

TENNESSEE CONSOLIDATED COAL CO.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 85-351

Decided October 20, 1987

Appeal from a decision of Administrative Law Judge David Torbett holding Walnut Coal Company solely responsible for liability for Notice of Violation No. 81-2-35-3. NX 1-87-R, NX 1-147-P.

Appeal dismissed.

1. Surface Mining Control and Reclamation Act of 1977: Appeals:  
Generally -- Rules of Practice: Appeals: Generally

Where an appeal to the Board constitutes, in essence, a request for an advisory opinion, the appeal will be dismissed.

APPEARANCES: Michael W. Boehm, Esq., Chattanooga, Tennessee, for Tennessee Consolidated Coal Company; Susan Hoven, Esq., Office of the Solicitor, U.S. Department of the Interior, and Harold P. Quinn, Jr., Esq., Assistant Solicitor, Litigation and Enforcement, Division of Surface Mining, U.S. Department of the Interior, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE BURSKI

The Office of Surface Mining Reclamation and Enforcement (OSMRE) appeals from a decision of Administrative Law Judge David Torbett, dated January 8, 1985, to the extent that he held that Tennessee Consolidated Coal Company (TCC) was not jointly and severally liable with Walnut Coal Company (Walnut) for Notice of Violation (NOV) No. 81-2-35-3, issued March 24, 1981, at Kelley Creek mine No. 25 located in Sequatchie County, Tennessee. TCC is the owner of mine No. 25 and Walnut is the lessee.

The NOV was initially issued to TCC for a violation of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. §§ 1201-1328 (1982). OSMRE charged TCC with failure to meet minimum numerical effluent limitations on discharges from areas disturbed by underground and surface operations at the mine. The citation was subsequently modified by substituting Walnut for TCC. Later the NOV was again modified to cite TCC in addition to Walnut as the permittee/operator.

The NOV was issued as a result of an OSMRE inspection of the site on February 13, 1981. On that date, OSMRE inspectors Douglas J. Godesky and David Walker, on a helicopter overflight of the area, observed a sediment-laden discharge originating in a sedimentation pond associated with mine No. 25 of the Kelley Creek mining complex. The OSMRE officials landed the helicopter in the vicinity of the mine and inspected the site, taking photographs of the area and water samples from the pond and the adjacent stream into which the discharge had been observed flowing.

TCC and Walnut filed an application for review of NOV No. 81-2-35-3 with the Hearings Division, Office of Hearings and Appeals, pursuant to 43 CFR 4.1160, where it was docketed as NX-1-87-R. In the interim, OSMRE issued a proposed civil penalty assessment of \$2,900 against TCC. After the assessment conference, this was modified to assess the penalty of \$2,900 jointly against both TCC and Walnut. A petition for review of the proposed civil penalty was also filed (NX 1-147-P). The petition and application for review were consolidated for hearing by Judge Torbett. Following a hearing, he affirmed the validity of the NOV as to Walnut, as well as the civil penalty assessment, but he dismissed the NOV with respect to TCC, rejecting OSMRE's argument that TCC and Walnut should be jointly and severally liable for the NOV.

OSMRE has appealed Judge Torbett's decision to this Board. OSMRE argues that the record establishes that Walnut was merely a nominal permittee and that TCC, which had control over the operations, should be held equally liable. OSMRE also argues that TCC is an "operator" within the meaning of section 701(13) of SMCRA 30 U.S.C. § 1291(13) (1982), and as an operator is subject to liability for the violations reported in the subject NOV. In support of its contention that Walnut and TCC are jointly and severally liable for the NOV, OSMRE cites S & M Coal Co. & Jewell Smokeless Coal Co., 79 IBLA 350 (1984). OSMRE contends that in the instant case, as in S & M, the evidence established that the lessor (TCC) had actual day-to-day control over the lessee's Walnut mining operations, as well as capacity to exercise control over the operations, since TCC owns 60% of Walnut's stock and controls the access to the Kelly Creek mining complex.

TCC generally disputes OSMRE's contention, arguing that majority stock ownership per se does not make the stockholder liable for the acts of a corporation. TCC contends that S & M is inapplicable because, unlike the situation involved in S & M where there was no permit, Walnut has declared it is the permittee, fulfilled all of its responsibilities for compliance with the standards, abated the violation, and paid the assessed penalty.

It is clear that the sole issue raised by this appeal is whether or not Judge Torbett erred in dismissing the NOV insofar as TCC was concerned. We decline to examine this question, however, because, as we shall explain, we view it as essentially a request for an advisory opinion. See Lenard D. Easterday, 51 IBLA 132, 138-39 n.6 (1980). Certain facts are critical to our determination.

First of all, the decision of Judge Torbett affirmed issuance of the NOV and the assessment of the \$2,900 originally levied by OSMRE. 1/ Walnut had prepaid this amount and, thus, there is no outstanding debt to be collected. Moreover, the violation of the minimum numerical effluent limitations was rectified while the OSMRE inspectors were present and a termination of the NOV was thereafter issued (Tr. 97; Exh. 16). Thus, we are not faced with a situation where a bankrupt "nominal" permittee is unable to pay a civil penalty or where such a permittee refuses to correct an on-going problem. Instead, we have a situation where the purposes of SMCRA have been fulfilled: a violation was properly cited, it was corrected, an appropriate civil penalty was assessed and it was collected. We fail to see how consideration of whether or not TCC was properly dismissed from the proceeding advances the purposes of SMCRA insofar as the instant NOV and civil penalty proceeding is concerned.

Nor can we discern how such a determination in this case would affect future adjudications under SMCRA with reference to this minesite. We recognize that section 518(a) of SMCRA, 30 U.S.C. § 1268(a) (1982), requires consideration of the "permittee's history of previous violations at the particular surface coal mining operation" in assessing the appropriate civil penalty. 2/ But, absent an indication that Walnut will cease to be the permittee at this site, any future assessment for violations at mine No. 25 will necessarily take into consideration NOV No. 81-2-35-3. If, in the future, a different permittee at the same site were determined to have violated provisions of SMCRA, that would be the time to examine any question as to whether the permittees were merely nominal in nature such that TCC was properly charged with both present and past violations for the purpose of computation of civil penalties.

We also recognize that section 510(c), 30 U.S.C. § 1260(c) (1982), requires an applicant for a permit to list violations incurred by the applicant during the 3-year period prior to the date of application, and that 30 CFR 778.14(c) requires this list for all violation notices received by any subsidiary, affiliate, or persons controlled by or under common control with the applicant as well. Further, section 510(c) precludes issuance of a permit to an applicant if any surface coal mining operation owned or controlled by the applicant is currently in violation of the Act or other laws referred to in section 510(c). See 30 CFR 773.15(b)(1). In this case, however, the violation was both incurred and terminated in March 1981, so neither of these provisions could have been invoked even by the time of the hearing in June 1984.

In light of these considerations, we can see no utility in proceeding to examine the contentions made by OSMRE in the present appeal. Accordingly, we hereby dismiss the instant appeal. Our action, however, should not be

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1/ In this regard, we note that while counsel for OSMRE argued in its brief after the hearing that OSMRE's assessment was too low and that a proper computation of the various factors would increase the civil penalty to \$3,500, Judge Torbett rejected this contention in his decision and OSMRE has not pursued this matter on appeal.

2/ Thus, 30 CFR 723.13(b)(1) provides, inter alia, that "[t]he history of previous violations for the purpose of assigning points shall be determined and the points assigned with respect to a particular surface coal mining operation."

construed as either an endorsement or rejection of the analysis contained in Judge Torbett's decision below.

Therefore, in accordance with the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the appeal is dismissed.

James L. Burski  
Administrative Judge

We concur:

Gail M. Frazier  
Administrative Judge

Will A. Irwin  
Administrative Judge

