

Editor's note: Appealed -- dismissed on joint motion, Civ.No. 86-C-852-C (N.D. Okl. Mar. 12, 1987)

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-526

Decided August 15, 1986

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming the issuance of Notices of Violation Nos. 84-03-006-004 and 84-03-006-005. TU-4-42-R.

Affirmed.

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

Publication in the Federal Register constitutes adequate notice of revocation of state primacy for the purposes of sec. 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982).

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

OSM makes a prima facie case by submitting sufficient evidence to establish the essential facts of the violation. When this evidence is un rebutted, the violation will be sustained on appeal.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for appellant; Nell Fickie, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

Turner Brothers, Inc. (Turner Brothers), has appealed the decision of Administrative Law Judge Frederick A. Miller dated March 12, 1985, Docket No. TU-4-42-R. The decision affirmed the issuance of Notices of Violation (NOV) Nos. 84-03-006-004 and 84-03-006-005, and found that the Office of Surface Mining Reclamation and Enforcement (OSM) properly exercised jurisdiction over Turner Brothers' operations in Craig County, Oklahoma.

OSM issued the challenged NOV's on August 31, 1984. Each cited Turner Brothers for "casting flyrock from the blasting vicinity beyond the line of

property owned or leased by" Turner Brothers in violation of Oklahoma Program Regulation (OPRPR) 816.65(g). The first alleged violation was observed at the Welch Mine No. 1 in Craig County, Oklahoma (state permit Nos. 82-86-4049 and 84-96-4090) during an inspection, on August 28, 1984, while the second was noted in an August 30, 1984 inspection of the same mine.

On September 17, 1984, Turner Brothers filed an application for review of the NOV's, denying any violation of OPRPR 816.65(g) and requesting an evidentiary hearing pursuant to 43 CFR 4.1164. A hearing was held in Tulsa, Oklahoma, on December 4, 1984, at which, as a preliminary matter, Turner Brothers objected both to the jurisdiction of OSM to issue the NOV's and to Judge Miller's authority to hear the case. At the close of OSM's case-in-chief, Turner Brothers rested its case without presenting any evidence or testimony in support of its argument that there had been no violation of OPRPR 816.65(g).

Turner Brothers argued before Judge Miller, and now argues before this Board, that OSM lacked jurisdiction to issue the NOV's because when OSM assumed primary enforcement jurisdiction of surface coal mining operations in Oklahoma, it did not allow for proper notice under the Administrative Procedure Act (APA), 5 U.S.C. § 553(d) (1982). Specifically, Turner Brothers maintains that the Secretary's publication in the Federal Register of notice of its decision to assume primary enforcement jurisdiction over Oklahoma's surface mining program on April 12, 1984, with a stated effective date of April 30, 1984, violated the APA, which requires a hiatus of 30 days between the publication date and the effective date of a "rule." Therefore, according to Turner Brothers, the Federal takeover of Oklahoma's surface mining regulatory program was void, leaving OSM without authority to issue the NOV's and the Office of Hearings and Appeals without jurisdiction to review their propriety.

OSM responds, as to the jurisdiction issue, that Turner Brothers failed to properly object to OSM's institution of direct Federal enforcement of Oklahoma's surface mining program. The procedure for challenging OSM's preemption, OSM alleges, is embodied in section 526(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1276(a)(1) (1982), which provides as follows:

Any action of the Secretary to approve or disapprove a State program or to prepare or promulgate a Federal program pursuant to this chapter shall be subject to judicial review of the United States District Court for the District which includes the capital of the State whose program is at issue.

* * * Any action subject to judicial review under this subsection shall be affirmed unless the court concludes that such action is arbitrary, capricious, or otherwise inconsistent with law. A petition for review of any action subject to judicial review under this subsection shall be filed in the appropriate Court within sixty days from the date of such action, or after such date if the petition is based solely on grounds arising after the sixtieth day. Any such

petition may be made by any person who participated in the administrative proceedings and who is aggrieved by the action of the Secretary.

Judge Miller noted that Turner Brothers participated in the proceedings under 30 CFR Part 733 regarding the Oklahoma program, and was a party "aggrieved by the action of the Secretary," thus meeting the standing requirements for seeking judicial review of OSM's decision to assume primary enforcement of Oklahoma's state program. However, he ruled, consistent with OSM's position, that the proper forum for judicial review of the Secretary's action concerning Oklahoma's state program is the United States District Court for the Western District of Oklahoma where the state capital, Oklahoma City, is located. Judge Miller made two findings in connection with Turner Brothers' failure to follow section 526(a)(1) of SMCRA in challenging OSM's action: (1) an Administrative Law Judge lacks authority to overrule the Secretary on such a matter, and (2) Turner Brothers failed to file its petition for judicial review in the appropriate court within 60 days from the date of the contested decision, regardless of whether April 12 or April 30, 1984, is treated as the date of the decision. Accordingly, Judge Miller rejected Turner Brothers' jurisdictional challenge, since it was filed in an improper forum in an untimely manner.

Judge Miller proceeded to rule that OSM's issuance of the NOV's was proper. He found that OSM, through witnesses and accompanying documentation, established a prima facie case as to the validity of the NOV's as required by 43 CFR 4.1171(a), which states that "OSM shall have the burden of going forward to establish a prima facie case as to the validity of the notice * * *." Turner Brothers did not rebut the testimony of OSM's witnesses; indeed, Turner Brothers did not present any evidence at all. Turner Brothers, as the applicant for review of the NOV's, must carry the "ultimate burden of persuasion" that the violation did not occur, under 43 CFR 4.1171(b). Judge Miller ruled that the NOV's must stand, since Turner Brothers failed to carry this burden.

[1] We will first address the jurisdictional issue. Turner Brothers again asserts that OSM had no jurisdiction to issue the NOV's and the Department of the Interior is without jurisdiction to hear this case. Appellant's assertion is based upon the APA requirement at 5 U.S.C. § 553(d) (1982) which states:

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except --

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

On April 12, 1984, after public notice and hearing, OSM published in the Federal Register its findings that Oklahoma's enforcement of its state

program was deficient, and gave notice pursuant to section 521(b) of SMCRA, 30 U.S.C. § 1271(b) (1982), 1/ that on April 30, 1984, OSM would substitute Federal enforcement for state enforcement of portions of the Oklahoma state regulatory program i.e., revoke state "primacy") until the deficiencies were corrected. 49 FR 14674 (Apr. 12, 1984).

The State of Oklahoma has unsuccessfully raised the same jurisdictional issue before the U.S. District Court for the Western District of Oklahoma (District Court). In its order dismissing the State's suit, the District Court stated:

The Court finds that the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201, contains its own administrative procedure for notification, hearings and the like. These procedures include timeliness, some of which conflict with the provisions and timeliness of the APA. The Court finds that the self-contained administrative procedures in SMCRA govern this case, overriding APA. In so doing, the Court rejects plaintiffs' contention that every agency action is either rulemaking or an order subject to APA without regard to congressional provision of alternative kinds of administrative governance in more specific statutes. The defendants complied in full with the provisions of the SMCRA, specifically with 30 U.S.C. § 1271(b). [Footnote omitted.]

State of Oklahoma v. Hodel, No. 84-1202-A (Dec. 5, 1985).

In accordance with the above-quoted order, we must agree with Judge Miller's conclusions concerning Turner Brothers' jurisdictional challenge.

1/ Sec. 521(b) of SMCRA provides as follows:

"Whenever on the basis of information available to him, the Secretary has reason to believe that violations of all or any part of an approved State program result from a failure of the State to enforce such State program or any part thereof effectively, he shall after public notice and notice to the State, hold a hearing thereon in the State within thirty days of such notice. If as a result of said hearing the Secretary finds that there are violations and such violations result from a failure of the State to enforce all or any part of the State program effectively, and if he further finds that the State has not adequately demonstrated its capability and intent to enforce such State program, he shall give public notice of such finding. During the period beginning with such public notice and ending when such State satisfies the Secretary that it will enforce this chapter, the Secretary shall enforce, in the manner provided by this chapter, any permit condition required under this chapter, shall issue new or revised permits in accordance with requirements of this chapter, and may issue such notices and orders as are necessary for compliance therewith: Provided, That in the case of a State permittee who has met his obligations under such permit and who did not willfully secure the issuance of such permit through fraud or collusion, the Secretary shall give the permittee a reasonable time to conform ongoing surface mining and reclamation to the requirements of this chapter before suspending or revoking the State permit."

As that order suggests, OSM provided ample public notice of the impending revocation of state primacy. Turner Brothers itself participated in the proceedings, giving Turner Brothers actual notice of the revocation of primacy. In the recent decision of Turner Brothers, 92 IBLA 381 (1986), the Board rejected arguments virtually indistinguishable from those involved herein, observing: "The notice OSM published in the Federal Register on April 12, 1984, constituted adequate public notice for the beginning of Federal enforcement pursuant to section 1271(b) of SMCRA." Id. at 388. Judge Miller correctly dismissed Turner Brothers' jurisdictional challenge, since it was raised before the wrong tribunal in an untimely manner.

[2] We affirm Judge Miller's ruling that OSM properly issued the contested NOV's. OSM established a prima facie case in support of the NOV's. Turner Brothers presented no evidence to rebut that prima facie case. James Moore, 1 IBSMA 216, 86 I.D. 369 (1979). Turner Brothers has raised no objection to Judge Miller's ruling that OSM properly issued the contested NOV's, other than its jurisdictional challenge, therefore; we affirm that ruling.

Therefore, 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 Miller is affirmed.

Bruce R. Harris
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge

