

TITAN COAL CORP.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-617
IBSMA 82-12

Decided January 5, 1984

Appeal by Titan Coal Corporation from the December 31, 1981, decision of Administrative Law Judge Tom M. Allen upholding the jurisdiction of the Office of Surface Mining Reclamation and Enforcement and the validity of Notice of Violation Nos. 81-I-18-11 (Docket No. CH 2-7-R), 81-I-106-5 (Docket No. CH 2-8-R); and Cessation Order Nos. 81-I-106-2 (Docket No. CH 1-165-R), 81-I-18-10 (Docket No. CH 2-24-R), 81-I-18-7, and 81-I-106-4 (Docket No. CH 2-4-R).

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Generally -- Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Scope of Review -- Surface Mining Control and Reclamation Act of 1977: Appeals: Generally -- Surface Mining Control and Reclamation Act of 1977: Hearings: Procedure

Where an application for review alleges only that a notice of violation or cessation order is "improper" and the applicant does not amend or move to amend the application to specifically contest the fact of violation and does not object to exclusion of that issue at the hearing, the hearing may properly be limited to the issue of the jurisdiction of the Office of Surface Mining Reclamation and Enforcement.

2. Surface Mining Control and Reclamation Act of 1977: Applicability: Generally -- Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: 2-acre

One claiming an exemption from regulation under the Act bears the burden of affirmatively demonstrating entitlement to that exemption.

APPEARANCES: Carl E. McAfee, Esq., Norton, Virginia, for appellant; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia and Walton D. Morris, Jr., Esq., Assistant Solicitor for Litigation and Enforcement, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

Titan Coal Corporation (Titan) has appealed from the December 31, 1981, decision of Administrative Law Judge Tom M. Allen, in which he held that the Office of Surface Mining Reclamation and Enforcement (OSM) had jurisdiction under the Surface Mining Control and Reclamation Act of 1977, P.L. 95-87 (Aug. 3, 1977), 30 U.S.C. §§ 1201-1328 (Supp. V 1981) (the Act), and its implementing regulations, 30 CFR Chapter VII, to issue notices of violation (NOV's) and cessation orders (CO's) to Titan. 1/ We affirm the decision as modified.

Facts

As the result of an inspection on June 26, 1981, in Wise County, Virginia, OSM Inspector Jim Fulks issued Notice of Violation No. 81-I-106-5 to Titan. Violation 1 of that notice charged Titan with failing to eliminate all highwall, in contravention of 30 CFR 715.14; it applied to "those disturbed areas listed with the Va. Division of Mines and Quarries [DMQ] as mine numbers 4, 5, 6, 7, 8, 9, 10, 12, and 13; and their approximate locations are shown on the attached topographic map" (OSM Exhs. 2, 12, and 13; also the attachment to applicant's application for review in Docket No. CH 2-8-R).

Violation 2 charged Titan with failing to pass all surface drainage from the disturbed areas through a sedimentation pond in violation of 30 CFR 715.17(a); it applied to "those disturbed areas listed with the * * * [DMQ] as mine numbers 4, 5, 8, 9, 10, 12, and 13, and their approximate locations are shown on the attached topographic map." Id.

The NOV specified the corrective action required for each violation and set the time for abatement for September 14 and July 31, 1981, respectively. OSM maintains that Titan failed to take any corrective action for either of the two violations in Notice of Violation No. 81-I-106-5. On August 4, 1981, OSM issued Cessation Order No. 81-I-106-2 for failure to abate violation 2 in the notice (OSM Exh. 3), and on September 15, 1981, it issued Cessation Order No. 81-I-106-4 for failure to abate violation 1 in the notice (OSM Exh. 4).

After additional inspections of Titan's surface mining operations, OSM Inspector Ronnie Vicars issued Notice of Violation No. 81-I-18-11 to Titan on August 7, 1981. This notice charged Titan with failing to construct sedimentation ponds (in violation of 30 CFR 715.17(a)) and with placing spoil on the downslope (in violation of 30 CFR 716.2(a)(1)). It applied to surface mines number 15 and 16 (OSM Exh. 9; Tr. 75, 78). Times for abatement were set for September 7 and October 7, 1981, respectively.

1/ Docket No.

CH 2-7-R	Notice of Violation No. 81-I-18-11
CH 2-8-R	Notice of Violation No. 81-I-106-5
CH 1-165-R	Cessation Order No. 81-I-106-2
CH 2-24-R	Cessation Order No. 81-I-18-10
CH 2-4-R	Cessation Order Nos. 81-I-18-7 and 81-I-106-4

OSM asserts that Titan failed to take any corrective actions. As a result, Vicars issued Cessation Order Nos. 81-I-18-7 (on September 8, 1981, for failure to abate violation 1 in the notice) and 81-I-18-10 (on October 9, 1981, for failure to abate violation 2) (OSM Exhs. 10, 11).

Pursuant to 43 CFR 4.1160-4.1171, Titan filed applications for review of all of the NOV's and CO's. The five applications were similar and read in substance as follows:

1. Titan was issued a NOV (or CO);
2. The area involved was less than two acres and consequently exempt;
3. OSM regulations concerning two acre or smaller sites have been suspended;
4. OSM has been selectively enforcing against Titan;
5. Applicant requests that the Notice of Violation (or CO) is improper and should be vacated.

OSM filed answers admitting only the allegation in paragraph 1 of the applications, denying those in the other paragraphs, and requesting an evidentiary hearing. 2/

2/ On Oct. 25, Nov. 10, and Dec. 7, 1981, Titan mailed documents entitled "Interrogatory and Request For Production of Documents" to the Administrative Law Judge and OSM in these cases. The first two interrogatories, mailed Oct. 25, were received by OSM and the Administrative Law Judge on Oct. 28. 43 CFR 4.1139 and 4.1140 provide that the party that is served shall serve response on the party that requested discovery within 30 days after service. (Filing is effective upon mailing (43 CFR 4.1107), but service is not complete until receipt. 43 CFR 4.1109.)

On Nov. 23, the Administrative Law Judge set the cases for hearing on Dec. 15. On Dec. 3, Titan filed a motion to compel discovery in one case (CH 1-165-R), OSM having failed to respond to the previous request (whose satisfaction date would have been Nov. 27), and a motion for a hearing continuance for all five cases until 30 days after Titan had received the material and information requested. The motion for a continuance was denied on Dec. 7 and on that same date the Administrative Law Judge ordered OSM to comply with the discovery motion "within 5 days of this order." OSM certifies that it mailed this response to Titan on Dec. 8. The original was delivered to the Administrative Law Judge on Dec. 9. The response stated that five of its employees would testify and that a certified land surveyor would demonstrate that combined sites 4 and 5, 6 and 7, and 15 and 16 were each more than 2 acres.

On Dec. 15, 1981, before the commencement of the hearing, Titan filed a motion for a default judgment in CH 1-165-R because OSM failed to comply with the order to respond within 5 days and because the response was insufficient.

On December 15, 1981, Administrative Law Judge Allen held a hearing on these cases. At the hearing OSM advised the Administrative Law Judge that it was "prepared to put on a case as to the fact of violation for all the notices and orders" and then suggested that Titan had not, in any of its pleadings, challenged the fact of violations but only OSM's authority to issue the notices and orders (because Titan alleged each site was under 2 acres) (Tr. 6). The Administrative Law Judge found that, pursuant to 43 CFR 4.1164, because Titan had not said, at least, that it denied the violations, that any substantive defenses had been waived so that he need consider only whether or not OSM had jurisdiction to issue the notices of violation. ^{3/} The hearing then proceeded solely on the question of OSM's jurisdiction over Titan's operations.

Titan had been surface mining coal in the area in question since the effective date of the Surface Mining Control and Reclamation Act of 1977. The area, or some of it, had been previously mined (Tr. 33, 35, 54, 61). Three seams were involved: The Lyons, the Dorchester, and the Norton. This case concerns 11 specific sites. Titan was issued a mine license number by the DMQ for each of the sites, although no permit or permits had been issued by the Division of Mineral Land Reclamation which is the regulatory authority for Virginia. The DMQ numbers are 4 through 16 (excluding 11 and 14, the former not having been included in the NOV's and the latter never being located) (OSM Brief at 5 n.5).

Sites 4 and 5 are 30 to 40 feet apart and connected by a jointly used haul road (Tr. 43, 45, 87-88, 91-92). Although OSM attempted to show that someone had surveyed 4 and 5 and found site 5 itself to be over 2 acres, that testimony was objected to as hearsay and denied admission (Tr. 95). No other testimony or evidence was offered as to the size of sites 4 and 5. The Dorchester and Lyons seams were mined on 4 and the Norton seam on 5.

Sites 6 to 13 are all within a half mile of each other (Tr. 92). Sites 6, 7, 8, and 13 are all along a joint haul road (OSM Exh. 2 and 13). Sites 6 and 7 are 50 to 60 feet apart (Tr. 48). Considered with the haul

The Administrative Law Judge denied the motion at the outset of the hearing, saying:

"The reason it is denied is that an answer was properly filed after the order of the 7th in my office on December 9, two days after the order, and the regulations require I be served with it, not necessarily the other side, so it was properly filed within the five days, and for that reason, the motion is denied. (Tr. 4, 5)."

Although it may be a fair inference that the rules require the Administrative Law Judge to be furnished a copy of the response at the same time it served upon the parties, there is no such requirement in terms. The rules do, however, specifically require that the parties be served. 43 CFR 4.1139, 4.1140. ^{3/} Tr. 6-11. Any person filing an application for review must incorporate in the application regarding each claim for relief: "(a) a statement of facts entitling that person to administrative relief; (b) a request for specific relief; * * * (e) any other relevant information." 43 CFR 4.1164.

road, site 6 is more than 2 acres, as are sites 7 and 8 (Tr. 55, 56, 57). Considered together, without the haul road, sites 6 and 7 exceed 2 acres (Tr. 56, 57, 58). Only if measured individually, without including the haul road, would sites 6 and 7 be less than 2 acres (Tr. 49, 55-56). The Norton seam was mined on sites 6 through 13.

Sites 15 and 16 are 40 to 50 feet apart (Tr. 79). Site 15 was surveyed at 2 acres and site 16 at 1.76 acres with each of their haul roads (Tr. 81-82). The Norton seam was mined on both of them. Sites 15 and 16 are approximately 3 air miles or 12 road miles from sites 6 through 13 (Tr. 100-01). There is no specific evidence, but OSM asserts in its brief that sites 4 and 5 are fewer than 3 miles from sites 6 through 13.

Counsel for appellant argued that "each [site] depended upon the completion of the first and whether or not another place was available to go after the completion of the first before another one was ever started" (Tr. 13). After Titan rested without introducing evidence and both parties declined to file proposed findings of fact or conclusions of law, the Administrative Law Judge issued his ruling from the bench. He concluded that "all of the individual sites, whether they were 2 acres more or less collectively exceed 2 acres of disturbed land" (Tr. 103). He then found Titan subject to the Act and the NOV's and CO's validly issued. In the written decision, he added that if any two or more of the sites were added together, the total would exceed 2 acres. Titan as an operator had thus

disturbed in excess of 2 acres within a 1-year period although each disturbance has been less than 2 acres. Where one operator disturbs land by coal mining operations within an area or location of such a definable region where it is operationally and economically practical to mine coal in such a manner as to amount to a continuous operation, then the combined disturbances place the operator under the provisions of the Act.

(Decision at 5.)

Discussion

The Act exempts from its purview "the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." 30 U.S.C. § 1278(2) (Supp. V 1981). The implementing regulations exempt from applicability

[t]he extraction of coal for commercial purposes where the surface coal mining and reclamation operation affects two acres or less, but not any such operation conducted by a person who affects or intends to affect more than two acres at physically related sites * * *;

* * * The extraction of 250 tons of coal or less by a person conducting a surface coal mining and reclamation

operation. A person who intends to remove more than 250 tons is not exempted.

30 CFR 700.11(b) and (c) (1979). ^{4/}

We note that a surface coal mining operation includes areas affected by access and haul roads (30 CFR 700.5), except those roads maintained with public funds. 30 CFR 710.5. The Administrative Law Judge also relied on the following definition, found at 30 U.S.C. § 1291(13) (Supp. V 1981): "[O]perator' means any person, partnership, or corporation engaged in coal mining who removes or intends to remove more than two hundred and fifty tons of coal from the earth by coal mining within twelve consecutive calendar months in any one location."

In its brief on appeal, Titan contends that it is exempt from the Act and contests each of the Administrative Law Judge's findings. Titan asserts that its statement in its applications for review that the NOV's and CO's were "improper" constituted a substantive denial of the fact of the violations; therefore, the Administrative Law Judge improperly limited the presentation of evidence to the question of jurisdiction. Appellant argues that its minesites do not comprise one location, but are discrete, physically unrelated sites of less than 2 acres apiece. In addition, Titan states that OSM did not allege or establish that Titan had extracted over 250 tons of coal.

OSM responds that appellant's pleadings before the hearing addressed only jurisdiction, so the Administrative Law Judge correctly restricted the hearing to that issue. OSM also argues that Titan, not OSM, bears the burden of proving the minimum tonnage exemption.

Further, OSM claims that Titan conducted an economically and functionally integrated mining operation that for 15 months mined coal, moving equipment from one site to the next, and sold all the coal extracted to the same entity, Paramount Mining Company. OSM argues that Titan thereby disturbed more than 2 acres in violation of 30 CFR 700.11(b). In addition, OSM asserts that the sites are physically related in several ways. On all sites but No. 4, Titan mined the same Norton seam. All sites drain into the Powell River, either directly or through the Yellow and Black Creeks. OSM also points out the close proximity of all sites and to the haul road connection between sites 4 and 5 and between sites 6, 7, 8, and 13.

[1] We consider first whether the scope of the hearing was improperly limited to jurisdiction, excluding consideration of the fact of the violations.

^{4/} An additional provision, extending the Act's coverage to an operation conducted by one who affects or intends to affect more than 2 acres at physically unrelated sites within 1 year, was suspended on Nov. 27, 1979 (44 FR 67942), before this case arose. Subsequent to the events in this case, this applicability regulation was amended to deem surface coal mining operations to be related if they occur within 12 months of each other, their drainage flows into the same watershed at any point within 5 miles of each other, and they have common ownership or control. 47 FR 33424, 33432 (Aug. 2, 1982).

An examination of the relevant events in this case is enlightening. Following issuance of the NOV's and CO's involved, Titan filed applications for review in which in each instance it requested that the notice or order be vacated as "improper." The pleadings in this case served to bring the parties to the hearing before the Administrative Law Judge. At that time counsel for OSM stated:

From an examination of those pleadings it is my understanding that Titan Coal is challenging the issuance of these notices of violation and the cessation orders based upon a challenge to OSM's jurisdiction. From my review of the pleadings, I don't find a challenge to the fact of violation in any of the notices or the cessation orders. I am wondering how the Court wishes us to proceed on that.

(Tr. 6). Counsel for OSM advised the Administrative Law Judge that he was prepared to present OSM's case as to the fact of violation for all the notices and orders, but he believed Titan was limited to the jurisdictional issue.

The Administrative Law Judge did not invite counsel for Titan to comment on OSM's statement, nor did counsel for Titan volunteer comment. Instead, Judge Allen inspected the application for review in Docket No. CH 1-165-R and stated:

It does not challenge nor deny the validity of the cessation order with the exception it is not subject to the Act; therefore, in the event it is determined that Titan Coal is subject to the Act, the cessation order will be affirmed, it having not -- there's been no denial of it.

(Tr. 6-7).

The following exchange then took place between the Administrative Law Judge and counsel for Titan:

MR. ADKINS: In other words, you're taking the position, Your Honor, as I understand it, that the only issue raised in the application for review is exempt [sic] from jurisdiction?

JUDGE ALLEN: That's correct.

MR. ADKINS: That's what I need to know.

* * * * *

MR. ADKINS: So, the only issue to be decided by the hearing is whether or not you [sic] are subject to the jurisdiction -- [emphasis added.]

(Tr. 7-8).

The Administrative Law Judge reviewed each of the applications and stated that if Titan was determined to be subject to OSM jurisdiction, the notices and orders would be affirmed (Tr. 7-10).

43 CFR 4.1164 requires that an application for review contain a statement of facts entitling the applicant to administrative relief, and any other relevant information. 43 CFR 4.1168 provides that an application for review may be amended once as a matter of right prior to the filing of an answer and thereafter by leave of the Administrative Law Judge upon proper motion. Although it is doubtful that the simple allegation in an application for review that an NOV or CO is "improper" complies with 43 CFR 4.1164, ^{5/} under the circumstances of this case it is clear that Titan cannot now complain it was deprived of its right to contest the fact of violation.

Counsel for Titan at no point amended or moved to amend the applications for review. Nor did he object to the limitation of the scope of the hearing. He registered no challenge to OSM's raising of the limitation issue nor to the Administrative Law Judge's ruling on that issue. He made no offer of proof concerning the facts of violations. His sole contribution was to attempt to clarify the ruling. His statement, "[t]hat's what I need to know," cannot be construed as an objection to the ruling. However, after remaining silent at the hearing, Titan now presents the argument on appeal that the limitation by the Administrative Law Judge was error.

Titan waived its right to raise the issue on appeal when its counsel acquiesced in the limitation at the hearing. The generally accepted definition of waiver is the intentional or voluntary relinquishment of a known right. 92 C.J.S. Waiver (1955) at 1041-42. In this case Titan clearly knew that it had the right to contest the fact of violation in each instance. It had the opportunity at the hearing to raise objections to the limitation of issues. It did not.

A waiver may arise or be inferred from the acquiescence or silence of the party who has the power to speak, under circumstances which require him to speak. 92 C.J.S. Waiver (1955) at 1064-65. In this case Titan's silence prejudiced OSM because OSM indicated its willingness and ability to go forward with proof concerning the facts of violation, yet Titan did not challenge or object to the ruling. Titan's inaction was further prejudicial to OSM, since Titan now claims on appeal that the case should be remanded for a hearing on the facts of the violation. Titan's failure to amend its pleadings or object at the hearing precludes it from raising the issue on appeal.

[2] In administrative review proceedings under the Act, this Department has held consistently that one who contests OSM jurisdiction must state and prove as an affirmative defense the grounds upon which the claim is based. Sam Blankenship, 5 IBSMA 32, 39, 90 I.D. 174, 178 (1983); Jewell Smokeless Coal Co., 4 IBSMA 211, 217, 89 I.D. 624, 627 (1982); Daniel Brothers Coal Co., 2 IBSMA 45, 51, 87 I.D. 138, 141 (1980). OSM carries the initial burden of establishing a prima facie case as to the validity of a notice or order. 43 CFR 4.1171(a). OSM has established a prima facie case where evidence

^{5/} Cf., Harry Smith Construction Co., 78 IBLA at 31, n.10 (1983).

sufficient to establish essential facts will remain sufficient if uncontradicted. Sufficient evidence justifies but does not compel a finding in favor of the one presenting it. Belva Coal Co., 3 IBSMA 83 (1981); James Moore, 1 IBSMA 216, 233 n.7, 86 I.D. 373 (1979). OSM's initial burden is limited to a prima facie showing that the one named in the NOV or CO was "engaged in a surface coal mining operation and failed to meet Federal performance standards." Rhonda Coal Co., 4 IBSMA 124, 134, 89 I.D. 460, 465 (1982). Once OSM has made such a showing, the applicant for review then carries the ultimate burden of persuasion. 43 CFR 4.1171(b). The applicant for review must then prove any claimed exemption from coverage under the Act by presenting supporting evidence as well as carrying the ultimate burden of persuasion if OSM attempts to rebut the evidence. Harry Smith Construction Co., 78 IBLA 27 (1983). Merely asserting an opinion is insufficient to establish an affirmative defense. Sam Blankenship, *supra* at 39, 90 I.D. at 178.

As this Board stated in Harry Smith Construction Co., *supra*, at 30.

Both sound legal principles and important practical considerations support these precedents. Where legislation is remedial, as the Surface Mining Act is, "exemptions from its sweep should be narrowed and limited to effect the remedy intended." Piedmont and Northern Ry. v. Comm'n, 286 U.S. 299, 311-12 (1932). Further, the responsibility for bringing a case within an exception to a statute not contained in the enacting clause falls on the party responding to a cause of action based on the statute. Sullivan v. Ward, 24 N.E.2d 672 (Mass. 1939); 130 A.L.R. 440 (1941).

It would be impractical for OSM to begin each hearing with a recitation of jurisdictional evidence, such as the 2-acre and 250-ton minimums, the lack of a Government-financed construction project or the lack of other mineral extraction to which coal extraction might be incident. 30 U.S.C. § 1278 (Supp. V 1981); 30 CFR 700.11. Indeed, the one claiming the exemption is likely best able to prove it, as the one in control of the necessary data.

In this case, Titan pleaded a lack of jurisdiction but did not submit the necessary evidence to prove it. Instead, Titan relies on assertions of size, an insistence that its sites are separate, and an apparent misapprehension that it need not prove mining less than minimum acreage and tonnage. ^{6/} Titan did not present evidence to sustain its burden of persuasion of the affirmative defenses it claimed.

Therefore, this Board finds that Titan was subject to the Act. The decision of the Administrative Law Judge highlighted the definition of "operator" found in the Act at 30 U.S.C. § 1291(13) and in the regulations at 30 CFR 701.5. The 2-acre exemption, however, applies to "operations," not "operators." 30 U.S.C. § 1278(2) (Supp. V 1981); Sam Blankenship, *supra*.

^{6/} The tonnage issue was first raised at the hearing on examination of Titan's president by OSM (Tr. 26, 37). No evidence on the issue was adduced at the hearing. Titan argues in its brief on appeal that OSM must prove Titan mined more than 250 tons of coal.

To the extent the Administrative Law Judge relied on this definition, his decision is modified. He did, however, focus on the size of the operation and held, correctly, that multiple sites can be aggregated for the purpose of calculating the 2-acre minimum. Mud Fork Coal Corp., 5 IBSMA 44, 52-55, 90 I.D. 181, 185-87 (1983). ^{7/}

Therefore, the decision of Administrative Law Judge Allen upholding the validity of NOV Nos. 81-I-18-11, 81-I-106-5 and CO Nos. 81-I-18-7, 81-I-18-10, 81-I-106-2, and 81-I-106-4 is affirmed as modified.

Will A. Irwin
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

^{7/} "In promulgating both the previous regulations to implement Section 528(2) of the Act, and the revisions discussed in this document, OSM has been concerned that the limited exemption provided by Congress not be abused by operators seeking to evade the permitting and environmental protection performance standards of the Act. OSM is concerned primarily with situations where an operator tries to claim the exemption by dividing what is essentially one mine site into numerous sites of two acres or less." 47 FR 33426 (Aug. 2, 1982).

