

REITZ COAL CO.
v.
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 84-184

Decided October 17, 1984

Appeal from decision of Administrative Law Judge Joseph E. McGuire denying petitions for review of Notices of Violation Nos. 80-1-23-6 and 80-1-113-21.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: At or Near a Minesite -- Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With -- Surface Mining Control and Reclamation Act of 1977: Words and Phrases

"Surface coal mining operations." In order to be conducting surface coal mining operations, within the meaning of the Surface Mining Control and Reclamation Act of 1977, a coal preparation and processing plant need only be operated in connection with a surface coal mine. A coal preparation and processing plant which is operated in connection with a number of surface coal mines, therefore, conducts surface coal mining operations within the meaning of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1291(28)(A) (1982).

APPEARANCES: John J. Dirienzo, Jr., Esq., Somerset, Pennsylvania, for appellant, Reitz Coal Company; Angela F. O'Connell, Esq., and Cleveland C. Gambill, Esq., Office of the Solicitor, Division of Surface Mining, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On February 20, 1980, an Office of Surface Mining Reclamation and Enforcement (OSM) inspector made an official examination of Reitz Coal Company's (Reitz) coal preparation plant No. 11 (Reitz 11) in Somerset County, Pennsylvania. Pursuant to provision of the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (1982), he served Reitz with a notice of violation (NOV No. 80-1-23-6) of the interim performance standards set forth in 30 CFR Part 700, consisting of failure to pass surface runoff through a sedimentation pond and failure to meet effluent limitations. On September 30, 1981, Reitz 11 was again cited for two violations

of the interim standards (NOV No. 81-1-113-21), involving failure to pass surface drainage through sedimentation ponds and failure to meet effluent limitations in violation of 30 CFR 715.17(a)(2). Reitz was subsequently assessed civil penalties for the violations and filed petitions for review of the assessments. An evidentiary hearing was held before Administrative Law Judge Sheldon L. Shepherd on February 23, 1982, in Somerset, Pennsylvania. The case was transferred to Administrative Law Judge Joseph E. McGuire for decision following the retirement of Judge Shepherd. On November 28, 1983, Reitz Coal Company filed a petition for discretionary review of the October 24, 1983, decision by Judge Joseph E. McGuire denying Reitz' petitions for review. By order dated December 22, 1983, the Board granted the petition.

The fact finder summarized the pertinent evidence at hearing as follows:

Petitioner firm [Reitz] is a wholly owned subsidiary of Berwind Corporation (Berwind) and Wilmore Coal Company (Wilmore) is a division of Berwind. Anthony T. Sossong is the president of all three companies (Tr. 11, 18, 19). Berwind is primarily a holding company with Wilmore acting as its property owner as well as its administrator and petitioner is its mining and processing arm (Tr. 18-19). In its mining operations, petitioner leases some coal seams from its parent (Tr. 20) and in 1975 began production on its North Somerset underground mine (Tr. 25, 28). It leases the property from Berwind, the surface and mineral owner (Tr. 25-26). In 1976, petitioner opened its Reitz 11 preparation plant (Tr. 28). The North Somerset and Reitz 11 properties are contiguous but their actual mining operations are separated by approximately 1 mile (Tr. 23-24). All of North Somerset's coal production was prepared at Reitz 11 (Tr. 24-25) and active mining was discontinued there in December 1980 and all coal on hand was later shipped to Reitz 11 for preparation (Tr. 23-26).

The Trent underground mine is also located about 1 mile from Reitz 11. Trent is not a Berwind company but it mines minerals owned by Berwind and delivers its coal to either Reitz 11 or Reitz 4, another preparation plant operated by petitioner (Tr. 27).

Shade 5 is a surface mine that adjoins Reitz 11 (Tr. 29-32). Berwind is the mineral and surface owner and the output from Shade 5 is hauled directly to Reitz 11 for preparation (Tr. 35-32-33). Shade 4 is another surface mine located next to Shade 5 (Tr. 36). Berwind owns the mineral and surface rights on the Shade 4 operation (Tr. 36). Beginning in 1979 Shade 5 discontinued shipping coal to Reitz 11 (Tr. 35). Both Shade 4 and 5 paid production royalties to Berwind (Tr. 32, 36) and petitioner had the right of first refusal to all coal prepared for Shade 4 and Shade 5 (Tr. 39).

Other mines, both underground and surface, some of which are owned by petitioner and the mineral rights for most of which are owned by Berwind or Wilmore, are positioned within 4 to 10 miles of Reitz 11. All coal produced at some of these mines is shipped to petitioner's Reitz 11 and some have accorded petitioner the right of first refusal of their product. The foregoing

information concerning ownership, business relations and relative distances was secured from the testimony of William L. Alden, petitioner's financial manager (Tr. 17). [Footnote omitted.]

(Decision at 2, 3). Based on these facts, which are unchallenged upon appeal to this Board, the Judge found:

[T]his preparation plant [Reitz 11] is owned by a company which also operated an adjacent mine (North Somerset) at least during the period of the first violation. Two other adjacent mines (Shade 4 and Shade 5) are owned by petitioner's parent company (Berwind) and pay royalties to Berwind on their coal output. Petitioner has the right of first refusal on all coal that is to be prepared for the Shade mines. The Trent mine is about a mile from Reitz 11 and its mineral is owned by Berwind. Under Departmental interpretations, there is a sufficient connection between Reitz 11 and one or all of these adjacent mines or those located within a mile of the minesites to place Reitz 11 squarely within the statutory and regulatory definitions of a surface coal mining operation. [Footnote omitted.]

(Decision at 4-5).

On appeal Reitz describes the activities at Reitz 11 as "physical processing [or] cleaning, concentrating, or other processing or preparation of coal," as well as the shipping of coal by rail (Brief at 6). On pages 2 to 3 of its brief, Reitz summarizes the tonnages of coal received from Reitz and other mines and processed at Reitz 11 in 1979-81. Almost half a million tons were processed in each of the years 1979 and 1980, and over 361 thousand tons were processed in 1981. Reitz contends, however, that the activities at Reitz 11 are not "in situ" at an active minesite, nor are they "at or near" a minesite. Citing Wolverine Coal Corp., 2 IBSMA 325, 81 I.D. 554 (1980), Reitz argues that a "two-part test" developed by past decisions of the Department must be applied to determine the single issue sought to be raised on appeal, whether OSM may exercise jurisdiction over Reitz 11 as a "surface coal mining operation" under provision of 30 CFR 700.5 (1979). Reitz has requested oral argument. For reasons set out later in this decision, the request for oral argument is denied.

[1] On May 5, 1983, the Department adopted a final rule defining "surface coal mining operations." This rule, 30 CFR 700.5, provides pertinently: "Surface coal mining operations means -- (a) Activities conducted on the surface of lands in connection with a surface coal mine * * *. Such activities include * * * the cleaning, concentrating, or other processing or preparation of coal." In the preface to those regulations, the following explanation appears:

"Coal preparation" or "coal processing" has been defined to mean the cleaning, concentrating, or other processing or preparation of coal in order to separate coal from its impurities. Under this definition, coal loading, crushing, sizing, and other activities do not constitute coal processing or preparation unless they result in the separation of coal from its impurities. By clarifying that coal processing includes only those activities

where coal is separated from its impurities, the definition provides for the regulation of these activities most likely to be associated with the potential for adverse environmental impacts on the surface.

48 FR 20394.

The regulation in effect at the time the claimed violation occurred in this case, 30 CFR 700.5 (1979), contained a provision defining "surface coal mining operations" which is, however, not the same as that appearing in the current rule. Both provisions implement the language of the Act appearing at 30 U.S.C. § 1291(28)(A) (1982). The evolution of the current interpretation of this rule, so far as offsite processing plants are concerned, is explained in Ann Lorentz Coal Co. v. OSM, 79 IBLA 34, 37-39, 91 I.D. 108, 109-10 (1984). That case involved a coal loading facility charged in 1979 with violations similar to those at issue here. The plant operator in Ann Lorentz also claimed, as does appellant here, that OSM lacked jurisdiction over the loading facility concerned under 30 CFR 700.5 (1979) in reliance upon past Departmental interpretations of the rule, which involved a "two-part test," used to determine whether a coal processing and loading plant was a "surface coal mining operation." This test required finding that a coal facility be operated (1) "in connection with" and also be (2) located "at or near" a mine. See, e.g., Reitz Coal Co., 3 IBSMA 260, 88 I.D. 745 (1981). This Board rejected the "two-part test" and set out the rule to be applied in light of the Departmental regulation change:

[W]e find that the test of whether a facility is a surface coal mining operation does not always involve two parts. The test now requires that the activities be scrutinized. If a facility engages in excavation for the purpose of obtaining coal, in situ distillation, retorting, leaching, or other chemical or physical processing or the cleaning, concentrating, or other processing or preparation of coal, and those activities are conducted in connection with a surface coal mine, that facility is involved in surface coal mining operations regardless of its physical distance from the surface coal mine.

79 IBLA at 39, 91 I.D. at 111. The Board then distinguished and considered the facts in Ann Lorentz which involved a "dry" tipple, which did not clean or process coal. That situation is not presented by this appeal. See Id. at 39, 91 I.D. at 111.

The fact finder in this case determined that the activities at Reitz 11 were conducted in connection with corporately owned mines as a matter of fact. The decision in Ann Lorentz Coal Co. v. OSM, supra, explains the background to this approach to the surface mining regulations in such cases. Generally stated, developing judicial precedent indicates the Department's prior decisions interpreting the regulations to require a "two part test" too narrowly construed the Act. See, e.g., Debord v. Watt, No. 82-99 (E.D. Ky. Sept. 29, 1982); Shawnee Coal Co. v. Andrus, 661 F.2d 1083 (6th Cir. 1981).

Since the decision in Ann Lorentz Coal Co. v. OSM, Departmental regulations which implement provisions of the Act respecting coal processing

facilities were considered by United States District Court Judge Flannery in In re: Permanent Surface Mining Regulation Litigation, Civ. No. 79-1144 (D.D.C. July 6, 1984). Rejecting the miners' contentions that the Department's coal mining regulations defining coal processing were too broad, Judge Flannery affirmed the jurisdiction of the Secretary to regulate processing plants not located at a minesite. See In re: Permanent Surface Mining Regulation Litigation, *supra*, slip op. at 17. the Flannery decision describes the Departmental construction of the statutory provisions regarding coal processing plants:

Coal preparation or coal processing is defined under the new regulations as "cleaning, concentrating, or other processing or preparation of coal in order to separate coal from its impurities." 30 C.F.R. § 701.5 (emphasis added). The separation of the impurities from coal, therefore, is where the Secretary makes his distinction. Facilities that do not engage in coal preparation, as defined, and which principally load coal are subject to the jurisdiction of the Act only when they are located "at or near a mine site." 48 Fed. Reg. 20396 (1983). Finally, facilities that are not listed as an activity in Section 701(28)(A) are subject to the jurisdiction of the Act when they are located in areas "resulting from or incident to a regulated activity." See 30 U.S.C. § 1291(28)(B).

In re: Permanent Surface Mining Regulation Litigation, *supra*, slip op. at 16. The Judge then went on to consider the practical definition to be given to the phrases "coal preparation," "coal processing," and "coal preparation plant" used by the Act; citing dicta from Shawnee Coal Co. v. Andrus, *supra* at 1094, he found:

[T]he Secretary's definitions of "coal preparation," "coal processing," and "coal preparation plant" are based on a misreading of the statute. The resulting limitation of the Act's coverage and the Secretary's jurisdiction over leaching, physical processing, or chemical processing when these operations do not involve the separation of coal from its impurities, to situations where these operations are conducted in situ is contrary to the statute and cannot stand. 17/

17/ The regulation defining "surface coal mining operations" should also be amended to reflect, with clarity, this court's holding. 30 C.F.R. § 700.5.

In re: Permanent Surface Mining Regulation Litigation, *supra*, slip op. at 19, 20. The definition of coal cleaning or processing which appears at 30 CFR 701.5, requiring a separation of impurities before a plant can be considered a "preparation plant" is, therefore, rejected outright by the Flannery decision.

The statute interpreted by the Flannery decision opinion provides, in pertinent part, at 30 U.S.C. § 1291(28)(A) (1982):

"surface coal mining operations" means --

(A) Activities conducted on the surface of lands in connection with a surface coal mine or subject to the requirements of section 1266 of this title surface operations and surface impacts incident to an underground coal mine, the products of which enter commerce or the operations of which directly or indirectly affect interstate commerce. Such activities include excavation for the purpose of obtaining coal including such common methods as contour, strip, auger, mountaintop removal, box cut, open pit, and area mining, the uses of explosives and blasting, and in situ distillation or retorting, leaching or other chemical or physical processing, and the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site[.]

As explained by Judge Flannery, the prior construction given by Departmental regulations to the statutory language quoted was too restrictive. The effect of his opinion is, therefore, to find that the Secretary has jurisdiction over offsite coal tipples operated in connection with surface coal mines, even though the plants do not "separate coal from its impurities." Slip op. at 16, 19. In this case, there is no question that Reitz 11 does, however, do just that. It is clearly operated in connection with a number of surface coal mines. Since the facility is engaged in "physical processing," "cleaning, concentrating or other physical processing" of coal as described by the Act, it is a "surface coal mining operation" and was subject to OSM jurisdiction as the fact finder found. See 30 U.S.C. § 1291(28)(A) (1982); In re: Permanent Surface Mining Regulation Litigation, supra; Ann Lorentz Coal Co. v. OSM, supra. Reitz 11 is, therefore, properly found within the jurisdiction of the Secretary without recourse to the now discarded two-part test to determine Secretarial jurisdiction established by prior Departmental decisions rejected by Ann Lorentz Coal Co. v. OSM, supra. Moreover, since Reitz 11 does "separate coal from its impurities," it was subject to OSM jurisdiction under either the prior OSM interpretation of the term "preparation plant" or under the Flannery decision which rejects the definition of "preparation plant" appearing at 30 CFR 701.5.

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 affirmed.

Franklin D. Arness
Administrative Judge

We concur:

R. W. Mullen Bruce R. Harris
Administrative Judge

Administrative Judge