

WILLIAM M. JOHNSON  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-1001  
IBSMA 81-25

Decided December 19, 1984

Appeal from decision of Administrative Law Judge Frederick A. Miller denying motion to vacate the May 14, 1982, decision of Administrative Law Judge Tom M. Allen upholding Notice of Violation No. 80-2-99-19.

Appeal dismissed.

1. Appeals -- Rules of Practice: Appeals: Dismissal -- Rules of Practice: Appeals: Timely Filing -- Surface Mining Control and Reclamation Act of 1977: Appeals: Generally

Under 43 CFR 4.1271, notice of appeal must be filed on or before 30 days from date of receipt of the order or decision sought to be reviewed. The timely filing of a notice of appeal is jurisdictional and failure to file the appeal within the time allowed requires dismissal of the appeal.

2. Surface Mining Control and Reclamation Act of 1977: Generally

Assuming, arguendo, that jurisdiction existed in the Board to review the merits of the proceedings below, it is clear that the Office of Surface Mining Reclamation and Enforcement possessed regulatory authority over appellant's surface mining operation and that appellant failed to raise any defense to the fact of violation, after being given full opportunity to do so.

APPEARANCES: Herman W. Lester, Esq., Pikeville, Kentucky, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

On May 14, 1982, Administrative Law Judge Tom M. Allen issued a decision upholding Notice of Violation No. 80-2-99-19 issued to William M. and Malvary Johnson by the Office of Surface Mining Reclamation and Enforcement (OSM). <sup>1/</sup> On June 11, 1982, William M. Johnson filed with the Hearings

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<sup>1/</sup> This decision followed a decision by the Interior Board of Surface Mining and Reclamation Appeals, William M. Johnson, 3 IBSMA 377, 88 I.D. 1112 (1981)

Division a motion to vacate the decision and for an additional hearing on the merits of the notice of violation. Administrative Law Judge Frederick A. Miller denied the motion by order dated August 4, 1982. Johnson thereafter filed a complaint in the United States District Court for the Eastern District of Kentucky on September 3, 1982. Following a preliminary conference on May 6, 1983, the court ordered that the matter be held in abeyance "pending the outcome of plaintiff filing an administrative appeal pursuant to C.F.R., Title 43, Section 4.1271, from the Order of the Administrative Law Judge entered on August 4, 1982." Johnson filed a notice of appeal and brief on September 22, 1983.

The provisions of 43 CFR 4.1271 are as follows:

§ 4.1271 Notice of Appeal

(a) Any aggrieved party may file a notice of appeal from an order or decision of an administrative law judge disposing of a proceeding under this subpart, except a civil penalty proceeding under § 4.1150.

(b) Except in an expedited review proceeding under § 4.1180, or in a suspension or revocation proceeding under § 4.1190, a notice of appeal shall be filed with the Board on or before 30 days from the date of receipt of the order or decision sought to be reviewed and the time for filing may not be extended.

By order dated December 5, 1983, this Board ordered appellant to show cause why his appeal should not be dismissed for failure to file the appeal on or before 30 days from the date of receipt of the order or decision sought to be reviewed. Appellant had received the August 4, 1982, decision of Judge Miller on August 6, 1982, and his counsel received it on August 5, 1982. 2/

In response to the Board's order of December 5, 1983, appellant argues that the district court judge "could not have contemplated that plaintiff's appeal would be timely under Title 43, Section 4.1271, and could only have contemplated that this appeal was necessary to resolve all pending issues" (Response at 3). He notes as well that the order did not require the appeal to be filed within any time period and that the order should not be construed as restricting appellant's right of appeal.

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that reversed an earlier decision by the Administrative Law Judge entered Nov. 20, 1980, vacating the notice of violation on procedural grounds. The case was remanded for further consideration.

By Secretarial Order No. 3092 dated Apr. 26, 1983, the Secretary of the Interior transferred all of the functions and responsibilities of IBSMA to the Interior Board of Land Appeals. 48 FR 22370 (May 13, 1983).

2/ Appellant ultimately seeks review of the May 14, 1982, decision of Administrative Law Judge Allen upholding the notice of violation at issue. He received notice of that decision on May 17, 1982.

[1] We disagree. The court's order is straightforward. It directed appellant to appeal pursuant to 43 CFR 4.1271 in apparent recognition that appellant had failed to exhaust his administrative remedies as required by 43 CFR 4.21(a) and (b). <sup>3/</sup> Courts have required parties to exhaust all administrative remedies afforded by the Department before allowing judicial review of agency action, in recognition of the provisions of 43 CFR 4.21. Mammedaty v. Kleppe, 412 F. Supp. 283 (D. Okla. 1976); Rawls v. Secretary of the Interior, 460 F.2d 1200 (9th Cir. 1972). In the absence of any direction to this Department to waive its time limit for filing, we must conclude that the court intended any appeal filed by appellant to be adjudicated under the same rules that apply in all other Departmental proceedings. <sup>4/</sup>

The timely filing of a notice of appeal is jurisdictional. This Board does not possess general supervisory authority over constituent agencies within the Department of the Interior. Unless its jurisdiction is properly invoked, the Board is without power to act in any matter. An appeal that is not filed timely must be dismissed. Lloyd M. Baldwin, 75 IBLA 251 (1983); DNA -- People's Legal Services, 49 IBLA 307 (1980). We hold that the appeal before us was not filed in a timely manner, and must be dismissed.

The Board is generally reluctant to take any action which would preclude review of appeals on the merits. However, the purpose of the rule requiring that appeals be timely filed is to establish a definite time when administrative proceedings are at an end, thereby protecting other parties in the proceedings and the public interest. Strict adherence to the rule is fundamental to the object of the rule. Lloyd M. Baldwin, *supra* at 252. See Browder v. Director, Ill. Dept. of Corrections, 434 U.S. 257, 264 (1978). Were this not so, then every party who failed to appeal timely, for whatever reason, would turn to the courts seeking reinstatement of his appeal rights. In any case, appellant has been less than diligent in seeking review; even after direction by the court, he waited over 4 months to file this appeal. Even if the Board had authority to entertain appeals filed within a reasonable time after the date due, this appeal would be subject to dismissal because of appellant's failure to press his appeal in a reasonable time.

[2] Assuming, *arguendo*, that the Board has jurisdiction to review the merits of the Administrative Law Judge's decision of August 4, 1982, and the preceding decision of May 14, 1982, upholding the notice of violation

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<sup>3/</sup> 43 CFR 4.21(b) states:

"(b) Exhaustion of administrative remedies. No decision which at the time of its rendition is subject to appeal to the Director or an Appeals Board shall be considered final so as to be agency action subject to judicial review under 5 U.S.C. 704, unless it has been made effective pending a decision on appeal in the manner provided in paragraph (a) of this section." (Emphasis in original.)

<sup>4/</sup> That the court could not have intended that appellant be afforded special review privileges by the Department is also evident from the fact that the merits of Departmental proceedings in this matter to date were not heard by the court; thus, it is not as though this case is before us following a remand decision stating that appellant is entitled to further review.

in question, appellant would not prevail. In deference to a possible interpretation of the Federal district court's preliminary conference order that appellant be afforded administrative appellate review on the merits of the case heard by Administrative Law Judge Allen on October 21, 1980, and all quasi-judicial proceedings thereafter, the Board has reviewed the administrative record in toto.

A full and complete hearing was given all parties on October 21, 1980, by Judge Allen regarding the issuance of Notice of Violation No. 80-2-99-19. With the consent of the parties, the basic issue adjudicated at the October 1980 hearing was whether OSM possessed regulatory authority over operations on appellant's property. See Tr. at 7-8. As stated by counsel for appellant, "if we are within the Act, we would have violated the regulation" (Tr. at 8).

On the foregoing basis, OSM proceeded to put on a comprehensive case establishing that appellant had undertaken surface mining operations without a proper permit. The evidence shows that appellant removed at least 3,000 tons of coal (Tr. 196, 197) and intended to sell it commercially (Tr. 154, 161, 168). Judge Allen found, and we agree, that an area in excess of 2 acres was disturbed (Tr. 209). Contradictory evidence was received as to whether coal extracted by appellant's operation entered interstate commerce (Tr. 210, 211). From the Board's de novo review of this evidence, including testimony of appellant's neighbors (Tr. 159, 160, 166, 178), we believe it was established that appellant's coal did enter interstate commerce.

Appellant had ample opportunity to raise appropriate defenses to whether or not his operations were covered by the Act. (He has in fact acknowledged that his defenses on this issue were presented. See Brief in Support of Appeal at 8; September 3, 1982, Complaint, Civ. No. 82-340, U.S.D.C., D. Ky., at 2, par. 5.) Nor can he be heard to complain that the fact of violation was not properly adjudicated. As previously noted, appellant's early representation at the October 1980 hearing that the only matter in controversy was whether OSM had jurisdiction to take enforcement action (Tr. at 8), led to the hearing being limited to that issue. At the close of the hearing, appellant wavered from this position but was afforded yet another opportunity to make affirmative defenses to the fact of violation:

MS. NICKLE [counsel for OSM]: Your Honor, if we could take a very short recess Mr. Lester and I could talk about a possible agreement as to the fact of violation at this point and have it on the record.

JUDGE ALLEN: I will leave the record open for the purpose of a stipulation.

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JUDGE ALLEN: For the record the parties have entered into an agreed stipulation that in the event Dr. Johnson is found to be subject to the Act that the facts of violations have been stipulated to have occurred.

MR. LESTER: No, that's not quite what we agreed to stipulate.

JUDGE ALLEN: What did you agree?

MR. LESTER: We agreed to stipulate that the violations occurred but that we are not accepting responsibility for same.

JUDGE ALLEN: All right. The purpose of the stipulation is for this case and the appeal only and that Dr. Johnson does not stipulate that he is responsible for the fact of violation, but that there are others who are responsible for those violations. The record will be kept open for fifteen days to provide for such evidence as necessary to sustain that position. And as far as who, what, when, where and so forth you have to file something.

MR. LESTER: Correct.

(Tr. at 213-14).

The record shows that appellant did not avail himself of the opportunity to produce evidence in support of the claim that he was not responsible for the violations at issue. In the absence of any defense to the fact of violation being proffered, Judge Allen issued his initial decision in the matter on November 20, 1980.

Thus, assuming the Board had jurisdiction to adjudicate the subject appeal, we would hold that the notice of violation was proper and should be sustained.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

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Wm. Philip Horton  
Chief Administrative Judge

I concur:

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Gail M. Frazier  
Administrative Judge

ADMINISTRATIVE JUDGE MULLEN CONCURRING:

I am in agreement with the determination by the majority but am compelled to comment further regarding the reason for appellant's failure to prevail.

During the course of the hearing appellant stipulated that violations had occurred but contended that he was not responsible for the violations (Tr. 213-14). Following this stipulation appellant was given 15 days to submit additional evidence necessary to sustain the contention that another was responsible for compliance. As noted in the majority opinion appellant did not avail himself of this opportunity.

There is no question regarding the propriety of issuance of a notice of violation (NOV), as appellant has stipulated that the events leading to issuance has occurred. These events were properly deemed to have been a violation of the applicable standards. The only remaining question was whether appellant was properly named in the NOV as a party responsible for compliance with the standards. In S & M Coal Co., 79 IBLA 350, 91 I.D. 159 (1984), we noted that, if there is a question as to who is responsible for compliance with the standards, it is proper for the inspector issuing the NOV to cite the party or parties he deems to be responsible for compliance. If a cited party can submit subsequent proof that he is not responsible for compliance, the violation will not be considered to be a violation by the party. Thus, if a party could reasonably be designated as an operator, it is proper to name that party in the NOV. S & M Coal Co., *supra*, at 355-56, 91 I.D. at 162. Until a named party can demonstrate to the satisfaction of the Administrative Law Judge that he could not have exercised control over the operations he is properly considered to be jointly and severally liable for compliance with the standard. S & M Coal Co., *supra* at 358, 91 I.D. at 163-64. Appellant was the property owner at the time of issuance of the NOV. Lacking evidence that the control over the operations was vested in another, appellant was properly deemed to be a party who could exercise control over the operations. Having failed to prove otherwise, the NOV naming appellant was properly upheld.

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R. W. Mullen  
Administrative Judge

