(c)(2). BLM found that appellant did not exercise reasonable diligence in mailing the payment from San Rafael, California, only 2 days prior to its due date in Billings, Montana. We agree.

Appellant's payment, mailed on December 31, had 2 days, one being a national holiday, to reach the Billings, Montana, BLM office

before the lease expired. No evidence in the record suggests that a payment posted in California 2 days in advance of the due date, would, in the normal course of business, reach Billings in a timely fashion, especially considering that one was a national holiday. This Board has repeatedly held that mailing the rental payment 2 days before the anniversary date of the lease does not constitute reasonable diligence. Jeannette L. Fenwick, 52 IBLA 250 (1981); Bob W. Scott, 46 IBLA 254 (1980); Norman C. Stroink, 44 IBLA 188 (1979).

In L. J. Arrieta, 26 IBLA 188 (1976), we found that appellant/ lessee's failure to make timely payment was due to a lack of reasonable diligence under the following facts:

Appellant did not send the payment until May 1, 1976, from Culver City, Calif. to Billings Montana. In William N. Cannon, 20 IBLA 361 (1975), we discussed mailing payments over long distances only 2 days before the due date. We stated:

We cannot say that mailing a payment this distance [Texas to Utah] two days in advance of the due date takes into account "normal delays" in the handling of the mail. Indeed, it is clear that a letter in that instance might arrive on time only if there were no delays of any kind, but rather was handled with extraordinary dispatch.

In this case the payment apparently was mailed on a Saturday from California and was due in Montana on Monday. We cannot say that appellant was reasonably diligent. [Emphasis in original.]

26 IBLA at 189.

Appellant attempts to distinguish Arrieta from his case by suggesting that the payment in Arrieta, mailed on a Saturday, may have been deposited after the last Saturday pickup and may not have been sent airmail. <sup>3/</sup> Since the recitation of facts in the Arrieta case does not reveal these details, the case cannot be distinguished on these grounds. The similarities, however, are clear. Both cases involved payments sent from California to Billings, Montana, 2 days prior to the due date.

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<sup>3/</sup> Appellant points out that prior to May 1, 1977, there was a distinction between first-class surface mail and airmail. Appellant suggests that mailing the payment surface mail would not have constituted reasonable diligence.

Appellant cites various cases in which this Board seemed to indicate that any payment mailed from one point to another within the contiguous United States is acceptable as evidence of reasonable diligence so long as the payment was mailed 2 days before the due date. To the extent that the cases cited by appellant can be read to imply that normal delays in the mail need not be considered, they may not be relied on as precedent. See William N. Cannon, *supra* at 363.

[3] A failure to make timely payment may be justifiable, however, if it is demonstrated that at or near the anniversary date there existed sufficiently extenuating circumstances outside the lessee's control which affected its actions in paying the rental fee. Dome Petroleum Corp., 59 IBLA 370, I.D. (1981); see Ramoco, Inc. v. Andrus, 649 F.2d 814 (10th Cir. 1981). Proximity in time and causality of the unfavorable occurrence are essential elements. Earl Chancellor, 24 IBLA 121 (1976). Accordingly, we are most concerned with circumstances affecting appellant at or near the anniversary date of the lease. Negligence, forgetfulness, or inadvertence do not justify failure to pay timely since they are events within the lessee's control. Dome Petroleum Corp., *supra*.

We do not believe that appellant has provided adequate justification for the late payment. It is true that circumstances adversely affecting an employee entrusted with payment of the annual rental may justify a late payment. See David Kirkland, 19 IBLA 305 (1975) (secretary solely responsible for personal accounts in hospital under sedatives on and before the due date). However, it seems equally true that such circumstances must cause the employee to be "so incapacitated as not to be reasonably able to attend to normal business matters." See Victor Holz, 42 IBLA 284 (1979); Earl Chancellor, *supra* at 122-123; David Kirkland, *supra*.

Appellant states that Mr. Elias' wife became ill and he was unable to go to the office on December 26. We learn of the circumstances surrounding this illness from an affidavit submitted by appellant's attorney, Walter Thomas. Mr. Thomas states at page 1-2:

The office in which Mr. Elias worked for Mr. Wilson is located in Sausalito, California. No other employee of Mr. Wilson regularly worked in that office. It had been Mr. Elias' intention to work at the Sausalito office on December 26, 1980. However, his wife was ill on December 25, 1980, and in the morning of Friday, December 26 was so ill and weak that she could not get out of bed without assistance. Because there was no one else who could stay with her and because of his concern for her health, Mr. Elias stayed home with her throughout that day.

The apparent severity of her illness was of concern to Mr. Elias, and he and his wife intended to seek medical advice until her condition began to improve later on Friday.

Appellant alleges that this illness, combined with the sale of two of his business, prevented Mr. Elias from paying the rental on or before the due date. The events surrounding the sale of the businesses are revealed in appellant's affidavit at page 2:

During the last two weeks of 1980, I was engaged in negotiations for the sale of two of my businesses. Late in the evening of Sunday, December 28, I telephoned Mr. Elias at his home to advise him that the sale of one of those businesses had been effected, and that the transfer of operations was required to occur on December 29, 1980. I instructed Mr. Elias to perform a physical inventory of the business [sic] the next day, to reconcile and close out the books, reconcile the cash and notify vendors and suppliers of the sale. Mr. Eilas worked at these tasks all day on December 29 and December 30, and part of the day on December 31. No other person had sufficient familiarity with the business to perform these tasks. This was a transaction of large monetary amount and outside the course of my regular business. The sale terms were not agreed to until Sunday, December 28, and Mr. Elias had no way of foreseeing the sudden need for his extra duties throughout the first three days of the week of December 29.

From the facts presented we are not convinced that these events so incapacitated the employee that he was prevented from making timely payment. The duration of his wife's illness accounted for only 1 day away from his office, hardly a justification for failing to make timely payment.

We recognize that December 29 and December 30 may have been critical days for mailing the payment and that appellant's employee was involved in extraordinary business matters. However, the Board has not accepted either the bulk and/or complexity of a business organization as adequate justification for late payment. International Resource Enterprises, Inc., 55 IBLA 386, 389 (1981). When appellant's employee became overburdened with work, appellant should have made other arrangements to ensure payment of the rental. International Resource Enterprises, Inc., supra.

Given the facts involved in this case, we do not find that the failure to make a timely rental payment was either justifiable or not due to a lack of reasonable diligence.

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.

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Gail M. Frazier  
Administrative Judge

We concur:

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Bernard V. Parrette  
Chief Administrative Judge

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C. Randall Grant, Jr.  
Administrative Judge

