

S & S COAL CO.  
v.  
OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-48

Decided June 27, 1985

Appeal from a decision of Administrative Law Judge Joseph E. McGuire, denying application for temporary relief from cessation order No. 84-81-226-11.

Affirmed.

1. Surface Mining, Control and Reclamation Act of 1977: Temporary Relief: Evidence

A party seeking temporary relief from enforcement action by the Office of Surface Mining Reclamation and Enforcement must show a substantial likelihood that the findings of the Secretary in the matter to which the application relates will be favorable to the applicant.

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

Sec. 528(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1278(2) (1982) states that the provisions of the Act shall not apply to mining operations which affect 2 acres or less. "Affected area" as defined by 30 CFR 701.5 includes "the area located above underground workings." Where 1.38 acres of surface area above appellant's underground workings is added to the 0.79 acres of above ground disturbance, the total affected area is 2.17 acres and appellant's mining operation is within the jurisdiction of the Act.

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

One claiming an exemption from regulation under the Surface Mining Control and Reclamation Act of 1977

bears the burden of affirmatively demonstrating entitlement to the exemption.

4. Surface Mining Control and Reclamation Act of 1977: Cessation Orders: Generally -- Surface Mining Control and Reclamation Act of 1977: Permits: Generally

An authorized representative of the Secretary properly issues a cessation order under 30 CFR 843.11(a)(2) where an operator is conducting surface coal mining and reclamation operations without a valid surface coal mining permit.

5. Constitutional Law: Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections: Generally

Warrantless inspections under the Surface Mining Control and Reclamation Act of 1977 are constitutionally permissible.

APPEARANCES: William Simpson, partner, S & S Coal Company, for appellant; Paul A. Molinar, Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

#### OPINION BY ADMINISTRATIVE JUDGE STUEBING

S & S Coal Company (S & S) appeals from a decision dated September 10, 1984, by Administrative Law Judge Joseph E. McGuire, denying its application for temporary relief from cessation order (CO) No. 84-81-226-11 <sup>1/</sup> issued by the Office of Surface Mining Reclamation and Enforcement (OSM) on July 3, 1984, pursuant to section 521(a)(3) of the Surface Mining Control and Reclamation Act of 1977 (the Act), 91 Stat. 445, 505, 30 U.S.C. § 1271(a)(3) (1982). OSM stated in the CO that appellant was mining without a valid surface disturbance permit in violation of section 502(a) of the Act, 91 Stat. 445, 468, 30 U.S.C. § 1252 (1982) <sup>2/</sup> and 30 CFR 843.11(a)(2).

Appellant's mine is located in Knox County, Kentucky. On July 3, 1984, Reclamation Specialist Daniel Ross, OSM, London, Kentucky, inspected the mine-site on instructions from OSM in Lexington, Kentucky, to inspect deep mines in Whitley and Knox Counties, Kentucky. Ross was assigned the inspection of appellant's mine site by his supervisor, Patrick Angel.

Prior to inspection, Ross contacted the Kentucky Department of Natural Resources and Environmental Protection Cabinet, which controls the permits

<sup>1/</sup> The CO was originally designated No. 84-81-94-11.

<sup>2/</sup> Section 502 of the Act pertains to the initial regulatory program. This case arises under the permanent regulatory program. Accordingly, the CO should have cited to section 506 of the Act, 30 U.S.C. § 1256(a) (1982), as the statutory basis for holding that appellant was mining without a valid permit from the State.

within the State of Kentucky. Upon review of the records, Ross found that appellant had not obtained a permit for the site. Ross also visited the Kentucky Department of Mines and Minerals, London, Kentucky, and inspected the maps filed by appellant in connection with its underground mining operations. The maps were drawn to scale and certified by an engineer. This information revealed that appellant's underground mining operations involved an underground mining disturbance measuring 1.38 acres, and that the projected removal of coal for 1983 was 5,078 tons.

During the course of the July 3, 1984, inspection, Ross measured appellant's access road, face-up, stockpile, and disposal areas. The affected surface area measured 0.79 acres. Therefore, the total affected area was found to be 2.17 acres, which included 1.38 acres affected by appellant's underground mining operation (the so-called "shadow area") and 0.79 acres of disturbed area at surface level. Ross issued CO No. 84-81-226-11 for mining without a valid surface disturbance permit. The CO required appellant to cease all coal mining operations until a valid surface disturbance permit was obtained from the State regulatory authority.

On July 31, 1984, appellant petitioned the Hearings Division, Office of Hearings and Appeals, Department of the Interior, for review of the CO and temporary relief from it. A hearing on the issue of temporary relief was conducted by Judge McGuire on August 6, 1984, in London, Kentucky.

In his decision dated September 10, 1984, Judge McGuire found that OSM properly exercised enforcement jurisdiction because appellant's mining operation affected two or more surface areas and properly issued the CO. Also, the Judge denied appellant's request for temporary relief because appellant failed to show that there was any likelihood that the findings of the Secretary would be favorable to it.

In its statement of reasons, appellant contends that OSM does not have jurisdiction over its mining operation. It also challenges the jurisdiction of the Administrative Law Judge to conduct the hearing and the jurisdiction of the "administrative court." Appellant asserts that its constitutional due process Fourth and Fifth Amendment rights have been violated and that it wants a trial by jury. Appellant emphasizes that it was without legal counsel at the hearing.

In response, OSM asserts that appellant's mining operation met the 2-acre jurisdictional threshold of 30 U.S.C. § 528(2) (1982) of the Act in that appellant had a total "affected area" of 2.17 acres as defined by 30 CFR 701.5; that appellant is not entitled to an exemption from OSM's enforcement jurisdiction; and that appellant's constitutional defenses to the CO cannot be considered in the context of an administrative proceeding.

Appellant filed an answer to OSM's brief in which it reiterates the arguments made in its statement of reasons. Appellant insists that it is not subject to OSM's jurisdiction. Appellant also charges that OSM trespassed on its property without a warrant, thereby violating its constitutional rights.

The two main issues presented for determination are: (1) Whether appellant's minings operation is subject to the Surface Mining Control and Reclamation Act of 1977 and (2) whether CO No. 84-81-226-11 was properly issued.

[1] Section 525(c) of the Act, 30 U.S.C. § 1275(c) (1982), provides that the Secretary may grant a request for temporary relief if:

(1) a hearing has been held in the locality of the permit area on the request for temporary relief in which all parties were given an opportunity to be heard;

(2) the applicant shows that there is substantial likelihood that the findings of the Secretary will be favorable to him; and

(3) such relief will not adversely affect the health or safety of the public or cause significant, imminent environmental harm to land, air, or water resources.

Judge McGuire found that the first condition had been met, but that appellant had failed to show that there was any likelihood, much less a substantial likelihood, that the findings of the Secretary would be favorable to it since CO No. 84-81-226-11 had been properly issued. The Judge concluded that in view of that finding consideration of the third condition was unnecessary. We agree with the Judge's determination. See Shamrock Coal Co. v. OSM, IBLA 374 (1984).

[2] Section 528(2) of the Act, 30 U.S.C. § 1278(2) (1982) states that the provisions of the Act shall not apply "to the extraction of coal for commercial purposes where the surface mining operation affects two acres or less." "Affected area" is defined by Departmental regulation 30 CFR 701.5 in pertinent part as follows:

Affected area means any land or water surface area which is used to facilitate, or is physically altered by, surface coal mining and reclamation operations. The affected area includes the disturbed area; any area upon which surface coal mining and reclamation operations are conducted; any adjacent lands the use of which is incidental to surface coal mining and reclamation operations; all areas covered by new or existing roads used to gain access to, or for hauling coal to or from, surface coal mining and reclamation operations, except as provided in this definition; any area covered by surface excavations, workings, impoundments, dams, ventilation shafts, entryways, refuse banks, dumps, stockpiles, overburden piles, spoil banks, culm banks, tailings, holes or depressions, repair areas, storage areas, shipping areas; any areas upon which are sited structures, facilities, or other property material on the surface resulting from, or incident to, surface coal mining and reclamation operations; and the area located above underground workings.  
[Emphasis added.]

At the hearing, Ross testified that he measured the affected area on the outside of the face-up area. This area consisted of the face-up area where the projections go underground, the stockpile and disposal areas, and the access road. He calculated that approximately 0.79 acres had been affected (Tr. 45-46). Appellant did not object to the areas included in this calculation or to the amount of acreage determined to have been affected (Tr.82).

[3] Ross also determined the shadow area of the underground mine operation to be 1.38 acres. He made this determination by reviewing the map submitted by appellant to the Kentucky Department of Mines and Minerals. Upon reviewing the map, he measured the area of actual disturbance that had been submitted through 1983 (Tr. 38-39). Departmental regulation 30 CFR 701.5 specifically includes in the definition of affected area "the area located above underground workings." The meaning of this regulation is clear. The area located above the underground workings is considered to be affected area regardless of whether that area has actually been disturbed. When the 1.38 acres of surface area above appellant's underground workings is added to the 0.79 acres of above-ground disturbance, appellant's total affected area is 2.17 acres. Since appellant has affected more than 2 acres of land, its operation is within the jurisdiction of the Act. Appellant has offered no evidence to show that its operation qualifies for an exemption. One claiming an exemption from regulation under the Act bears the burden of affirmatively demonstrating entitlement to that exemption. S & M Coal Co. v. OSM, 79 IBLA 350, 91 I.D. 159 (1984). 3/

[4] CO No. 84-81-226-11 was issued in accordance with the provisions of 30 CFR 843.11 which reads as follows:

§ 843.11 Cessation orders.

(a)(1) An authorized representative of the Secretary shall immediately order a cessation of surface coal mining and reclamation operations or of the relevant portion thereof, if he or she finds, on the basis of any Federal inspection, any condition or practice, or any violation of the Act, this chapter, any applicable program, or any condition of an exploration approval or permit imposed under any such program, the Act, or this chapter which:

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(ii) Is causing or can reasonably be expected to cause significant environmental harm to land, air, or water resources.

(2) Surface coal mining and reclamation operations conducted by any person without a valid surface coal mining permit constitute a condition or practice which causes or can reasonably be expected to cause significant, imminent environmental harm to land, air or water resources, unless such operations:

(i) Are an integral, uninterrupted extension of previously permitted operations, and the person conducting such operations has filed a timely and complete application for a permit to conduct such operations; or

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3/ In S & M Coal Co., the Board did not include the area above appellant's underground mine workings in determining whether an area in excess of 2 acres was affected by the mining operation. The S & M Coal Co. case arose under the initial regulatory program and the Board held that calculation requirements under the permanent program regulations did not apply thereto. Order denying Motion for Reconsideration dated July 16, 1984.

(ii) Were conducted lawfully without a permit under the interim regulatory program because no permit has been required for such operations by the State in which the operations were conducted.

Since appellant was conducting coal mining operations without a valid surface coal mining permit, Ross was required by 30 CFR 843.11(a)(2) to issue the CO. See Virginia Citizens for Better Reclamation, 82 IBLA 37, 91 I.D. 247 (1984). Again, one claiming an exemption from regulation under the Act bears the burden of affirmatively demonstrating entitlement to that exemption. S & M Coal Co. v. OSM, supra. Appellant has not shown that its operation falls within the exemptions listed in 30 CFR 843.11(2)(i) or (ii).

[5] Appellant raises various constitutional defenses to the CO based on constitutional due process, and the Fourth and Fifth Amendments to the Constitution. We find no deprivation of Constitutional rights resulted from these procedures. Moreover, we note that the question of whether or not OSM can conduct an inspection under the Act without a search warrant has been decided in court. In Andrus v. P-Burg Coal Co., 495 F. Supp. 82 (S.D. Ind. 1980), the court held that warrantless inspections under the Act are constitutionally permissible.

Appellant's implication that its hearing was not fair because it was not represented by counsel is without merit. Although a contestee in a Government contest proceeding under the Administrative Procedure Act has the right to be represented by counsel, the Department of the Interior has no duty under that Act or the Constitution to provide such counsel for him. United States v. Jack McLean, 50 IBLA 290 (1980).

Also, appellant has not shown that it was in any way prejudiced by the fact that it was represented by one of its partners, William Simpson, rather than by a licensed attorney at the hearing. On the contrary, Judge McGuire acknowledged the fact that Simpson was appearing pro se and encouraged him to "speak up" if in doubt (Tr. 13). Judge McGuire stretched the rules by having OSM present its evidence first in order to accommodate appellant (Tr. 16). On cross-examination, the Judge allowed Simpson "a near unlimited scope of inquiry" because he was appearing pro se (Tr. 70). Judge McGuire noted that an attorney would not be allowed this scope of inquiry (Tr.

Appellant states that it is "challenging the validity of this court [Board of Land Appeals]." Appellant wants "a trial by jury and due process of law." Section 525 of the Act provides for review of orders by the Secretary, including a hearing. 30 U.S.C. § 1275 (1982). The Board of Land Appeals is the Secretary's designated representative in these matters. The jurisdiction of the Board includes the authority to exercise the final decisionmaking power of the Secretary under the Act pertaining to application for review of orders of cessation. 43 CFR 4.1101(a)(3). Appellant was not required to invoke the jurisdiction of this Board prior to seeking review of the denial of temporary relief. As provided in 43 CFR 4.1267(b) any party desiring to appeal a decision of an Administrative Law Judge denying temporary relief may appeal to the Board or, in the alternative, may seek judicial review pursuant to section 526(a) of the act. However, appellant, having sought review, cannot be heard to complain about the Board's authority to act. We find that review of appellant's cessation order is properly before this Board.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision to deny temporary relief from CO 84-81-226-11 is affirmed.

Edward W. Stuebing  
Administrative Judge

We concur:

Wm. Philip Horton  
Chief Administrative Judge

R. W. Mullen  
Administrative Judge

