

NATIONAL KING COAL, INC.

IBLA 83-315

Decided September 26, 1983

Appeal from decision of Colorado State Office, Bureau of Land Management, overruling objections to readjustment of terms and conditions of coal lease. P-058300.

Affirmed.

1. Coal Leases and Permits: Leases -- Coal Leases and Permits:
Readjustment -- Coal Leases and Permits: Royalties

At the time of readjustment of the terms of an underground coal lease, BLM may, consistent with the policy of the Minerals Management Service, set the royalty rate at 8 percent and refuse to consider a reduction of the rate to 5 percent, under the discretionary authority embodied in 43 CFR 3473.3-2(a)(3).

APPEARANCES: Richard L. Fanyo, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE FRAZIER

National King Coal, Inc., has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated December 15, 1982, overruling its objections to the readjustment of the terms and conditions of coal lease P-058300.

Effective September 11, 1941, a coal lease was issued to C. H. Cole and Fred J. Girard for 40 acres of land situated in La Plata County, Colorado, pursuant to section 2 of the Mineral Leasing Act, as amended, 30 U.S.C. § 201 (Supp. II 1980). Effective February 1, 1978, following several mesne conveyances, assignment of the coal lease to appellant was approved by BLM. The lease as modified presently encompasses 160 acres.

By notice dated August 13, 1980, BLM informed appellant that coal lease P-058300 would "become subject to readjustment on September 11, 1981." By memorandum also dated August 13, 1980, BLM requested the Geological Survey (Survey) to submit "recommendations for new terms and conditions for the 10-year period ending September 11, 1991." By memorandum dated June 11, 1981, the

Director, Survey, recommended in part that appellant pay "a royalty

at the rate of 8 percent of the gross value of coal mined by underground methods" and that the lease bond be increased "from \$15,000 to \$25,000." By notice dated June 24, 1981, BLM informed appellant that the terms of the coal lease would be readjusted effective September 11, 1981, to reflect in part a royalty of "8 percent of the value of coal produced by underground mining methods" and a lease bond "in the amount of \$25,000.00." BLM further stated that appellant would have 60 days either to file objections to the proposed readjusted terms or to relinquish the lease.

On August 28, 1981, appellant filed with BLM objections to the proposed readjusted terms, specifically with respect to the "amount of royalty for coal produced by underground mining methods" and the "amount of the bond." Appellant argued that the readjusted royalty rate was "excessive in relation to the financial operating characteristics of the lease" and requested "a reduction in the royalty rate to 5 percent under the criteria set forth in 43 CFR, Section 3473.3-2(d)(1)." Appellant also argued that the increase in the lease bond was "reflective of the increase in the royalty from the current 4% to the proposed readjustment level of 8%" and requested a decrease corresponding to the requested reduction in the royalty rate. On November 12, 1981, appellant submitted additional information in support of its request for a reduction in the royalty rate. By memorandum dated December 23, 1981, BLM requested that the District Mining Supervisor, Survey, make a recommendation on the requested reduction in the royalty rate.

On February 3, 1982, appellant filed additional objections to the proposed readjusted terms. Appellant stated therein that it had been informed by Survey that "the USGS Royalty Reduction Guidelines for Federal Coal Leases [(Guidelines)], dated December 1, 1980, prohibit reduction of a coal lease royalty as part of the readjustment of the lease" (Letter to Colorado State Office, BLM, at 2 (emphasis added)). Appellant argued that BLM should consider its objections to the amount of the royalty rate "in the context of the readjustment," or, in the alternative, that the request for a reduction in the royalty rate be treated independent of the readjustment. *Id.* Appellant argued that BLM was "required" to consider its objections in the context of the readjustment where these objections "include a claim that the proposed royalty is excessive." *Id.* at 3. Appellant explained that:

[T]o disregard National King Coal's claim that the proposed readjusted royalty is excessive because such a claim cannot be considered in connection with the readjustment, violates the Secretary's directive in section 3473.3-2(a)(1) which mandates that the royalty rate be determined on [an] individual case basis in both readjustments and new lease issuance. The only limitation on this mandate is that royalties are not to be readjusted below the "minimum prescribed" of not less than 5%, in accordance with sections 3451.1(a)(2) and 3473.3-2(a)(3).

Id. at 5. Appellant argued that the Guidelines, to the extent they are inconsistent with consideration of appellant's objections in the context of the readjustment, were superseded by the relevant regulations.

By memorandum dated May 13, 1982, the District Mining Supervisor, Minerals Management Service (MMS) (formerly the Conservation Division, Survey), informed BLM that the royalty rate recommended in the June 1981 memorandum from the Director, Survey, is the "minimum rate set by statute, and according to Minerals Management Service policy, cannot be reduced at the time of coal lease readjustment."

In its December 1982 decision, BLM overruled appellant's objections to readjustment of the terms and conditions of coal lease P-058300. BLM concluded that it was proper to set the royalty rate at 8 percent for coal mined by underground methods in the context of the readjustment and that appellant could seek relief under 43 CFR 3473.3-2(d), citing Blackhawk Coal Co., 68 IBLA 96 (1982). In addition, BLM concluded that the amount of the lease bond was not excessive.

In its statement of reasons for appeal, appellant contends that BLM "must consider reducing the underground royalty below 8% in the process of readjusting a coal lease if a substantial claim is made that 8% is excessive" (Statement of Reasons (SOR) at 9). In support of this contention, appellant essentially reiterates the arguments made in its February 1982 letter to BLM. Appellant asserts that these arguments were not addressed by the Board in Blackhawk Coal Co., *supra*.

[1] Section 7 of the Mineral Leasing Act, as amended, 30 U.S.C. § 207 (1976), requires a royalty rate of not less than 12-1/2 percent, "except the Secretary may determine a lesser amount in the case of coal recovered by underground mining operations." The Departmental regulations implementing the statute provide that "[a]ny lease subject to readjustment which contains a royalty rate less than the minimum royalty prescribed in § 3473.3-2 of this title shall be readjusted to conform to the minimum prescribed in that section." 43 CFR 3451.1(a)(2). 43 CFR 3473.3-2(a)(3) provides that: "A lease shall require payment of a royalty of not less than 8 percent of the value of the coal removed from an underground mine, except that the Minerals Management Service may determine a lesser amount, but in no case less than 5 percent if conditions warrant."

Section 39 of the Mineral Leasing Act, as amended, 30 U.S.C. § 209 (Supp. V 1981), further provides that the Secretary may "reduce" the royalty whenever it is necessary to promote development of the lease or the lease cannot be successfully operated under its terms. However, "in no case shall the royalty be reduced to zero percent." 43 CFR 3473.3-2(d). Such a reduction may take place at any time after readjustment. See 47 FR 33132 (July 30, 1982).

In the present case, BLM applied the mandatory minimum royalty rate for coal recovered by underground mining operations set forth in the Departmental regulations and permitted by 30 U.S.C. § 207 (1976), i.e., 8 percent. As noted above, 43 CFR 3473.3-2(a)(3) provides that the rate "shall [be] * * * not less than 8 percent." (Emphasis added.) In addition, 43 CFR

3473.3-2(a)(3) provides for a discretionary reduction of the mandatory minimum royalty rate to not less than 5 percent. The language reads: "[T]he Minerals Management Service may determine a lesser amount, but in no case less than 5 percent." Id. (emphasis added).

It is clear, therefore, that at the time of readjustment the royalty rate may be set as low as 5 percent. This is the "minimum prescribed" for underground coal. 43 CFR 3451.1(a)(2); see also 47 FR 33132 (July 30, 1982). However, as the record establishes, it has long been the policy of MMS and, formerly, of Survey under the Guidelines that it will not consider reduction of the royalty rate for underground coal from 8 percent to not less than 5 percent at the time of readjustment of a coal lease. We can find nothing which mandates consideration of reduction below 8 percent at that time. 1/ The lessee still retains the option of requesting a rate reduction under 30 U.S.C. § 209 (Supp. V 1981) and 43 CFR 3473.3-2(d). The rationale for the policy enunciated by MMS was essentially set forth in Blackhawk Coal Co., supra at 99, which similarly involved objections to imposition of a production royalty of 8 percent, for underground coal, at the time of readjustment:

If a lower rate is put into the lease now and economic conditions change favorably during the term of the lease, there will be no opportunity for upward adjustment of the royalty figure until the lease is again ripe for readjustment. The method chosen by BLM thus assures the United States a fairer return over the life of the lease, provides appellant some relief from statutory 12-1/2 percent rate, yet affords appellant an opportunity for further royalty relief when it is really needed.

Appellant has not persuaded us to depart from this policy. 2/ See Coastal States Energy Co., supra.

1/ The only thing which appellant cites in support of its contention that BLM was required to consider reduction of the royalty rate below 8 percent is 43 CFR 3473.3-2(a)(1), which provides, in relevant part: "Royalty rates shall be determined on an individual case basis." Where BLM sets the royalty rate at 8 percent and invokes the MMS policy of not reducing the royalty rate for underground coal below 8 percent in a particular case, in accordance with its discretionary authority under 43 CFR 3473.3-2(a)(3), that is deemed to be consistent with the requirement for determination on an "individual case basis."

2/ It is apparent that appellant's argument with respect to the amount of the lease bond is "collateral" in nature (SOR at 3). Appellant argues that BLM must reduce the amount of the lease bond "if the royalty is reduced in the process of readjustment." Id. As we conclude that the royalty rate will not be reduced at the time of readjustment, the amount of the lease bond will similarly not be reduced. Moreover, appellant has presented no evidence which independently supports such a reduction. See Coastal States Energy Co., 70 IBLA 386 (1983).

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.

Gail M. Frazier
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Edward W. Stuebing
Administrative Judge

