

RACE FORK COAL CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 83-618
IBSMA 82-16

Decided January 28, 1985

Appeal from a decision of Administrative Law Judge David Torbett, vacating Notices of Violation Nos. 80-I-25-2 and 80-I-84-4 for lack of jurisdiction. CH O-115-R and CH O-116-R.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Applicability: Generally

In an application for review proceeding, a person contesting the jurisdiction of the Office of Surface Mining must plead and prove the basis for its claim as an affirmative defense.

2. Surface Mining Control and Reclamation Act of 1977: Tipples and Processing Plants: In Connection With

Offsite processing facilities are operated "in connection with" surface mines where the owner and operator of the facility is also the permittee and/or operator of a group of supplying mines.

APPEARANCES: E. K. Street, Esq., Grundy, Virginia, for Race Fork Coal Corporation; Harold Chambers, Esq., Office of the Field Solicitor, Charleston, West Virginia, John C. Martin, Esq., Walton D. Morris, Esq., and Harold P. Quinn, Jr., Esq., Office of the Solicitor, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

On March 25, 1982, the Office of Surface Mining Reclamation and Enforcement (OSM) appealed from a March 8, 1982, decision of Administrative Law Judge David Torbett. This decision vacated Notices of Violation (NOV) Nos. 80-I-25-2 and 80-I-84-4 and held that OSM had no jurisdiction over the coal preparation facility of Race Fork Coal Corporation (Race Fork).

On January 16, 1980, OSM inspectors visited the Woodman-Luke preparation plant and a coal refuse site operated by a permit holder, Race Fork, in Buchanan County, Virginia. Pursuant to the Surface Mining Control and Reclamation Act of 1977 (Act), 30 U.S.C. §§ 1201-1328 (1982), they issued the NOV's for violations of the interim performance standards outlined in 30 CFR Part 700. NOV No. 80-I-25-2 charged Race Fork with six violations; NOV No. 80-I-84-4 listed two violations, one of which was vacated. ^{1/}

^{1/} Seven violations were charged, but two were merged later. NOV No. 80-I-25-2 specified the preparation plant failed to pass all surface drainage through a sedimentation pond, in violation of 30 CFR 717.17(a); conducting operations on areas not covered by a permit, in violation of 30 CFR 710.11(a)(2); improper spoil disposal, in violation of 30 CFR 715.15(a) and 717.14(a); placing material on the downslope, in violation of 30 CFR 717.14(c); failure to submit for approval a surface water monitoring program, in violation of 30 CFR 717.17(b)(1); and failure to monitor groundwater, in violation of 30 CFR 717.17(h). (Decision at 3; Exh. R 11).

After a hearing on November 19, 1980, in Abingdon, Virginia, Judge Torbett found the following facts:

33. According to Mr. Lewis's testimony, mines permitted to the Applicant [Race Fork] or operated by the Applicant delivered from 165,000 to 200,000 tons of coal to the preparation plant during its first year of operation (Tr. 70, 71, 73, 74, 75, 76, 83, 85, 86, 87, 96, 97, 98, 100, 101).

34. The preparation plant received and processed 800,000 tons of coal during its first year of operation (Tr. 60).

35. According to Mr. Lewis, if the operation conducted by Hackney Fuels was to shut down, the deep mine would continue to operate "with our coal going to other operations in the area" (Tr. 66). The Applicant plans to purchase "any or all" of the coal mined until the mine ceases operating (Tr. 66).

36. Approximately 600,000 or 635,000 tons of coal were delivered to the preparation plant from mines permitted to South Atlantic Coal Corporation (Tr. 76).

37. The Applicant is a partnership between Crown Central Petroleum and John McCall Coal Company (Tr. 77).

38. John McCall Coal Company is "associated" with South Atlantic Coal Corporation (Tr. 78). Mr. Lewis did not know any details about the association other than to say that "some sort of business arrangements" existed between the two companies (Tr. 78).

39. J. M. McCall, Jr. is connected with John McCall Coal Company and is a member of the board of directors for the Applicant (Tr. 94, 95).

40. According to Mr. Lewis, South Atlantic holds permits for 6-10 mines. These mines delivered "close to 80 percent" of the coal received by the preparation plant in January, 1980 (Tr. 78).

41. According to Mr. Lewis, mines permitted to the Applicant delivered from 10 to 75 percent of the total production of an individual mine to the preparation plant (Tr. 83).

fn. 1 (continued)

The remaining violation from NOV No. 80-I-84-4 cited the failure to report surface water monitoring with respect to the separately permitted disposal site adjacent to the preparation plant, in violation of 30 CFR 717.17(b)(v). (Decision at 5; Exh. R 21).

42. South Atlantic Coal Company has a processing plant of its own (Tr. 101). Some of the coal mined by South Atlantic cannot be processed through its preparation plant; this coal is sold to the Applicant for processing through the preparation plant owned by the Applicant (Tr. 101).

(Decision at 8-9).

On the issue of whether OSM had jurisdiction over the facility, Judge Torbett concluded:

Under the present state of the law, in order for the Respondent to have jurisdiction over a coal preparation plant, the plant must be operated in conjunction with, and at or near a surface mine. The closest mine belonging to the Applicant to the preparation plant is only 2 1/2 miles away, and thus, the undersigned is of the opinion that the at or near test is met. 2/

The facts as found by the undersigned show that approximately one-fourth of the coal processed by the Applicant's preparation plant comes from mines that are owned, operated, or permitted by the Applicant. The undersigned is of the opinion that this is an insufficient percentage of coal, when considered with the other evidence, to prove that the Applicant's preparation plant is operated in conjunction with surface mines which are owned, operated, or permitted by the Applicant.

The proven facts do not show that the Applicant and South Atlantic Coal Corporation are one and the same business. Nor do the facts show them to be inter-related in such a manner that they should be considered as one. The coal supplies [sic] the

2/ As to the holding on the "at or near" issue, we point out that it is no longer the law that a coal preparation plant that does more than load coal must be both at or near a minesite and operated in connection with a mine in order to be deemed a surface coal mining operation. Reitz Coal Co. v. OSM, 83 IBLA 198 (1984); Ann Lorentz Coal Co. v. OSM, 79 IBLA 34, 91 I.D. 108 (1984). For the current interpretation of "at or near the mine site," see Ann Lorentz Coal Co. v. OSM supra at 44.

Applicant's processing plant by South Atlantic cannot be considered as proof of the "operated in conjunction with" test. [3/]

(Decision at 10).

Judge Torbett then vacated the notices of violation on the basis of OSM's lack of jurisdiction.

OSM appealed. 4/

This appeal raises the issue whether or not OSM had regulatory authority over the Race Fork processing facility, i.e., whether the activities conducted there constituted "surface coal mining operations" as defined by the Act and the implementing regulations. Section 701(28) of the Act, 91 Stat. 518 (1977), codified at 30 U.S.C. § 1291(28) (1982), contains the following definition:

(28) "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 516 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

3/ Decision of Mar. 8, 1982, at 10. We assume the Administrative Law Judge's use of the phrase "in conjunction with," as opposed to the statutory and regulatory language "in connection with," intended no different standard.

4/ The Interior Board of Surface Mining and Reclamation Appeals (IBSMA) received this appeal. However, IBSMA was abolished by Secretarial Order No. 3092 on Apr. 26, 1983. Its caseload was transferred and its functions consolidated with the Interior Board of Land Appeals. 48 FR 22370 (May 18, 1983).

the cleaning, concentrating, or other processing or preparation, loading of coal for interstate commerce at or near the mine site. [Emphasis added.]

This definition appeared in the regulations at 30 CFR 700.5. 5/

[1] 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 Corp., 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 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, 88 I.D. 448 (1981); James Moore, 1 IBSMA 216, 223 n.7, 86 I.D. 369, 373 n.7 (1979). OSM's initial burden is limited to a prima facie showing that the one named in the NOV or cessation order 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). Such a showing would establish an activity that falls within the definition of surface coal mining operations in 30 U.S.C. § 1291(28) (Supp. IV 1980), which caused a violation of one or more of the regulations governing surface coal mining. Such a showing by OSM as to the validity of the notice or order under 43 CFR 4.1171(a) shifts to the

5/ 30 CFR 700.5 was later amended. See 48 FR 20392, 20400 (May 5, 1983).

applicant for review, under 43 CFR 4.1171(b), the burden of going forward and the ultimate burden of persuasion as to (1) whether he was conducting surface coal mining operations and whether the alleged violations actually occurred or (2) whether his activity is excepted from the coverage of the Act or regulations and therefore not subject to OSM jurisdiction.

If a person challenges OSM's jurisdiction because he believes his surface coal mining operation is not covered by the Act, he must not only come forward with supporting evidence but also carry the ultimate burden of persuasion if OSM attempts to rebut the evidence. 43 CFR 4.1171(b); Rhonda Coal Co., *supra*; Virginia Fuels, Inc., 4 IBSMA 185, 190, 89 I.D. 604, 606; James Moore, *supra*. Merely voicing an opinion is not sufficient to establish an affirmative defense. Sam Blankenship, *supra* at 39, 90 I.D. at 178. If the burden is carried, OSM's jurisdiction is defeated and its enforcement action must be vacated. Harry Smith Construction Co. v. OSM, 78 IBLA 27, 30 (1983).

[2] The IBSMA decisions which discuss the definition of a surface coal mining operation address the meaning of the phrase "in connection with" a mine. In Western Engineering, Inc., 1 IBSMA 202, 86 I.D. 336 (1979), the Board found no connection of a river terminal with a mine where the company used the river terminal exclusively for the preparation and loading of coal shipments on contract and neither purchased coal nor owned, operated, or leased any coal mines.

IBSMA found common ownership and use to be adequate bases for a finding that an activity is conducted "in connection with a surface coal mine" in

Drummond Coal Co., 2 IBSMA 96, 87 I.D. 196 (1980). There the owner of a coal processing facility supplied it completely from its own mines. Cf. Drummond Coal Co., 2 IBSMA 189, 87 I.D. 347 (1980). On review of the first Drummond decision the court agreed there was an "economic integration" between the plant and the mines and therefore a connection. Drummond Coal Co. v. Andrus, CV 80-M-0829 (N.D. Ala., Apr. 20, 1981). In Wolverine Coal Corp., 2 IBSMA 325, 87 I.D. 554 (1980), a connection was found between a tippie and two mines that supplied 69 percent of the coal it loaded where the company owned, operated, and held permits for the tippie and the mines.

In Virginia Iron, Coal and Coke Co., 2 IBSMA 165, 87 I.D. 327 (1980), the Board found that a preparation plant was operated in connection with a deep mine where both the plant and mine were permitted to the same company and the mine was opened to provide coal to the plant. Where the company owned, operated, and held the permit for a tippie as well as owned at least some of the coal it crushed and loaded, but contractors or lessees mined the coal under their own permits, the Board said whether a connection existed depended on the nature of the arrangement between the plant and the mines. In Bethlehem Mines Corp., 2 IBSMA 215, 87 I.D. 380 (1980), IBSMA found such a connection between a rail loading facility and a Bethlehem mine where Bethlehem leased the land the facility was located on and the terms of the contract between the facility operator and Bethlehem clearly indicated the plant operations depended on the mine superintendent's requirements. These two cases were followed in Falcon Coal Co., 2 IBSMA 406, 87 I.D. 669 (1980), where a loading facility was operated and controlled (but not owned) by the company that owned and operated the mines that supplied all its coal.

In Roberts Brothers Coal Co., 2 IBSMA 284, 87 I.D. 439 (1980), the owners of the coal facility also owned the land and the coal on which a coal mine under permit to another entity was located. Although the mine operator was not required to sell the coal to the facility, he did so. Even though only 2 percent of the facility's coal came from this mine, that 2 percent constituted the mine's entire output. In view of the "symbiotic" and close financial relationship between the facility owners and their lessee, the Board found a connection, specifically rejecting the argument that a facility must depend on a mine in order to be found connected with it.

In Thoroughfare Coal Co., 3 IBSMA 72, 88 I.D. 406 (1981), a connection was found between a tipple and a mine where the tipple owner was also part owner of the mine and the tipple received 46.5 percent of its coal from the mine. In Reitz Coal Co., 3 IBSMA 260, 88 I.D. 745 (1981), a connection was found between a coal preparation facility and a mine where 16.6 percent of the coal it processed came from two mines owned by the same company. ^{6/}

Finally, relying in part on some of these cases, the U.S. Court of Appeals for the Sixth Circuit rejected the argument that an offsite tipple was not a surface coal mining operation because it was not operated in connection with a mine owned by the same company (even though the mining, but

^{6/} In the Reitz decision IBSMA altered its approach to analyzing whether a facility was located "at or near" a mine. Subsequent IBSMA decisions concerning the definition of surface coal mining operations focused on this issue and therefore did not contain holdings on the question of whether a facility was operated in connection with a mine, but do contain discussions of this issue. See Ross Tipple Co., 3 IBSMA 322, 88 I.D. 851 (1981); Westbury Coal Mining Partnership, 3 IBSMA 402 (1981); Dinco Coal Sales, Inc., 4 IBSMA 35, 89 I.D. 113 (1982), rev'd Debord v. Watt, No. 82-99 (E.D. Ky., Sept. 29, 1982).

not reclamation, had ceased). Shawnee Coal Co. v. Andrus, 661 F.2d 1083, 1094 (6th Cir. 1981).

Given the facts he found, we cannot agree with the Administrative Law Judge's conclusion that, under "the state of the law" at the time of his decision, Race Fork did not operate its processing facility "in connection with" a surface coal mine or surface operations or impacts of an underground mine. Race Fork was either the permittee or operator for eight surface mines and three deep mines in Virginia and Kentucky that delivered up to three-fourths of their production to the facility for processing and supplied up to one-fourth of the coal it processed. See Findings 32-33, Decision at 5-8. These facts are sufficient to find that the Race Fork facility was operated "in connection with" a surface coal mine, even assuming a connection with South Atlantic mines could not be established. 7/

This conclusion is consistent with this Board's decisions. In Ann Lorentz Coal Co. v. OSM, 79 IBLA 34, 91 I.D. 108 (1984), we found a connection between a tipple and a mine where the same individual was half owner of both tipple and mine, president of the tipple company, salaried supervisor and secretary-treasurer of the mine, and overseer of both. In Reitz Coal Co. v. OSM, 83 IBLA 198 (1984), a coal preparation plant was found to operate in

7/ Without more information than is in the record about the relationship between the John McCall Coal Company, a partner of Race Fork, and South Atlantic Coal Corporation, or about the arrangements for the sale of coal by South Atlantic to Race Fork's facility, we will not determine whether there was a connection with South Atlantic mines. Race Fork and South Atlantic would not have to be "one and the same" or so interrelated that they "should be considered as one" to establish a connection, however, as the Administrative Law Judge's decision implied.

connection with a number of surface coal mines where it was part of a wholly-owned subsidiary of a holding company from whose property and mineral rights the coal it processed came.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Torbett vacating the notices of violation is reversed and the case is remanded to the Hearings Division for further proceedings.

8/

Will A. Irwin
Administrative Judge

We concur:

C. Randall Grant, Jr.
Administrative Judge

Edward W. Stuebing
Administrative Judge.

8/ OSM's motion for oral argument and Race Fork's motion for summary dismissal are denied.

