

Editor's note: 93 I.D. 199, Appealed -- aff'd, Civ.No. 86-C-553-E (N.D.Okl. August 23 1988)

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-410

Decided May 8, 1986

Appeal from a decision of Administrative Law Judge Frederick A. Miller upholding the issuance of Notice of Violation No. 84-3-38-10 for a blasting violation. TU 4-10-R.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977:
Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977:
Blasting and Use of Explosives: Generally -- Surface Mining Control and Reclamation Act of 1977:
Inspections: Ten-Day Notice to State -- Surface Mining Control and Reclamation Act of 1977: State
Program: Ten-Day Notice to State

Where OSM issues a 10-day notice to the State and the State fails to take appropriate action to cause the violation to be corrected, or show good cause for such failure, 30 CFR 843.12(a)(2) requires OSM to reinspect prior to taking any enforcement action. In the case where the violation is a failure to file with the State

92 IBLA 23

regulatory authority information concerning blasting, proof that OSM contacted the regulatory authority and was informed that the documentation had not been filed would satisfy the reinspection requirement.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof -- Surface Mining Control and Reclamation Act of 1977: Inspections: Ten-Day Notice to State -- Surface Mining Control and Reclamation Act of 1977: State Program: Ten-Day Notice to State

In an application for review proceeding of a notice of violation issued by OSM following 10-day notice to the State, OSM has the burden of going forward to establish a prima facie case as to the validity of the notice. As part of that prima facie case, OSM must establish that it reinspected in accordance with 30 CFR 843.12(a)(2). However, the permittee waives any objection to OSM's failure to do so by presenting evidence which establishes the violation.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Turner Brothers, Inc. (TBI) has appealed from a February 4, 1985, decision of Administrative Law Judge Frederick A. Miller upholding the issuance of Notice of Violation (NOV) No. 84-3-38-10 by the Office of Surface Mining Reclamation and Enforcement (OSM), pursuant to section 521(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1271(a) (1982). That notice was served on TBI on March 30, 1984. It charged that on February 24, 1984, TBI conducted a blast after sundown at its Welch Mine No. 1 in Craig County, Oklahoma. It stated that TBI violated "30 CFR 936 OPRPR 816.65(a)(2) 30 CFR 816.65(a)(2)," and it required TBI to "submit reports as required by 816.65(a)(2) to state regulatory authority & furnish OSM with a copy," no

later than April 16, 1984. ^{1/} On April 6, 1984, TBI filed an application for review of the notice. At the hearing on August 2, 1984, the parties presented no witnesses. They merely stipulated certain facts and submitted various documents as exhibits for the record.

There is no dispute that TBI conducted a blast after sunset on February 24, 1984. TBI asserts it was justified in doing so; however, that is not an issue in this case. The violation for which OSM cited TBI, as acknowledged by counsel for TBI at the hearing (Tr. 6), was failure to notify the Oklahoma Department of Mines (ODOM) as required by 816.65(a)(2)(iii).

^{1/} 30 CFR 936 is a citation to the Oklahoma State program. OPRPR 816.65(a)(2) is the Oklahoma regulatory counterpart to 30 CFR 816.65(a)(2) (1982) and contains essentially the same wording with only minor changes not relevant herein.

30 CFR 816.65(a)(2) (1982) provides:

"(2) Blasting may, however, be conducted between sunset and sunrise if:

"(i) A blast that has been prepared during the afternoon must be delayed due to the occurrence of an unavoidable hazardous condition and cannot be delayed until the next day because a potential safety hazard could result that cannot be adequately mitigated.

"(ii) In addition to the required warning signals, oral notices are provided to persons within one-half mile of the blasting site; and

"(iii) A complete written report of blasting at night is filed by the person conducting the surface mining activities with the regulatory authority not later than 3 days after the night blasting. The report shall include a description in detail of the reasons for the delay in blasting including why the blast could not be held over to the next day, when the blast was actually conducted, the warning notices given, and a copy of the blast report required by § 816.68."

This regulation was not, however, in effect at the time of issuance of the NOV. On Mar. 8, 1983, OSM published final rules revising 30 CFR Part 816, effective Apr. 7, 1983. 48 FR 9788 (Mar. 8, 1983). That revision deleted 30 CFR 816.65. Certain of the requirements found in 30 CFR 816.65(a) were adopted in amended form in new 30 CFR 816.64(a). 48 FR 9793-94 (Mar. 8, 1983). The necessity for filing a written report with the regulatory authority under 30 CFR 816.65(a)(2)(iii) was eliminated. 48 FR 9807 (Mar. 8, 1983). There is no evidence, however, of amendment of the State program regulations.

The record in this case indicates an OSM inspector, Samuel M. Petitto, Jr., was conducting an inspection of TBI's Welch No. 1 mine on February 24, 1984, when the blast occurred. On March 12, 1984, he issued a 10-day notice to ODOM in accordance with 30 U.S.C. § 1271(a) (1982), informing ODOM of TBI's activity. The State did not respond to that notice or contact TBI within 10 days. 2/ OSM issued the NOV on March 30, 1984. On April 17, 1984, OSM terminated the NOV because "[r]eports required by OPRPR 816.65(a)(2) have been submitted to the ODOM" (Exh. A-3). The record includes a copy of a letter from TBI to ODOM, dated April 4, 1984, explaining the circumstances of its February 24, 1984, blast (Exh. A-1).

In affirming the violation the Administrative Law Judge concluded:

OSM clearly informed ODOM and the applicant of the nature of the violation. ODOM did not take any appropriate action and OSM was justified in intervening under Section 521(a)(1) of the Act. OSM did not have to inspect the minesite but only had to reconfirm the lack of notice by the applicant. This lack of notice constituted a violation of 30 CFR § 816.65(a)(2). [3/]

Decision at 3.

fn. 1 (continued)

Thus, the filing of a report remained a requirement of the State program which OSM had the authority to enforce under 30 CFR 843.12(a)(2) at the time of issuance of the NOV.

2/ At the hearing counsel for TBI stated: "And, secondly, the parties will further stipulate that the [Oklahoma] Department of Mines conceded the ten day notice did absolutely not respond to the ten day notice or notify Turner Brothers within ten days" (Tr. at 8, 9).

3/ This finding by the Administrative Law Judge was incorrect because notice was no longer a requirement under the regulations in 30 CFR. That requirement did exist in the State regulations, however, and we modify the Judge's decision accordingly.

On appeal TBI first charges OSM failed to apprise it of the nature of the violation. This argument is fallacious. The notice of violation clearly stated TBI was in violation of the State blasting regulations by failing to submit required reports. Counsel for TBI admitted at the hearing the violation was "simply for failure to notify the Oklahoma Department of Mines timely within -- as required by the regulation, providing written reports under 81665-A-2-III" (Tr. 6). In response to Judge Miller's question whether that was the Oklahoma regulation, counsel for TBI stated, "That is the Oklahoma reg. Again this is federal enforcement of the Oklahoma rules and regulations" (Tr. 7). Counsel for TBI further stated, "The only portion of the regulation that we did not comply with at the time was that we failed to notify, or as the regulation is written, for failure to notify the regulatory agency in this case the Oklahoma Department of Mines in writing of that fact" (Tr. 6).

[1] TBI further claims Judge Miller erred in affirming the NOV because OSM failed to comply with 30 CFR 843.12(a)(2). That regulation provides:

(2) When, on the basis of any Federal inspection other than one described in paragraph (a)(1) of this section, an authorized representative of the Secretary determines that there exists a violation of the Act, the State program, or any condition of a permit or exploration approval required by the Act which does not create an imminent danger or harm for which a cessation order must be issued under § 843.11, the authorized representative shall give a written report of the violation to the State and to the permittee so that appropriate enforcement action can be taken by the State. Where the State fails within ten days after notification to take appropriate action to cause the violation to be corrected, or to show good cause for such failure, the authorized representative shall reinspect and, if the violation continues to exist, shall issue a notice of violation or cessation order, as appropriate. No additional notification to the State by the Office is

required before the issuance of a notice of violation, if previous notification was given under § 842.11(b)(1)(ii)(B) of this chapter. (Emphasis added).

TBI alleges by failing to reinspect prior to issuance of the NOV, OSM violated the regulation which makes the duty to reinspect mandatory and that such failure "negates any jurisdiction to invade the states [sic] primacy under § 521." Brief at 9. OSM argued in its post-hearing brief at 2:

By March 30, 1984 the state still had not responded to the ten day notice and Mr. Petito [sic] again called the ODOM to check the status of the reports. Immediately following ODOM's assurance that no blasting report had been filed, Inspector Petito [sic] wrote NOV 84-3-38-10 citing TBI with a violation of 30 C.F.R. 816.65(a)(2).

The Administrative Law Judge made the following finding regarding reinspection:

The applicant cites 30 CFR § 843.12(a)(2) for the proposition that OSM did not "reinspect" the minesite after the state failed to respond to the ten-day notice and thus the notice of violation was unlawfully issued. These regulations require reinspection to insure the violative conditions still exist at the time of the notice of violation. In this situation no reinspection of the minesite was necessary because the violation involved a failure to notify the state regulatory authority. Inspector Petitto "reinspected" by calling ODOM to see if their office had received the required notification. They had not received notification and therefore the notice of violation was validly issued for this failure to notify. (Emphasis added).

Decision at 3.

There is no question the statute and the regulations at 30 CFR 843.12(a)(2) require reinspection. The rationale for that requirement is

that when the State fails to respond or show good cause for its failure, the Secretary must determine whether the violation which precipitated the State notification, in fact, still exists. If so, the Secretary is required to take the appropriate enforcement action. See Shamrock Coal Co. v. OSM, 81 IBLA 374, 379 (1984), appeal filed, No. 84-238 (E.D. Ky. July 27, 1984). The statute and regulation describe the determination process as reinspection. In most cases reinspection would require that the OSM inspector physically return to the minesite to determine whether the violative conditions still exist. This insures the permittee is not burdened with a notice of violation for a nonexistent violation.

The question presented is whether a physical return to the minesite is required when the violation involved, as in this case, is a paperwork violation. If the inspector returned to the minesite, he might be able to find out whether the permittee filed the necessary documentation. However, we find that a return to the minesite is not required by the statute or regulations if, in the case of a paperwork violation, OSM can establish that it ascertained in some fashion whether or not the violative conditions continued. Such ascertainment may constitute the required reinspection. Where the violation is a failure to file information with the state regulatory authority, proof that OSM contacted that regulatory authority and was informed the documentation had not been filed would satisfy the reinspection requirement.

[2] In an application for review proceeding, the regulations provide at 43 CFR 4.1171(a) that OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice of violation. The applicant for review has the ultimate burden of persuasion. 43 CFR 4.1171(b). We

find that as part of its prima facie case for a violation involving a failure to file information with the State regulatory authority, issued following a 10-day notification to the State, OSM must establish that it reinspected either by a physical return to the minesite or by ascertaining in some other fashion the continued existence of the violation.

In this case the record shows issuance of an NOV following State notification. While OSM asserts the inspector telephoned ODOM prior to issuance of the NOV, it presented no evidence thereof at the hearing. Therefore, the Administrative Law Judge's reliance on that allegation in support of his finding that reinspection had taken place was improper. ^{4/}

While evidence of reinspection is a vital component of OSM's prima facie case, it is possible that a failure by OSM to provide such evidence could be rectified by evidence submitted by the permittee. In mining claim contest cases the Board has held that a timely motion to dismiss the contest complaint may be made at the completion of the Government's case on the basis of failure to present a prima facie case. United States v. Winters, 2 IBLA 329, 78 I.D. 193 (1971). However, where the contestee proceeds to present evidence after making the motion to dismiss, that evidence must be considered as part of the entire evidentiary record and, though the Government may have failed to establish a prima facie case, any record proof which supports the

^{4/} TBI argued before the Administrative Law Judge that following receipt of the 10-day notice ODOM conducted its review and "concluded rightly that TBI had followed the requirements of OPRPR § 816.65(a)(2)(i) and (ii) and decided to take no action" (Post Hearing Brief at 7). In response thereto the Administrative Law Judge stated that TBI had "presented no evidence to support this contention. Mere allegations do not carry any evidentiary weight" (Decision at 3). (Emphasis added.)

Government's case may be considered for purposes of decision. United States v. Anderson, 83 IBLA 170, 178 (1984).

Herein, there was no independent presentation of evidence by OSM to which TBI might have filed a timely motion to dismiss. This case was presented for decision on the basis of stipulations and exhibits. The record shows 10-day notification by OSM and the March 30, 1984, issuance of the NOV. TBI's exhibit A-1 is a letter dated April 4, 1984, to ODOM in which TBI stated: "As requested by Section 816.65(a), Turner Brothers is herein notifying the Oklahoma Department of Mines that a blast occurred at our Welch No. 1 Mine in Craig County Oklahoma outside the published hours and after sunset." 5/ TBI does not allege it filed any report pursuant to the regulation prior to its receipt of the NOV. In fact, in an amended application for review filed with Judge Miller on May 15, 1984, TBI explained as follows:

The charge was set early in the afternoon; but due to a broken down endloader below the shot area, it was necessary to delay the shot until such equipment could be moved. Further, it was necessary that the blast be completed on this evening because it is the policy of the Mining Safety and Health Administration, the Oklahoma Mine Board, and Turner Brothers, Inc. to NEVER leave a shot in the ground overnight as this presents too many hazards. Faced with this situation, the emergency provisions of OPRPR § 816.65 were followed except that due to an oversight [sic] at the mine, Applicant failed to file a written report with the Oklahoma Department of Mines within the three days required by OPRPR 816.65(a)(2)(iii). [Emphasis added.]

2. Applicant contends this is a "paper violation" * * * . * * *
 * * * Applicant notes that when it became aware of the oversight [sic] in filing a written report regarding this blasting, it immediately filed a report with the Oklahoma Department

5/ The record shows that on May 3, 1984, TBI filed a copy of OSM's notice of termination of the NOV in question with Judge Miller. That termination notice dated April 17, 1984, stated: "Reports required by OPRPR 816.65(a)(2) have been submitted to the ODOM."

of Mines and sent a certified copy to OSM as required by the NOV.^{6/}

Amended Application for Review at 2-3. Thus, according to the record, TBI failed to comply with the 3-day reporting requirement of the Oklahoma regulation 816.65(a)(2)(iii).

We find TBI waived the opportunity to raise any objection to a deficiency in OSM's prima facie case by agreeing to submit the case to the Judge for decision based on stipulations and exhibits. Since the violation is established by TBI's evidence, the inadequate prima facie case is not fatal. ^{7/}

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 as modified. ^{8/}

Bruce R. Harris

Administrative Judge

I concur:

Gail M. Frazier
Administrative Judge.

^{6/} This admission contradicts the dissent's speculation whether a report was actually required under the Oklahoma regulation. It is clear TBI believed it was.

^{7/} The dissent poses the question whether the record is sufficient to support the violation charged or whether there should be a new hearing. The violation, as TBI agreed at the hearing, was failure to file a timely report in accordance with the Oklahoma regulation. The present record shows TBI did not make a timely filing. The record is sufficient to support the violation. To remand for a further hearing is not justified. ^{8/} We note that in Clinchfield Coal Co. v. Hodel, No. 85-0113-A (W.D. Va. June 20, 1985), the district court found 30 CFR 843.12(a)(2) expanded OSM's authority beyond that contemplated by the Act and held that the Secretary had no authority to issue notices of violation in States with approved programs, except where OSM finds that a violation causes "imminent danger of environmental harm." That decision is on appeal. Clinchfield Coal Co. v. Hodel, No. 85-2206 (4th Cir. Nov. 22, 1985).

ADMINISTRATIVE JUDGE ARNESS DISSENTING IN PART:

The holding in this case turns upon language in footnote 3 of the majority opinion where the Administrative Law Judge's ruling is "modified" to change an "incorrect" finding of a violation of Departmental regulation 30 CFR 816.65(a)(2) (1982), by Turner Brothers, Inc. (TBI), into a finding TBI had, instead, violated an Oklahoma State surface mining program regulation when it failed to timely report nighttime blasting. This change substitutes a finding by this Board for the ultimate holding made by Administrative Law Judge Miller, on the assumption there is proof in the record to show that a violation of the State's surface mining regulation took place. It also assumes that conduct which would be a violation of former regulation 30 CFR 816.65(a)(2) would violate the State rule.

Ultimately at issue in this appeal is whether the record is sufficient to permit this Board to decide there was or was not a violation as changed, or whether there should be another hearing ordered to permit the development of a record which will permit rendition of a final decision. Review of the entire record leads to the conclusion another hearing is required. This conclusion is based upon provisions of Departmental regulation 43 CFR 4.1171 which establish the allocation of the burden of proof between the parties to this proceeding. The regulation provides that the Office of Surface Mining Reclamation and Enforcement (OSM), shall have the burden of going forward to establish a prima facie case as to the validity of the order; TBI, however, bears the ultimate burden of persuasion. 43 CFR 4.1171. The prima facie

case to be proven by OSM requires, as the majority point out, proof that a reinspection made pursuant to 30 CFR 843.12(a)(2) revealed the existence of a violation; that is to say, proof a report required by Oklahoma law had not been made.

In this case the parties stipulated their evidence into the record at a hearing before Administrative Law Judge Miller. No witnesses were called. The entire record consists of a 10-page transcript of the appearance before the Administrative Law Judge by the attorneys for the parties. The Administrative Law Judge accepted the stipulations and exhibits as offered by the attorneys. His decision, however, is not based upon their agreed record, but upon later assertions and counter-assertions appearing in the briefs of the parties, concerning which there is no agreement. This occurrence may be explained by the manner in which the parties approached the hearing, and how their agreed statement of facts was altered by their subsequent briefing of the case. Not only did they shift the focus of their arguments during the progression of their briefing, they altered the issues in a fashion which tended to blur the questions in dispute.

At the hearing before the Administrative Law Judge, OSM apparently considered the main issue in contention to concern OSM's jurisdiction to issue the notice under review. Apparently OSM was primarily interested in showing that a "Ten-Day Notice," Departmental form IE-160 (Mar. 3, 1981), was in fact sent by the Tulsa Field Office of OSM to the State of Oklahoma's Department of Mines (ODOM). See OSM's Post Hearing Brief dated Jan. 25, 1985, at 3, 4. Counsel for TBI, on the other hand, in response to

OSM's cited brief, argued that TBI was not in violation of the Oklahoma regulation requiring reports of nighttime blasting and that OSM, by failing to reinspect as required by 30 CFR 843.12(a)(2) had failed to discover essential facts which revealed the TBI operation was outside the reporting requirement of the Oklahoma regulation (Appellant's Post Hearing Brief at 3-5).

Responding to TBI's arguments, OSM filed a reply which contains a detailed statement of fact concerning the circumstances surrounding the issuance of OSM's 10-day notice to Oklahoma and the subsequent contacts between OSM and Oklahoma employees concerning the matter (OSM Reply Brief at 1-3). Following this exchange, the Administrative Law Judge issued his decision which relies upon facts stated in the OSM brief.

The transcript of the hearing establishes that the parties agreed to narrow the question at issue to whether there was a violation of an Oklahoma State Regulation. They stated:

MR. PETRICK: * * * This regulation is simply -- this violation is simply for failure to notify the Oklahoma Department of Mines timely within -- as required by the regulation, providing written reports under 81665-A-5-III. And we will provide a copy of the regulation.

JUDGE MILLER: Is that the Oklahoma reg?

MR. PETRICK: That is the Oklahoma reg.

Again, this is federal enforcement of the Oklahoma rules and regulations.

JUDGE MILLER: Do you accept this stipulation, Ms. --

MS. O'CONNELL: Yes. I do, Your Honor, but could I also get co-counsel to stipulate that OSM did comply with the procedural requirements of the ten day notice to the state. That seemed to have been in issue in the original complaint, and I

assume that has been dropped, since we supplied them with a copy of the ten day notice.

MR. PETRICK: I will -- I think we need to submit that portion of the ten day notice for your determination. 1/

(Pause)

MR. PETRICK: Your Honor, I have no objection to the introduction of the ten day notice.

(Tr. at 6, 7).

Exhibit A-2, consisting of two typewritten pages, was stipulated into evidence as a copy of Oklahoma regulation OPRPR 816.65(a) through (e)(1). Except for TBI's blasting report, dated April 4, 1984, no other evidence concerning the Oklahoma surface mining program regulations or the administration of those regulations was offered by either party. There was no testimony whatever concerning the violation charged.

1/ TBI argues that it was prevented from offering proof on this issue by the manner in which OSM presented its case. TBI explains:

"An administrative law judge has no authority to consider evidence not properly admitted in his decision. In this case the administrative law judge hinged a decision on the validity of an NOV (notice of violation) upon their allegations made in the post hearing brief. At the time of the hearing concerning NOV 84-3-38-10, certain matters were presented to the administrative law judge upon stipulation of the parties and no evidence outside of these stipulations was admitted into the case. In this matter, TBI is basically alleging a failure on the part of OSM to properly exercise its oversight [sic] jurisdiction due to the fact that it did not fairly appraise [sic] TBI of the subject matter of the violation, and that it did not reinspect the mine site as required by regulations after a ten day notice. The only defense offered to these allegations by OSM is a statement made outside of the hearing in a post hearing brief claiming that Inspector Petitto had oral contact, which cannot be verified in writing, with members of ODOM concerning TBI's failure to file blasting records. This evidence was never entered in the trial on the hearings [sic] but was relied upon heavily by the administrative law judge in rendering his decision." (Appellant's Brief at 11). Review of the record indicates this statement fairly characterizes the manner in which the record was assembled on this issue. Clearly, as early as the initial hearing, it was apparent there were factual issues in dispute by the parties at the hearing which only the testimony of witnesses could elucidate.

As the majority correctly state in their footnote 1, the Departmental regulations published at 30 CFR 816.65(a)(2) (1982), were amended in 1983 and the reporting requirement formerly appearing at 30 CFR 816.65(a)(2)(iii) was removed. 43 FR 9807 (Mar. 8, 1983). The text of former regulation 30 CFR 816.65 when compared to exhibit A-2 appears to be nearly identical to the Oklahoma rule, except for appropriate substitutions made to indicate the regulatory authority enforcing the rules is the Oklahoma Department of Mines (ODOM). Since there is no provision of the Surface Mining Control and Reclamation Act of 1977 which requires a report of nighttime blasting, and since there is no longer a Federal regulation which requires such reports, the only possible violation which could have occurred in this case must have involved the State's regulation.

Despite this circumstance, the Administrative Law Judge made no findings concerning any violation of the State regulation. Nor does it appear this was a matter of inadvertence; in the section of his opinion entitled "Factual Background," Administrative Law Judge Miller limited his inquiry to the charged violation of the Department regulation 30 CFR 816.65(a)(2), which was alleged in the NOV (Decision at 2). While the Administrative Law Judge's decision refers to the receipt into evidence of a copy of the Oklahoma regulation as exhibit A-2, the fact-finder chooses instead to focus upon the application of the former Federal regulation, 30 CFR 816.65, as applied to the conduct charged against TBI. However, responding to TBI's arguments that there was no violation under the circumstances agreed upon by the parties, the Administrative Law Judge comments:

The applicant argues that OSM has not properly exercised jurisdiction under Section 521 of the Act. They claim that ODOM did not receive specific notification of the violation. The ten-day notice (Respondent's Exhibit No. 1) states under nature of violation "blasting outside scheduled time frames without meeting requirements of 816.65(a)(2). The applicant focused on Section 816.65(a)(2)(i) and (ii) which are not specifically mentioned in the ten-day notice. OSM obviously informed ODOM that any and all provisions of 816.65(a)(2) could have been violated. Including § 816.65(a)(2)(iii) which requires notice to the state [sic]. The applicant asserts that ODOM determined that there was an emergency exemption but they have presented no evidence to support this contention. Mere allegations do not carry any evidentiary weight. The decisive issue is whether ODOM took appropriate action. It seems clear that they did not take any action and OSM was justified in exercising jurisdiction.

(Decision at 3). TBI's brief attacks this position at two points; first, it is argued that the Administrative Law Judge applied different evidentiary standards to OSM and to TBI. Appellant argues:

In this case the administrative law judge hinged a crucial decision on a NOV upon "mere allegations" made by OSM without support of any evidence entered on the record but was totally unwilling to consider any statements or rationale offered by TBI that was not entered upon the record.

While the appellant should rightfully be held to support its arguments with evidence derived from statements of stipulations, this same rule must equally apply to the Office of Surface Mining, and [at] the very least the administrative law judge's failure to base his decision upon matters entered on the record of the administrative hearing should necessitate the remand of this hearing to the administrative law judge so that these allegations concerning verbal contact between Inspector Petitto and ODOM may be supported by evidence and so that TBI may be afforded its constitutional right to cross-examine any witness making these statements.

(Appellant's Brief at 12).

Secondly, TBI points out the need to explain the inaction by the Oklahoma Department of Mining: "Here OSM informed ODOM of the belief TBI had blasted after sunset. ODOM upon review of the information concluded rightfully that TBI had followed the requirements of OPRPR § 816.65(a)(2)(i) and (ii) and decided to take no action" (Appellant's Brief at 13).

Both these arguments merit consideration, since the question presented on appeal is whether TBI's failure to report violated an Oklahoma regulation, the administration of which is the primary responsibility of the State of Oklahoma. TBI's arguments are not idle speculation, but point to a real void in the evidence in this case, which prevents adjudication of this matter now, and requires another hearing on the question of the validity of the notice in this case. It is apparent the Administrative Law Judge permitted the parties to shift the issue in dispute to whether there was a reinspection by OSM. Later, when argument on this issue was joined, OSM was permitted to introduce, during briefing, facts concerning the reinspection of the TBI notice of violation. This circumstance led the Administrative Law Judge to enter a finding there had in fact been a reinspection and that the facts it discovered had been sufficient to establish a violation as charged. See Decision at 3. The conclusion reached, therefore, (that there was a violation of the former OSM rule, 30 CFR 816.65(a)(2) (1982)), was doubly erroneous.

First, as the majority points out, since the Federal regulation was removed in 1983, it could not have been violated by TBI a year later.

Second, the pivotal issue under review was whether there had been an effective reinspection, which showed a violation of the state reporting regulation had taken place. Since there was no agreement concerning the operative facts which would reveal whether there had been such an investigation by OSM, much less whether the State regulatory agency interpreted its own regulation to require a report in this case, proof was required to create a record which supports a finding on this central issue.

It does appear, upon examination of exhibit A-2, (the State's regulation OPRPR 816.65), that some discretion may be allowed the state in determining whether a nighttime blasting report is required. The regulation is written in two apparently divisible parts: It provides, in pertinent part:

§ 816.65 Use of explosives: Surface blasting requirements.

(a) All blasting shall be conducted between sunrise and sunset.

(1) The Department may specify more restrictive time periods, based on public requests or other relevant information, according to the need to adequately protect the public from adverse noise.

(2) Blasting may, however, be conducted between sunset and sunrise if:

(i) a blast that has been prepared during the afternoon must be delayed due to the occurrence of an unavoidable hazardous condition and cannot be delayed until the next day because a potential safety hazard could result that cannot be adequately mitigated.

(ii) in addition to the required warning signals, oral notices are provided to persons within one-half mile of the blasting site; and

(iii) a complete written report of blasting at night is filed by the operator conducting the surface mining activities with the Department not later

than 3 days after the night blasting. The report shall include a description in detail of the reasons for the delay in blasting including why the blast could not be held over to the next day, when the blast was actually conducted, the warning notices given, and a copy of the blast report required by Section 816.68.

(b) Blasting shall be conducted at times announced in the blasting schedule, except in those unavoidable hazardous situation, previously approved by the Department in the permit application, where operator or public safety require unscheduled detonation.

(Exhibit A-2, at 1, 2). The arrangement of this regulation is such as appellant argues, that it is possible to construe the rule so as to excuse a written report in the case of a an unavoidable hazardous condition, the contingency provided for by subparagraph (i), quoted above. Understood in this fashion, the written report is required only after the activity described in subparagraphs (ii), and (iii). Whether this is, in fact, the actual situation is not known, because the parties did not consider this aspect of the charged violation at all in their agreed statement of facts, and also because it is not possible to reconstruct enough of the facts concerning the matter from the documents available in the record. While the April 4, 1984 letter from TBI establishes that no report was earlier filed, it does not prove that a report was required. In fact, it is merely confusing, since it is neither consistent with a showing that a report was required, nor a showing that a report was not necessary.

Clearly, there is no longer a Federal rule on this subject, and the 1977 Act itself does not explicitly require reporting a nighttime blast. It is inferable, therefore, as TBI suggests, that no report was required given the circumstances of this case. The evidentiary record on the question is

simply blank, unless it be considered permissible for the Administrative Law Judge to fill in the gap with assertions by counsel for the parties concerning what happened between the time the shot was fired by TBI on February 24, 1984, and the time it inexplicably reported the fact to the State on April 4, 1984. But, even if such an approach is permissible, it does not establish that reinspection took place as required by Department regulation. Neither party has carried the burden of proof allotted to it by 43 CFR 4.1171, as a result, since neither has established either the fact that a reinspection took place, nor that a required report was not made in violation of State law.

On the present record it is not possible to say whether OSM has correctly interpreted the State rule respecting reporting of nighttime blasts, because, as appellant argues, if OSM failed to reinspect as required by 30 CFR 843.12(a)(2), OSM failed to obtain sufficient information concerning the handling of this matter by the State to know whether there had been a reporting violation or not. The administrative law judge considered the mere fact of OSM's telephonic inquiry to the State to satisfy the reinspection requirement, and now the majority members of this Board seek to avoid the procedural problems inherent in considering evidence of this telephone call which was received outside of the record by placing the burden to show compliance with the regulation upon TBI. This approach, however, ignores the burden which 43 CFR 4.1171 places upon OSM of going forward with evidence to make a prima facie case. Although the parties chose to present evidence by stipulation instead of through witnesses, neither of them may avoid the requirements of the regulation, which applies to whatever evidence is offered,

regardless of the form it may take. TBI did not supply the missing prima facie showing here, because it did not offer proof of reinspection or facts obtained upon reinspection. These facts are denied by TBI and can only be found in OSM's legal argument.

While I agree that reinspection need not always require a trip to the minesite, it seems certain that reinspection should be purposive and should be done to reveal whether a violation is continuing or, in this case, whether it has taken place. Reinspection must be done to discover whether a violation exists. It is not enough to know, in this instance, whether there was a report made (the April 4, 1984 letter from TBI to OSM), in the face of a consistent contention none was required. It could be as easily concluded, on the State of the present record, that TBI has proven no report was required under the State rule, since it is shown none was required to be filed by the State enforcement agency. Looked at in this way, TBI might argue it has satisfied the burden placed upon it by 43 CFR 4.1171 by reliance upon the rule that presumes officials at ODOM perform their duty in a regular manner and will not be assumed to have acted contrary to regulations which they administer. See, e.g., Jack Bolke, 88 IBLA 58 (1985) (Departmental employees are presumed to perform their duty in regular fashion). In this case, following such reasoning, ODOM's failure or refusal to act establishes prima facie that no report was required. Such a conclusion is no more absurd than the notion that TBI waived the requirement to prove a violation by stipulating to admission of the exhibits received at hearing. The record before this Board simply does not contain proof that a required report was not filed.

OSM, the Administrative Law Judge, and now this Board have equated the former Federal rule at 30 CFR 816.65 (1982) to the present State rule, and assume the application of each rule in practice should be identical. It might be possible in a proper case to conclude that the State rule OPRPR 816.65(a)(2) is interchangeable with 30 CFR 816.65(a)(2) (1982). But since the Oklahoma State program is now more demanding of reports than is the Federal scheme, it is difficult to see how a state waiver of a state reporting rule, or a lenient state interpretation of a state rule which has no Federal counterpart, could permit a finding there was a violation of the 1977 Act. But an affirmation of the Administrative Law Judge's findings leads to just such a result.

TBI has continuously objected that the NOV was defective and denied its inaction violated the State program. The scanty record now before the Board is not sufficient to permit the making of findings by substitution so as to cure the erroneous finding by the Administrative Law Judge that TBI violated 30 CFR 816.65 (1982), by filing a late blasting report. Because the only proof in the record concerning OSM's reinspection of this alleged violation came into the record after the evidentiary hearing as a recital in a legal brief, TBI should be afforded an opportunity to present rebuttal evidence to show contrary facts, in the manner suggested by its brief.

The 1977 Act requires, upon an application for review of a NOV, that an investigation and findings be made. See 30 U.S.C. § 1275. This appeal reveals the investigation of the charged violation to have been incomplete, and the findings made by the Administrative Law Judge to be erroneous as a

result. It cannot be said on the record before the Board as now constituted that a reinspection pursuant to 30 CFR 843.12(a)(2) was conducted by OSM which established the validity of the NOV issued to TBI. Another hearing is therefore required to permit inquiry into the events between February 24, and April 4, 1984, which will establish whether there was a reinspection pursuant to 30 CFR 843.12(a)(2), and to discover whether the Oklahoma State program required a report of the February blast at TBI's mine, and whether such a report was given as required.

Franklin D. Arness
Administrative Judge.

