

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-439

Decided September 15, 1987

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming issuance of Notice of Violation No. 84-3-11-2, and Cessation Order No. 84-3-11-4 for failure to properly construct a sedimentation pond. TU-4-3-R, 4-6-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally -- Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally -- Surface Mining Control and Reclamation Act of 1977: Inspections: 10-day Notice to State -- Surface Mining Control and Reclamation Act of 1977: State Program: 10-day Notice to State

Where a 10-day notice to the state regulatory authority is issued in response to a citizen's complaint, OSMRE may conduct a Federal inspection and issue appropriate enforcement orders if the state fails to take "appropriate action" to abate a violation within 10 days. Where, however, the evidence establishes that the state action was "appropriate" under the specific facts of a case, the Board will vacate enforcement actions undertaken by OSMRE.

APPEARANCES: Robert J. Petrick, Esq., Muskogee, Oklahoma, for Turner Brothers, Inc.; Milo C. Mason, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

Turner Brothers, Inc. (Turner Brothers) has appealed from a decision of Administrative Law Judge Frederick A. Miller, dated February 19, 1985, sustaining the issuance of Notice of Violation (NOV) No. 84-3-11-2 and Cessation Order (CO) No. 84-3-11-4. For reasons set forth below, we reverse.

On November 30, 1983, officials from the Office of Surface Mining Reclamation and Enforcement (OSMRE), and the Oklahoma Department of Mines (ODOM) jointly inspected the Porter Mine No. 2, in Wagoner County, Oklahoma. This mine was operating under State permit 82/87-4037. In the course of this joint investigation, sedimentation pond No. 1 was observed discharging water containing iron at levels above those permitted by the applicable standards (Tr. 12). More relevantly to the instant appeal, the inspectors also determined that the sedimentation pond, as constructed, did not accord with the specifications provided in the approved permit. See Exh. R-C. The permit required that sedimentation pond No. 1 be constructed as an excavation sediment pond whereas the inspectors concluded it had been constructed as an embankment pond. Pursuant to this joint investigation, State inspector A. J. Hartlein issued NOV No. 83-03-25, which noted a number of violations, including the failure to construct the sedimentation pond in accordance with the State permit. See Exh. R-G. Corrective action required under this NOV was the construction of the pond in accordance with the permit and certification by a certified professional engineer that the pond, as built, complied with the plan contained in the permit. Turner Brothers was given until January 5, 1984, to abate the State NOV.

Turner Brothers took no action on the ground to rectify the NOV. However, on January 4, 1984, it submitted a revision of the permit to allow construction of an embankment pond together with a certification that, under the revised plan, the pond, as built, conformed to the permit requirements. This revision was apparently received by ODOM on January 6, 1984. See Exh. R-I. In any event, on January 9, 1984, State inspector Hartlein issued CO No. 84-03-1 for failure to abate violation number one of NOV No. 83-03-25, which related to the failure to construct the sedimentation pond in accordance with the approved permit. This CO, however, did not require cessation of mining.

At about the same time, OSMRE received a citizen's complaint enumerating numerous alleged deficiencies in the Turner Brothers' operations, including the failure to provide an appropriate continuation of principal and emergency spillways at pond No. 1. See Exh R-E. Accordingly, on January 11, 1984, pursuant to section 521(a)(1) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1271(a)(1) (1982), OSMRE sent ODOM a Ten-Day Notice (TDN) covering the various points raised in the citizen's complaint.

Upon receiving the TDN, State inspector Hartlein again inspected the Porter Mine No. 2. On January 25, 1984, he issued another NOV for the sedimentation pond (NOV No. 84-03-15). This NOV was based on the failure to construct the sedimentation pond in the location specified in the approved mine plan. The corrective action specified was that the permittee construct the pond "in its proper location, as specified in mine plan map in conjunction with requirements of previous violations to build pond #1 according to plan in permit." Exh.R-F.

When OSMRE was apprised of the actions undertaken by ODOM pursuant to the TDN, it concluded that, at least insofar as sedimentation pond No. 1

was concerned, the action undertaken was not "appropriate." See 30 CFR 842.11(b)(ii)(B). Accordingly, a Federal inspection by OSMRE inspector Michael A. Lett was made on January 31, 1984. Pursuant to this inspection, NOV No. 84-3-11-2 was issued on February 2, 1984. This NOV also cited the failure to construct the pond in accordance with the approved permit design. The required corrective action was to construct the pond in accordance with the design and to submit certification to that effect.

At the same time that OSMRE was conducting this inspection, appellant was participating in a hearing on the State NOV before State Hearing Examiner John F. Percival. On February 17, 1984, the State Hearing Examiner rendered his decision. With reference to pond No. 1, the State Hearing Examiner made certain findings:

Sediment pond #1 is admittedly of embankment type construction. Operator has gone almost exclusively to construction of embankment type sediment ponds rather than excavation type construction due to requests from DOM that Operator provide computer [sic] analysis of sediment ponds. * * * Central to the rationale of changing from excavation to embankment type construction for sediment ponds was the necessity that the pond have a pipe spillway for a computer analysis to be done. Sediment pond #1 has no pipe spillway and is dewatered with a siphon hose rather than a pump.

In Hearing Examiner's order in AH 83-18 and consolidated cases, the Hearing Examiner concluded that the mere fact of embankment type construction of sediment ponds rather than excavation type construction of sediment ponds was not sufficient to establish a violation of the Act. This conclusion presupposes an embankment type pond built to standard. The evidence adduced raised serious questions as to whether sediment pond #1, the subject matter of NOV 83-03-25, violation 1 of 5, was built to standard.

In particular, the pond had no pipe spillway and was being dewatered through a siphon hose. The justification for going to an embankment type of construction given to the Hearing Examiner was [the] request of DOM to provide specific data based on a computer [sic] analysis which could only be done on an embankment type sediment pond with an elevated pipe spillway. There is no rational basis for applying this justification to sediment pond #1. Hearing Examiner concludes NOV 83-03-25, violation 1 of 5, should be sustained.

Exh. A-2 at 3-4, 9.

The responsible officials of OSMRE were apparently totally unaware of the above proceedings. On February 15, 1984, two days prior to the issuance of the State Hearing Examiner's decision, Lett reinspected the minesite. At

that time, Michael S. Roscoe, engineering manager for Turner Brothers, gave Lett a copy of the January 4 revision of the permit which Turner Brothers had submitted to ODOM. This was the first information concerning the proposed revision which OSMRE had received (Tr. 36). Lett then called James Hann of ODOM. In his inspection report, Lett related the substance of this conversation:

[Hann] confirmed that a revision had been submitted and received by the ODOM on January 6, 1984. He told me he had requested a statement of technical reasons for the empoundment change from Turner Brothers on January 15, 1984. He told me he had received no reply, and that he had rejected the revision as of today.

Exh. R-I.

Lett then visited the minesite and, upon discovering that the embankment pond had not been altered, issued CO 84-3-11-4. This CO, unlike the one issued by Hartlein, required the cessation of all mining activities within the surface drainage area served by sedimentation pond No. 1. The actual effect of this CO is open to some debate, since no actual surface mining was occurring within the drainage area. The drainage area did, however, contain a coal stockpile (Tr. 49).

On February 20, 1984, Roscoe wrote to ODOM noting that, after computer modeling, it had been determined that the sedimentation pond could be modified to accept a pipe and attached a schematic showing the proposed modification. 1/ At some point thereafter, appellant added the pipe to the pond (Tr. 92, 98). On March 5, 1984, OSMRE terminated its CO. In June 1984, ODOM terminated the NOV which it had issued subsequent to the citizen's complaint investigation. 2/

Turner Brothers filed applications for review of both the Federal NOV and CO. Before Judge Miller, appellant argued that OSMRE had no authority to issue the NOV because Oklahoma had assumed primary responsibility for the regulation of surface mining under section 503 of SMCRA, 30 U.S.C. § 1253 (1982). Moreover, appellant contended that, even assuming that OSMRE had authority to issue an NOV after a state had assumed primacy, this authority

1/ This document was not submitted at the hearing but rather was filed with Judge Miller after the close of the hearing by OSMRE. OSMRE justified this tardy filing on the ground that it had only recently discovered this letter in a different case file.

2/ On April 12, 1984, direct Federal enforcement of the approved Oklahoma regulatory program was substituted for enforcement by ODOM. See 49 FR 14688 (Apr. 12, 1984). While ODOM was granted authority to take administrative enforcement actions to bring outstanding violations to a final disposition, the regulations further provided that "any termination or vacation of enforcement actions by ODOM shall not take effect until approved by OSM." 30 CFR 936.17(a) (1985).

was improperly exercised in the instant case since the State's response was "appropriate." Turner Brothers also argued that OSMRE had failed to establish that the sedimentation pond was, in fact, an embankment rather than an excavation pond and, thus, had not established the fact of the violation.

In his decision, Judge Miller rejected all three contentions. First, he noted that Turner Brothers had clearly misinterpreted the applicable regulations. Thus, he noted that under 43 CFR 4.1171, while OSMRE had the obligation of establishing a prima facie case, the regulation expressly provided that "the ultimate burden of persuasion shall rest with the applicant for review." Judge Miller held that the evidence clearly established the fact of the violation (Dec. at 6). Judge Miller rejected appellant's argument that OSMRE lacked jurisdiction and also held that OSMRE was justified in concluding that the State's response to the TDN was not "appropriate," since it had failed to result in remedial action by the permittee. Accordingly, he affirmed NOV No. 84-3-11-2 and CO No. 84-3-11-4.

On appeal, Turner Brothers reiterates its arguments that Judge Miller erred in holding that OSMRE properly had jurisdiction to cite it for any violation or that, even assuming it had jurisdiction, that OSMRE correctly concluded that the State's response was not "appropriate." Additionally, appellant contends that it has, in essence, been subjected to double jeopardy, in that the same violation which served as the basis for the issuance of the State NOV's and CO also was the predicate for OSMRE's NOV and CO.

[1] Appellant suggests that OSMRE lacked jurisdiction to issue any NOV because of the ongoing State enforcement proceedings. It relies on various decisions of this Board and the Interior Board of Surface Mining Appeals (IBSMA), which have held that upon the filing of a proper notice of appeal, the constituent agencies of this Department lose jurisdiction to act on the subject matter of the case until such time as action is taken by the appellate body to restore jurisdiction to the agency. *See, e.g., Apache Mining Co.*, 1 IBSMA 14, 85 I.D. 395 (1978); *Utah Power & Light Co.*, 14 IBLA 372 (1974). Appellant recognizes that these cases are not directly on point but argues that the rationale for the rule (the avoidance of adjudicatory chaos) should apply in the instant case, to prevent OSMRE from taking enforcement action, where the mining permittee is in the process of pursuing an appeal within the State of State enforcement actions arising from the exact same alleged violation.

The main problem with appellant's argument on this point is that, as a matter of jurisdiction, the pendency of State enforcement activity is irrelevant to the exercise of Federal oversight authority. While it is true that, where an approved program is in-place, the state has primary responsibility in enforcement, the Federal oversight role must operate to allow OSMRE, in the appropriate circumstances, to intervene even where state enforcement activities are ongoing. *See generally Bernos Coal Co. v. OSMRE*, 97 IBLA 287 (1987). Thus, the mere fact that an operator is pursuing administrative

appeals from state enforcement activities cannot act as a jurisdictional bar to the exercise of Federal oversight responsibilities. This does not mean, however, that the pendency of such proceedings is irrelevant. On the contrary, we believe that the existence of ongoing state enforcement action is properly considered in whether the state response is "appropriate" where OSMRE has issued a TDN.

As we noted in our recent decision in Turner Brothers, Inc. v. OSMRE, 92 IBLA 320 (1986), the meaning of the phrase "appropriate action" in 30 CFR 842.12(a)(2) is defined neither in SMCRA nor in the regulations promulgated thereunder. Id. at 323. We pointed out, however, that in promulgating these regulations, the Department declared that "[t]he crucial response of a state is to take whatever enforcement action is necessary to secure abatement of the violation." 47 FR 35627-28 (Aug. 16, 1982). Thus, we concluded in Turner Brothers that

use of the word "appropriate" requires OSM to exercise its discretion in determining whether the state's response to its 10-day notice is such that OSM must reinspect the site of the violation and issue either an NOV or a CO, depending upon the circumstances. We further find that OSM, in evaluating the state's response to a 10-day notice, must determine whether the response is calculated to secure abatement of the violation. See Thomas J. Fitzgerald, 88 IBLA 24, 29 (1985).

Id.

It is clear that OSMRE was unaware of the fact that appellant was pursuing State appeals during the period of time that it was issuing its NOV and CO. Indeed, Judge Miller expressly found that "[n]either the applicant nor ODOM informed OSM of the State administrative hearing after the ten day notice" (Dec. at 6). It may well be that, based on the information then known to it, OSMRE correctly concluded that the State's response to the citizen's complaint was not "appropriate." But, as has been noted, while, as an initial matter, the decision as to the appropriateness of the State's response to a TDN must be based on the information proceeds through time it makes its decision, as review of this determination proceeds through the administrative process that review must take into consideration all information which has subsequently become available. See Donald St. Clair, 77 IBLA 283, 308-12, 90 I.D. 496, 509-10 (1983) (concurring opinion).

In the instant case, ODOM had commenced its enforcement activities on November 30, 1983, with issuance of NOV No. 83-03-25. When Turner Brothers failed to take the requisite abatement action, ODOM proceeded to issue CO No. 84-03-1 on January 9, 1984. In the interim, on January 6, 1984, Turner Brothers had filed a revision of its permit to allow construction of the embankment pond. It had also appealed the State NOV. When ODOM received the TDN from OSMRE in mid-January, it again inspected the site and issued another NOV on January 25, 1984. Six days later, a hearing was held before

a State Hearing Examiner on the original NOV. Approximately two weeks after the hearing, the Hearing Examiner affirmed the NOV and assessed \$ 1,300 in civil penalties therefor. In his decision, the State Hearing Examiner expressly alluded to the lack of a pipe spillway. Four days after the issuance of this decision, Turner Brothers submitted a new revision expressly incorporating a pipe spillway and soon thereafter added the pipe spillway to its embankment structure. Based on these on-the-ground changes and the certification of them, OSMRE ultimately terminated its own NOV and CO.

The foregoing facts stand in stark contrast to the situation which the Board reviewed in Turner Brothers v. OSMRE, supra. In that case, which also involved a sedimentation pond, the State had become aware of certain problems and issued an NOV on January 4, 1983. Over a year passed and no action was taken to abate this violation. Upon receipt of a citizen's complaint, OSMRE issued a TDN to ODOM which reinspected and issued another NOV. When informed of this action, OSMRE decided it was inappropriate and conducted a Federal inspection which ultimately generated both an NOV and a CO.

In its review of the evidence, the Board concluded that it seemed likely that the OSMRE determination as to the appropriateness of the State response may have been based on a factual misapprehension on the part of OSMRE. Nevertheless, based on the facts disclosed at the hearing, the Board affirmed the determination that the State's response was not "appropriate," noting that "although ODOM had been aware of the problem with the pond for over a year, [it] had not succeeded in abating the violation." Id. at 324.

In the present case, on the other hand, the record developed at the hearing shows an ongoing effort on the part of ODOM to rectify a violation. Nothing in the record indicates that enforcement activities were not proceeding apace. Moreover, it seems relatively clear that the actions ultimately undertaken to achieve abatement were generated by the State enforcement proceedings.

In his testimony, Lett placed much emphasis on the fact that the CO which ODOM had issued did not require cessation of operations within the drainage area served by the pond. This fact would have more force if, indeed, Turner Brothers had been conducting actual mining operations within the area, which would have been interdicted by the issuance of a CO requiring cessation of operations. Since, however, Turner Brothers was not conducting actual mining operations, the failure of the State CO to order a cessation of such operations becomes a matter of less than monumental import.

Based on our review of the record, we must conclude that the State's response to the TDN directed to the sedimentation pond was "appropriate," and, therefore, Federal enforcement was unjustified. It follows, therefore, that the OSMRE enforcement action should be vacated. In light of this conclusion, we do not reach appellant's argument concerning double jeopardy.

Accordingly, 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 Frederick A. Miller is reversed and NOV No. 84-3-11-2 and CO No. 84-3-11-4 are vacated.

James L. Burski
Administrative Judge

We concur:

John H. Kelly
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge