

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 86-594

Decided March 21, 1988

Appeal from a decision of Administrative Law Judge Frederick A. Miller, affirming the issuance of Notice of Violation No. 85-03-006-005. TU 5-48-R.

Affirmed.

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

The Federal Register notice (49 FR 14674 (Apr. 12, 1984)) of the Secretary's decision to initiate Federal enforcement of the approved Oklahoma regulatory program effective Apr. 30, 1984, was in compliance with sec. 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982), which notice provision supersedes the more general rulemaking requirements of the Administrative Procedure Act.

2. Surface Mining Control and Reclamation Act of 1977: Permits: Modifications--Surface Mining Control and Reclamation Act of 1977: Permits: Revisions--Surface Mining Control and Reclamation Act of 1977: Variances and Exemptions: Generally

In enforcing SMCRA and the regulations promulgated pursuant thereto, OSMRE is entitled to rely upon the permit package for terms and conditions under which mining and reclamation have been approved. An operator must obtain a variance or amendment of the permit before engaging in conduct that would otherwise violate the terms of the permit and/or the regulations.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Marshall C. Stranburg, Esq., Office of the Regional Solicitor, Tulsa, Oklahoma, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE GRANT

Turner Brothers, Inc. (Turner), has appealed a decision of Administrative Law Judge Frederick A. Miller, dated February 19, 1986, Docket No. 5-48-R. The decision affirmed the issuance of Notice of Violation (NOV) No. 85-03-006-005, and found that the Office of Surface Mining Reclamation and Enforcement (OSMRE) properly exercised jurisdiction over Turner's Welch No. 1B mine in Craig County, Oklahoma.

OSMRE issued the NOV on January 11, 1985. The NOV cited Turner for failing "to comply with the terms and conditions of the permit and the requirements of the Act and these regulations" and referred to 30 CFR 936 and to Oklahoma Permanent Regulatory Program Regulation (OPRPR) 771.19 as the provisions violated. Appellant was cited for an abandoned pit observed in the southwest corner of the Welch No. 1B mine (Oklahoma State permit No. 84/86-4090) during an inspection conducted on January 8, 1985, by OSMRE Inspector Joseph Funk.

On February 7, 1985, Turner filed an application for review of the NOV denying any violation of 30 CFR 936 or OPRPR 771.19 and requesting an evidentiary hearing. A hearing was held before Judge Miller in Tulsa, Oklahoma, on September 18, 1985, at which time, as a preliminary matter, Turner objected to Judge Miller's jurisdiction to hear the case and to OSMRE's jurisdiction to issue the NOV (Tr. 3-4).

Judge Miller found that OSMRE had jurisdiction to issue the NOV in question and, further, found the evidence supported the existence of the violation for which Turner was cited:

TBI [Turner Brothers Inc.] proposed and agreed in its permit to backfill and grade within two (2) pits of the active pit on this permit. TBI cannot unilaterally decide to conduct operations that are not in conformance with its approved permit. OPRPR Section 771.19 requires TBI to "conduct surface coal mining and reclamation operations under permits issued pursuant to these regulations and [to] comply with the terms and conditions of the permit" Until TBI receives an approved permit revision from the Oklahoma Department of Mines (ODOM), the state regulatory authority for permitting, TBI is under the duty to conduct operations in accord with the terms and conditions of its approved permit. B & J Excavating Co. v. OSM, 89 IBLA 129 (September 30, 1985).

TBI presented testimony that it had submitted a permit revision to ODOM concerning the area surrounding the open pit. The revision, however, was not approved before Notice of Violation No. 85-03-006-005 was issued (Tr. 17, 22-23). An unquestionable principle of surface mining laws and regulations is that a permittee shall comply with the terms and conditions of its approved permit until such time that a revision is approved by the appropriate regulatory authority. Therefore, when TBI went ahead and conducted operations that were not in conformance with

its approved permit (the failure to backfill and grade within two (2) pits of the active pit), TBI exposed itself to liability.

TBI also presented testimony that tended to show that a great expenditure of time, money and resources would result if TBI had to fill the open pit and then reopen a pit in that area when TBI received approval of its permit revision. This testimony, however, does not rebut the fact that TBI failed to follow the terms and conditions of its approved permit, and assumes that the permit revision will be granted. However, it may not be. In any event, the circumstances TBI finds itself in are a result of its own poor planning, which has led it to violate the law.

TBI argues that OSM should have delayed issuing the notice of violation until ODOM had taken action on the revision application. However, there was no indication of when the revision would be approved due to deficiencies in the application submitted by TBI. Because of these deficiencies, TBI had to respond on four occasions to notices from ODOM for additional information. TBI clearly was not diligent and complete in its efforts to obtain a permit revision and may not avoid liability for its actions on this basis.

TBI further argues that in order to uphold this violation the pit must be classified as abandoned. That is simply not the case. Regardless of what Inspector Funk called the pit i.e. abandoned, delinquent, open, etc., the un rebutted facts show that TBI was not following the terms and conditions of its permit. Therefore, OSM properly issued Notice of Violation No. 85-03-006-005 for a violation of OPRPR Section 771.19 because TBI failed to comply with the terms and conditions of its permit.

(Decision at 3).

In the statement of reasons for appeal, Turner argues that the Office of Hearings and Appeals (OHA) has no jurisdiction to hear the case because of OSMRE's failure to comply with the Federal Administrative Procedure Act (APA) when attempting to exercise authority over Oklahoma's surface mining regulatory program in direct contravention, appellant asserts, of 5 U.S.C. | 553(d) (1982). Turner maintains that on April 12, 1984, respondent caused to be published in the Federal Register a final rule providing for the Federal takeover of the Oklahoma surface mining regulatory program, with a stated effective date of April 30, 1984. Appellant contends this rulemaking violated the APA which requires a hiatus of 30 days between the publication date and the effective date of the rule. Therefore, appellant concludes the final rule is void, leaving OHA without jurisdiction to review the instant case. Applying the same theory, appellant further concludes that OSMRE lacked the necessary authority to issue the January 11, 1985, NOV.

With respect to the issue of a violation of the mining permit, appellant asserts it was in compliance with the permit terms because the pit for

which it was cited was not abandoned. Rather, appellant contends, it was still an active pit in that appellant planned to mine additional coal from the pit upon approval of the amendment of the permit requested from ODOM which would enlarge the boundaries to permit mining of coal on adjacent lands.

In its brief to the Board, OSMRE responds that Turner cannot now properly challenge OSMRE's implementation of direct Federal enforcement for portions of Oklahoma's program. Respondent argues the proper procedure for challenging OSMRE's preemption is found 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:

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

In addition to arguing that appellant has challenged the Federal assumption of enforcement responsibility in the wrong forum, OSMRE contends that proper procedures for Federal assumption of enforcement responsibility are set forth in SMCRA, that the Department has complied with these requirements, and that the 30-day notice requirements of the APA do not apply to this procedure.

Regarding the issue of the violation of the terms of the mining permit, OSMRE asserts it is clear from the evidence that appellant violated the permit terms by failing to backfill and regrade within two pits of the active pit. Regardless of the pending application to amend the permit, OSMRE asserts appellant was obligated to mine in accordance with its permit terms in the interim.

[1] In reviewing the jurisdictional argument, we note that this issue has been addressed by the Board in the context of several other appeals emanating from Federal enforcement of the Oklahoma program. In one recent case, the Board summarized our past holdings:

Turner Brothers' arguments regarding jurisdiction and OSMRE's response thereto are identical to those addressed by this Board in Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986) (Turner Brothers I). Therein we held that "the notice OSM published in the Federal Register on April 12, 1984, [1/] constituted adequate public notice

1/ 49 FR 14674 (Apr. 12, 1984).

for the beginning of Federal enforcement pursuant to section 1271(b) of SMCRA." [2/] Id. at 388.

Moreover, as we noted in Turner Brothers, Inc. v. OSMRE, 98 IBLA 395 (1987) (Turner Brothers II), this issue was also addressed by the United States District Court in Oklahoma v. Hodel, Civ. No. CIV-84-1202-A (W.D. Okla. Dec. 3, 1985). In rejecting an identical challenge to the assumption of direct Federal enforcement by OSMRE, the court declared that the "self-contained administrative provisions in SMCRA govern this case, overriding [the] APA" and held that OSMRE had properly followed the procedures set forth in 30 U.S.C. | 1271(b) (1982). Turner Brothers' jurisdictional argument must be rejected.

Turner Brothers, Inc. v. OSMRE, 99 IBLA 349, 351 (1987).

We therefore reject the argument that OSMRE was not authorized to issue Turner this NOV and that OHA is without jurisdiction to hear Turner's appeal.

[2] With respect to the question of whether the evidence of record sustains the NOV, we note that Joseph Funk, the OSMRE inspector, testified that at the time of his January 8, 1985, inspection of the mine, the active mining area was more than two pits away from the abandoned pit which was the

2/ Section 521(b) of SMCRA, 30 U.S.C. | 1271(b) (1982), 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."

subject of the citation (Tr. 13-14; Exh. R-4). ^{3/} The provisions of the approved mine permit relating to reclamation introduced into evidence at the hearing require backfilling and spoil grading to be accomplished within two pits of the active pit (Exh. R-3; Tr. 11). Inspector Funk further testified that no revision of the permit had been approved at the time of his inspection (Tr. 17).

Gregory Govier, chief mining engineer employed by Turner, explained in his testimony that the abandoned pit was left to facilitate mining a new area adjacent to the permit boundary to be included in the amended permit (Tr. 21). Although the permit revision was applied for in September 1984, it was not approved by ODOM until April 4, 1985 (Tr. 22). The delay was apparently caused by several deficiencies in the application which necessitated additional information from appellant (Tr. 26).

The evidence clearly sustains the existence of the violation, as the Administrative Law Judge found. Notwithstanding appellant's intent to utilize the pit to facilitate mining on adjacent lands upon approval of the permit boundary change, the abandoned pit was clearly situated more than two pits away from the active pit at the time of the inspection. In enforcing SMCRA, OSMRE is entitled to rely on the permit package as evidence of the conditions under which mining and reclamation have been approved and an operator's failure to obtain written documentation of permit changes from a State regulatory agency exposes a permittee to liability under the Act. Rith Energy, Inc., 101 IBLA 190, 194 (1988); Turner Brothers, Inc. v. OSMRE, 92 IBLA 381 (1986). An operator must obtain a variance before engaging in conduct that would otherwise violate the surface mining regulations. B & J Excavating Co. v. OSMRE, 89 IBLA 129, 135 (1985); see Hardly Able Coal Co., 2 IBSMA 270, 87 I.D. 434 (1980); Carbon Fuel Co., 1 IBSMA 253, 86 I.D. 483 (1979). Accordingly, we must uphold issuance of the NOV in this case.

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.

C. Randall Grant, Jr.
Administrative Judge

We concur:

Bruce R. Harris Will A. Irwin
Administrative Judge

Administrative Judge

^{3/} Inspector Funk testified that an "active pit" was one in which equipment was still working, *i.e.*, removing coal, removing overburden, or backfilling (Tr. 16).