

RAPOCA ENERGY CO.
v.
OFFICE OF SURFACE MINING RECLAMATION
AND ENFORCEMENT

IBLA 85-61

Decided October 17, 1985

Appeal from decision of Administrative Law Judge David Torbett sustaining notice of violation No. 84-13-47-1 but ordering that no civil penalty be assessed.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Roads:
Generally

Under the approved Virginia permanent regulatory program a road used for coal hauling or access to a surface coal mining operation must be included in permit acreage calculations unless (1) the road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located; (2) the road is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction in which it is located; and (3) there is substantial (more than incidental) public use of the road.

2. Surface Mining Control and Reclamation Act of 1977: Roads:
Maintenance

When a public road, receiving more than incidental public use, is utilized as a coal haul and access road, it will be subject to regulation and permitting under the Surface Mining Control and Reclamation Act of 1977 where the county allocates monies for road maintenance but the only expenditure by the county in 5 years for the road in question was made at the behest of the coal operator in an attempt to avoid Federal regulation.

APPEARANCES: Elsey A. Harris III, Esq., Norton, Virginia, for appellant; Paul A. Molinar, Esq., Office of the Field Solicitor, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Rapoca Energy Company (Rapoca) has appealed from a September 24, 1984, decision of Administrative Law Judge David Torbett sustaining notice of violation (NOV) No. 84-13-47-1 but ordering that no civil penalty be assessed. NOV No. 84-13-47-1 cited Rapoca for conducting surface coal mining activities outside its permitted area in Dickenson County, Virginia. Specifically, Rapoca was cited for failing to have the Neece Creek Road under permit.

Rapoca sought review of the notice on March 2, 1984, pursuant to section 525 of the Surface Mining Control and Reclamation Act of 1977 (the Act), 30 U.S.C. § 1275 (1982), by filing with the Hearings Division an "Application for Temporary Relief and Review." Rapoca also petitioned, pursuant to section 518 of the Act, 30 U.S.C. § 1268 (1982), for review of the civil penalty assessed for NOV No. 84-13-47-1, paying the \$2,200 proposed penalty into escrow.

Judge Torbett, after a hearing, denied Rapoca's request for temporary relief. He then consolidated the review and penalty proceedings at an April 12 and 13, 1984, hearing, and subsequently issued his decision.

Rapoca filed a timely appeal of Judge Torbett's decision, arguing that he had improperly sustained the NOV. It did not raise any issue relating to the civil penalty determination. In its brief in response to Rapoca, the Office of Surface Mining Reclamation and Enforcement (OSM) raised the civil penalty question and argued, contrary to Judge Torbett's ruling, that Rapoca should have been assessed the full amount of the civil penalty.

Thereafter, Rapoca moved the Board to dismiss OSM's attempt to include the civil penalty issue in the appeal. On May 17, 1985, the Board issued an order granting Rapoca's motion stating:

The record reveals no reason for Rapoca to have challenged the Judge's civil penalty ruling. The applicable regulation, 43 CFR 4.1270(b), provides that: "A petition under this section [for discretionary review of the civil penalty] shall be filed 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." See Tri Coal Co. v. Office of Surface Mining Reclamation and Enforcement, 85 IBLA 146, 148 (1985). In this case, OSM failed to file a petition for discretionary review of the civil penalty within 30 days from receipt of Judge Torbett's decision. The civil penalty issue is not properly before this Board. Rapoca's motion to dismiss the civil penalty issue from this appeal is granted.

The sole issue presented by this appeal is whether Rapoca was required to obtain a permit for the Neece Creek Road. Rapoca argues that it was not; OSM that it was.

The Act provides at section 506(a), 30 U.S.C. § 1256(a) (1982), that "[n]o person shall engage in or carry out on lands within a State any surface

coal mining operations unless such person has first obtained a permit issued by such State pursuant to an approved State program * * *." Surface coal mining operations are defined at section 701(28)(B), 30 U.S.C. § 1291(28)(B) (1982), to include:

the areas upon which such activities occur or where such activities disturb the natural land surface. Such areas shall also include any adjacent land the use of which is incidental to any such activities, all lands affected by the construction of new roads or the improvement or use of existing roads to gain access to the site of such activities and for haulage * * *.

The regulatory definition of "affected area" includes

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 * * *. The affected area shall include every road used for purposes of access to, or for hauling coal to or from, surface coal mining and reclamation operations, unless the road (a) was designated as a public road pursuant to the laws of the jurisdiction in which it is located; (b) is maintained with public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction; and (c) there is substantial (more than incidental) public use. [1/]

30 CFR 701.5.

[1] This definition reflects OSM's recognition of serious Congressional concern with the environmental damage attributable to coal haul roads. Harman Mining Corp. v. OSM, 87 IBLA 369, 370-71 (1985). Under the regulation a road may be a public road for purposes of local administration; however, it would still be subject to the requirement that an operator obtain a permit for the road for its use as a coal haul road unless it meets all three of the criteria set forth in the regulation. Id. at 371.

For purposes of its State program, Virginia adopted a regulatory definition of public road incorporating the three regulatory criteria, plus one

1/ We note that on July 15, 1985, Judge Thomas A. Flannery issued his memorandum opinion in In re: Permanent Surface Mining Regulation Litigation, No. 79-1144 (Round III Opinion). Therein, Judge Flannery remanded to the Department the definition of "affected area" set forth at 30 CFR § 701.5 (1984) because:

"The Secretary's rule goes far beyond what is called for by [30 U.S.C.] § 701(28) in exempting essentially all public road[s] where public use is more than incidental. This definition does not square with the statutory language and thus this aspect of the definition must be remanded as inconsistent with law."

Opinion at 142-43.

Judge Flannery stated that when the effect of the mining use of the road is "de minimis, or relatively minor, * * * the road need not be included as part of the surface coal mining operation." Opinion at 142.

other. That definition, found at Chapter 23, Title 45, of the Code of Virginia, provided:

(p) Public Road - for the purpose of this chapter, a road will be considered a public road and exempt from permit acreage computations under section 3.01 of these regulations when:

(1) The road has been duly established as a public road according to the laws of the jurisdiction in which it is located;

(2) There is a substantial (more than incidental) public use of the road;

(3) The road is actually maintained with public funds and constructed in a manner similar to other public roads in the vicinity; and

(4) The county within which the road is located has performance standards at least as stringent as the applicable minimum standards as stated in the coal surface mining reclamation regulations adopted pursuant to Chapter 19, Title 45.1 of the Code of Virginia.

These criteria were amended effective March 16, 1984, 49 FR 9898 (March 16, 1984), to eliminate the requirement of minimum county construction standards. The amendment provided:

Coal haul and access roads as defined in permanent program regulations Section V701.5 will be considered part of the affected area of an operation and included in acreage calculations thereof unless all of the following conditions are met:

a. The road has been designated as a public road pursuant to the laws of the jurisdiction in which it is located;

b. The road is maintained with the public funds, and constructed, in a manner similar to other public roads of the same classification within the jurisdiction in which it is located; and

c. There is substantial (more than incidental) public use of the road.

The foregoing criteria will apply in repermitting of operations previously permitted under the interim program regardless of whether or not a particular road was previously permitted.

The following facts are undisputed. Appellant operates a coal preparation plant in Dickenson County, Virginia. The plant is located on Neece Creek Road, which connects Virginia Routes 650 and 651. Neece Creek Road is a narrow gravel and dirt road running parallel to Neece Creek, and it serves as the only access road to the preparation plant.

On January 19, 1984, the OSM Lebanon, Virginia, area office received a citizen's complaint charging that appellant was in violation of the Act with regard to the Neece Creek Road. In response to the citizen's complaint on January 20, 1984, OSM issued a 10-day notice to the Commonwealth of Virginia. See 30 U.S.C. § 1271(a)(1) (1982). Following an inspection, the Virginia Division of Mined Land Reclamation denied it had jurisdiction stating, "This road has been established and maintained as a public road" (Exh. A-10). Thereafter, an OSM inspector visited the site and on February 13, 1984, he cited appellant with the subject NOV. ^{2/}

At the hearing Rapoca asserted that Neece Creek Road was exempt from the permitting requirements of the Act because of its status as a public road. In his September 24, 1984, decision Judge Torbett, after correctly pointing out that one claiming an exemption from OSM's jurisdiction must plead and prove that exemption, citing S & M Coal Co., 79 IBLA 350 (1984), and Harry Smith Construction Co., 78 IBLA 27 (1983), discussed the evidence in the case as it related to the three criteria. He concluded that Neece Creek Road was a duly established public road, that the road receives "more than incidental" public use, but that "it certainly does not meet the criteri[on] which requires the public to maintain the road." Decision at 12.

On appeal Rapoca makes two arguments. First, it claims OSM cannot require the permitting of a public road under Virginia regulations. Second, it asserts that Neece Creek Road is maintained with public funds and constructed in a manner similar to other public roads in the vicinity. ^{3/} Appellant's first argument must be rejected. Appellant asserts that a public road in Virginia may not be permitted. It argues that Neece Creek Road has a long history as a public road and "is therefore a duly established public road according to the laws of the Commonwealth of Virginia and cannot be permitted." Appellant's Brief at 7. Appellant's argument completely ignores the public road definition adopted by the Commonwealth of Virginia for the purpose of surface coal mining regulation. Under that definition a road is considered a public road and exempt from permit acreage computations only when it meets the above-listed three criteria. The fact that a road may

^{2/} On June 20, 1985, the United States District Court for the Western District of Virginia - Abingdon Division issued a memorandum opinion and order in Clinchfield Coal Co. v. Hodel, No. 85-0113-A, granting the company's request for temporary relief and enjoining the Department of the Interior from issuing a cessation order to the company for failure to obey a NOV. In its opinion the court expressed its belief that OSM lacked authority to issue a NOV on the basis of a federal inspection after a 10-day notice, "where the state authority has made a determination that no violation exists." Id. at 20. On July 1, 1985, OSM filed a Motion for Reconsideration of the court's opinion and order.

^{3/} In its brief, OSM argues that "[a]ppellant has failed to meet each one of the three elements for a public road." OSM Brief at 9. Only the maintenance element was challenged by appellant on appeal. Judge Torbett found in appellant's favor for the other two criteria. Because of our disposition of the maintenance question, we need not address the other criteria.

be considered a public road for other purposes does not exempt it from regulation. In response to a similar argument in Harman Coal Co. v. OSM, *supra*, the Board stated at page 371:

[S]atisfaction of any one of the elements of the definition for public road might be sufficient to classify that road as a public highway for the purposes of local administration such as enforcement of traffic laws. See generally, 39A C.J.S. Highways §§ 1-2 (1976). However, a public road must meet all three criteria to be exempt from regulation under SMCRA. Harman's assertion that the roads are considered public roads under certain provisions of Virginia law unrelated to surface mining has no dispositive significance in the instant appeal, except, perhaps, in determining whether the roads were designated as public roads, pursuant to the laws of the jurisdiction in which the roads were located.

[2] We turn now to the pivotal question in this appeal--was the Neece Creek Road actually maintained with public funds in a manner similar to other public roads of the same category in the county?

The Neece Creek Road is approximately 5.4 miles in length (Exh. A-2). On June 5, 1979, the Dickenson County Board of Supervisors adopted a resolution establishing the Neece Creek Road as a public road (Exh. A-5). From June 1979 until the time of the hearing, the county maintenance of the Neece Creek Road consisted of the purchase (for \$134) and dumping of one load of rock on the road in December 1983 (Tr. 155-56, 159). That truckload of rock covered about 100-150 feet of the roadway (Tr. 156). After being dumped, the rock was not worked but subsequently Rapoca did grade that area of the road (Tr. 156). The cost of the rock did not come from funds earmarked for maintenance of public roads owned by the county in fee but from a special flood fund. William Patton, Chairman of the Dickenson County Board of Supervisors, testified as follows regarding the special fund:

Well, I think the law read[s] that you couldn't spend money on the roads unless you own the right-of-way, and so forth, and by doing this, as long as these roads are being used by the public, we didn't have to own them, but we was looking after the health and welfare and safety of the public, and by putting this money in this special fund, and all checks that's written comes out of this fund, that it made it legal for us to do that, and what we do, I think last year we budgeted \$30,000 to be spent in each district, and we've already spent over \$50,000 or maybe sixty some thousand.

(Tr. 213-14). Henry Cook, General Manager of Rapoca's Norton Coal Division, testified that the county placed the stone on the road "to assist Rapoca Energy Company in complying with the regulations in the Federal Register" (Tr. 159). Cook also estimated that \$120,000 had been spent by Rapoca on maintenance of the Neece Creek Road since he became manager in April 1982 (Tr. 157).

Patton testified that not all public roads get routine maintenance and that some roads may not have money spent on them for several years

(Tr. 193-94). In his opinion, the Neece Creek Road received maintenance in a manner similar to other public roads in Dickenson County (Tr. 192).

From this evidence appellant concludes that Neece Creek Road receives the same maintenance as other dirt roads in the county and, therefore, it is maintained with public funds in the manner similar to other public roads in the vicinity. We disagree. Judge Torbett correctly found that Neece Creek Road did not meet the maintenance criterion of the Virginia program.

Neece Creek Road is a public road. It is maintained by Rapoca Coal Company. The only funds expended for maintenance of the road by Dickenson County in the 5 years prior to the hearing were admittedly spent at the request of Rapoca in an attempt to avoid Federal regulation. The record reveals that although Dickenson County has no systematic method for maintaining county roads, it does, in fact, allocate money for road maintenance and provide road maintenance, even though such maintenance may be on an infrequent and irregular basis. Therefore, we must reject appellant's argument that Neece Creek Road receives maintenance similar to that of other county roads. In this situation there was no reason for the county to maintain Neece Creek Road. Appellant had undertaken to keep the road passable for coal haulage purposes. The testimony at the hearing showed that even the rock spread on 100-150 feet of the 5-mile long road by the county in 1983 was graded by Rapoca equipment.

In this case appellant has failed to show that Neece Creek Road is actually maintained with public funds in a manner similar to other public roads of the same category in the county.

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.

Bruce R. Harris
Administrative Judge

We concur:

James L. Burski
Administrative Judge

Gail M. Frazier
Administrative Judge

