

J-O'B OPERATING CO.

IBLA 85-536

Decided April 28, 1987

Appeal from a decision of the New Mexico State Office, Bureau of Land Management, rejecting oil and gas lease application NM-A 060095 (TX).

Affirmed.

1. Oil and Gas Leases: Applications: Generally -- Notice: Generally --
Notice: Constructive Notice

The Department has long followed the rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. A party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision.

APPEARANCES: W. Glenn Smith, manager, Land Department, J-O'B Operating Company, for appellant.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

J-O'B Operating Company (J-O'B) has appealed from a decision of the New Mexico State Office, Bureau of Land Management (BLM), dated March 18, 1985, rejecting under 43 CFR 3112.5-1(c) the company's simultaneously filed oil and gas lease application for failure to file an offer to lease within 30 days of receipt of the decision to award the lease as required by 43 CFR 3112.6-1(a).

Appellant's application received first priority for lease offer for parcel NM 668 in the October 5, 1984, drawing. The parcel consists of 10 acres of land in the Sabine National Forest, Shelby County, Texas. By decision dated January 2, 1985, BLM notified the company of its priority and enclosed lease forms and stipulations. The decision informed the company that by regulation 30 days were allowed to execute the lease forms and stipulations and return them to the State Office. Otherwise, the decision stated, "this application will be considered finally rejected and closed without further notice." The decision also described itself as being "final 30 days from the day it is received," and advised J-O'B of its right to appeal within 30 days from receipt of the decision.

The decision and accompanying documents were transmitted by certified mail, return receipt requested, to J-O'B Operating Company, 761 Pierremont, Shreveport, LA 71135-5928. On February 1, 1985, the envelope was returned to BLM marked "unclaimed." The claim check on the envelope indicated that notices were issued on January 8 and 13 and that the envelope was returned on January 23. The BLM decision which occasioned this appeal was then issued and sent to the company. The decision stated that the undelivered lease forms had been returned to BLM on February 1 and the company's application had been "finally rejected and closed" as of March 1, 1985.

On appeal, J-O'B argues it should not be penalized for the Postal Service's failure to deliver the lease forms and stipulations and that it is entitled to an appeal. In regard to the latter, appellant points out that BLM's January 2 decision stated that it was final unless appealed within 30 days of receipt, but it was never received. J-O'B notes that the March 18 decision stated that the company's application had been "finally rejected" as of March 1, 1985, and argues that a final decision should not have been made until 30 days after it received the March 18 decision.

Appellant is correct that it is entitled an appeal. The subject of BLM's January 2 decision was the fact J-O'B's application had been selected for first priority lease offer. This determination would, as stated in the decision, become final 30 days from the date the decision was received, unless an appeal was filed. However, the decision also contemplated rejection of the application upon the running of the 30-day period if the forms were not returned. This aspect of the decision was interlocutory. John R. Anderson, 71 IBLA 172 (1983); Carl Gerard, 70 IBLA 343, 346 (1983).

While it is unlikely that a party whose application is drawn for first priority would wish to appeal its success, it may object to the lease terms or stipulations added to the lease. In addition, it is possible that a third party might wish to protest the successful applicant's priority. Thus, if the lease forms and stipulations had been received by J-O'B, as described in Fortune Oil Co., 71 IBLA 153, 156-57, 90 I.D. 84, 86 (1983), the company would have had three choices. If the lease terms and stipulations were acceptable, it could have executed and timely returned them and have been issued the lease. If it objected to one or more items but was willing to acquire the lease if they could not be removed or changed, it could have executed and returned the forms and stipulations under protest. In such a case BLM would have been required to review the protest and issue an appealable decision. If BLM retained the objectionable provisions and on review the Board upheld its decision, the lease would stand as issued. J-O'B's third choice would have been to not execute the lease forms and stipulations but, instead, to bring an appeal to this Board. ^{1/} If the appeal were successful, the lease would issue without the objectionable provisions, but if it were not successful, no additional opportunity to accept the lease would be given.

^{1/} The mechanism for properly bringing an appeal to the Board may require careful consideration. The option described in Fortune Oil Co., *supra*,

Although appellant's options would have been reasonably clear if the lease forms and stipulations had been delivered, the materials were not delivered, but were returned to BLM marked "unclaimed." Appellant argues that under the terms of the decision, the forms were never received by it, and the 30-day period never began to run. Although this argument is appealing, the wording of BLM's decision is not controlling. Rather, the question which controls both the issue of the timing of appellant's right to appeal and whether appellant is to bear the loss resulting from the nonreceipt of the forms is whether J-O'B was constructively served the lease forms and stipulations.

The rules governing constructive service are provided by both regulation and Board decisions. The applicable regulation, 43 CFR 1810.2(b), contains two provisions. It first states:

Where the authorized officer uses the mails to send a notice or other communication to any person entitled to such a communication under the regulations of this chapter, that person will be deemed to have received the communication if it was delivered to his last address of record in the appropriate office of the Bureau of Land Management, regardless of whether it was in fact received by him.

Under this provision, when BLM sends a notice or decision return receipt requested to a party's last address of record and it is delivered, it is deemed received by the addressee on the service date stated on the return receipt regardless of whether it was in fact received by the addressee. In short, delivery to the last address of record establishes constructive notice to the addressee. See Lawrence E. Welsh, Jr., 91 IBLA 324 (1986); Richard L. Knowles, 88 IBLA 120 (1985).

The second part of the regulation provides:

An offer of delivery which cannot be consummated at such last address of record because the addressee had moved therefrom without leaving a forwarding address or because delivery was refused or because no such address exists will meet the

fn. 1 (continued)

clearly contemplates that a party "await receipt of a rejection of his offer and then appeal to this Board." Id. at 157, 90 I.D. at 86. The decision sent to appellant in the present case, however, stated: "In the event of noncompliance within the time allowed this application will be considered finally rejected and closed without further notice." Thus, taking BLM at its word, J-O'B could not have awaited receipt of a decision rejecting its offer before bringing an appeal because the decision indicated that none would be sent, nor could it have reasonably waited the 30-day period before filing a notice of appeal. As discussed above, this aspect of the decision was interloctory and a party would in fact have 30 days after the initial 30-day period in which to file a notice of appeal. See Robert C. LeFavre, 95 IBLA 126 (1987); James M. Chudnow, 89 IBLA 361 (1985).

requirements of this section where the attempt to deliver is substantiated by post office authorities.

43 CFR 1810.2(b). Under this part of the regulation, when BLM sends a notice or a decision, return receipt requested, to a party's last address of record and it is returned by the Postal Service because there is no forwarding address, or delivery was refused, or no such address exists (as established by the Postal Service notation on the envelope), BLM is deemed to have met its obligation to notify the party and may act as if delivery had actually been made. In short, the fact that delivery was attempted but could not be made at a party's last address of record establishes constructive notice to the addressee. In such circumstances, BLM has no obligation to track down a new address and send further notice before it can proceed to act on its decision. However, in keeping with the purpose of the regulation, BLM must wait for 30 days from the date its notice is returned undelivered (the period for filing a notice of appeal) before it may implement its decision.

[1] In addition, sometimes described as implicit in the regulation and sometimes as a separate rule, the Department has long followed the general rule that transmission of a decision to a party's last address of record by registered or certified mail, return receipt requested, constitutes constructive service even though delivery was unsuccessful. Victor M. Onet, Jr., 81 IBLA 144, 146 n.2 (1984), and cases cited; Michele M. Dawursk, 71 IBLA 343 (1983); John Oakason, 13 IBLA 99, 102 (1973). In such a case the date of service is the date the item is received back by BLM. Michele M. Dawursk, *supra* at 347; Betty Alexander, 53 IBLA 139, 141 (1981); John Oakason, *supra* at 102.

Application of the constructive service rule is based on two assumptions: First, that BLM's decision was sent to appellant's last address of record, and second, that the Postal Service properly performed its duties. John H. Blackwood, 89 IBLA 379, 381 n.1 (1985). Due to the first assumption, upon return of an item as undeliverable, BLM is required to check its files to verify that the address to which the item was sent was correct and to determine whether a new address has been provided since the date the notice or decision was sent. Stephen C. Ritchie, 81 IBLA 162, 165 (1985); Estate of Glen R. Coy, 52 IBLA 182, 194, 88 I.D. 236, 242 (1981). If a change of address is found, notice must be sent to the new address to perfect service. Because of the second assumption a party may defeat application of the rule by showing error in Postal Service procedure amounting to negligence in transmitting the decision. Terry L. Wilson, 85 IBLA 206, 211, 92 I.D. 109, 112 (1985); Tom Hurd, 80 IBLA 107, 109 (1984); L. Lee Horschman, 74 IBLA 360 (1983); Brooks Griggs, 51 IBLA 232, 87 I.D. 612 (1980); Joan L. Harris, 37 IBLA 96 (1978).

In its statement of reasons appellant asserts it never received the lease forms and stipulations and never received notice of any attempt to deliver from the post office. In particular, appellant argues that if delivery had been attempted on January 8 during normal business hours, the company's receptionist would have been present to receive the item. J-O'B further points out that January 13, 1985, was a Sunday and argues it is

unlikely that any attempt at delivery was in fact made on that date. In addition, appellant points out that the decision notifying it that its offer had been rejected had been sent to the same address and received without delay. In effect, appellant argues that the Postal Service was negligent and did not follow its own procedures so that actual and constructive notice were precluded.

In order to resolve the factual issues raised by appellant's assertions, the Board directed inquiries to the Shreveport Louisiana post office. The Manager/Postmaster for the Shreveport office informed the Board:

1. Mail addressed [to appellant] as above would be delivered to P. O. Box 5928, coinciding with the Zip Code. The street address 761 Pierremont has a 71106 Zip Code, whereas, the firm's P. O. Box Zip Code is 71135-5928.
2. The claim check number from the PS Form 3849-A is attached to the mail when it first arrives at the delivery unit. The dates for notices and returns are filled in at that time. These dates indicate when the Postal employee is to issue a notice or return the item.
3. The procedure for issuing notices does not vary, depending upon whether the item is to be delivered to a street address or a post office box, with one exception. That exception is that notices are delivered to post office boxes on minor holidays, but not to street addresses. No notices are delivered on Sunday.

In regard to the Sunday date on the claim check the Manager/Postmaster states: "When the second notice date filled in by the delivery unit on the claim check is a Sunday, the date is not adjusted. Delivery is affected [sic] on the next day, Monday."

Based on the foregoing information from the Shreveport post office, we must reject the arguments J-O'B has made on appeal. Delivery to the last address of record on file with BLM would have been attempted, not at J-O'B's office as the company asserts, but to its post office box. J-O'B letterhead stationery, used to file its notice of appeal, confirms that the company holds post office box number 5928. Thus, in the normal course of the exercise of Postal Service procedures, on January 8 a notice would have been placed in J-O'B's post office box. Similarly, while appellant is correct that January 13, 1985, was a Sunday, we are informed that a notice would have been delivered the following Monday.

It is, of course, possible that, as J-O'B claims, the company did not receive the notices because they were not placed in its post office box, just as it is also possible that J-O'B did receive the notices but mislaid them or confused them with other delivery notices it received. We have no evidence, however, that either event occurred. Rather, the evidence in the record indicates that the notices were issued, and appellant has failed to show negligence by the Postal Service in transmitting the decision. Cf. Terry L. Wilson, supra.

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.

Franklin D. Arness
Administrative Judge

I concur:

R. W. Mullen
Administrative Judge

CHIEF ADMINISTRATIVE JUDGE HORTON CONCURRING IN THE RESULT:

No one has questioned appellant's right to bring the subject appeal. The discussion in the majority opinion about interlocutory decisionmaking is not germane. This is purely a constructive notice case and I agree with the result ultimately reached on that question.

Wm. Philip Horton
Chief Administrative Judge