

TURNER BROTHERS, INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 87-273

Decided February 13, 1989

Appeal from a decision of Administrative Law Judge Frederick A. Miller affirming issuance of a notice of violation and a cessation order. TU 5-77-R (NOV No. 85-03-006-026), TU 5-83-R (CO No. 85-03-006-011).

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977: Abatement: Generally--Surface Mining Control and Reclamation Act of 1977: Backfilling and Grading Requirements: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally

OSMRE may properly refuse to grant a request for an extension of time to abate a violation for failure to stabilize rills and gullies where the evidence shows that the failure to abate was a result of the permittee's lack of diligence in arranging for the necessary work to be completed during the abatement period, rather than due to adverse climatological conditions.

APPEARANCES: Mark Secrest, Esq., Muskogee, Oklahoma, for appellant; Angela F. O'Connell, 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 HARRIS

Turner Brothers, Inc. (TBI), has appealed from a decision of Administrative Law Judge Frederick A. Miller, dated January 1, 1987, affirming issuance of notice of violation (NOV) No. 85-03-006-026 and cessation order (CO) No. 85-03-006-011 by the Office of Surface Mining Reclamation and Enforcement (OSMRE) with respect to reclamation activities at the Muskogee No. 2 mine (State permit No. 80/81-3075) situated in Muskogee County, Oklahoma.

OSMRE inspector Joe C. Funk issued the NOV following his May 6, 1985, inspection of the Muskogee No. 2 mine. The NOV cited TBI for failure to "fill, grade, or otherwise stabilize rills and gullies on the regraded and topsoiled areas," in violation of 30 CFR 715.14(i), and required TBI to fill, grade, and adequately stabilize all rills and gullies by June 16, 1985 (Exh. R-4). Funk reinspected TBI's minesite on June 17, 1985. On June 20, 1985, TBI was served with the CO for failure to abate the violation cited in the NOV. At the time of issuance of the NOV and CO, OSMRE had assumed direct Federal enforcement of the State surface mining regulatory program. See 49 FR 14674 (Apr. 12, 1984).

TBI filed timely applications for review of the NOV and CO and the cases were consolidated for hearing. On October 28, 1986, Judge Miller held the hearing and in his January 1987 decision, he concluded that OSMRE properly issued the citations. TBI has appealed from that decision.

The first argument raised by appellant on appeal is that OSMRE lacked jurisdiction to issue the NOV and CO because when OSMRE assumed primary enforcement jurisdiction of surface coal mining operations in Oklahoma, it did not allow for proper notice under the Administrative Procedure Act, 5 U.S.C. | 553(d) (1982). This argument has been considered and rejected on numerous occasions by this Board. E.g., Turner Brothers, Inc. v. OSMRE, 103 IBLA 10, 12 (1988), and cases cited therein. We reject it again.

Appellant next contends that Judge Miller improperly sustained issuance of the NOV and CO because OSMRE cited it with a violation of initial program regulations which were never properly adopted by the State of Oklahoma and were therefore not in effect at the time of issuance of the NOV and CO. In Turner Brothers, Inc. v. OSMRE, supra, appellant raised the identical argument. That case involved enforcement action at the same minesite (Muskogee No. 2 mine) and under the same permit (No. 80/81-3075) as in the present appeal. We concluded in that case that appellant's operations were, at the time of the issuance of the NOV (October 1984), subject to the Department's initial program regulations. 103 IBLA at 16. The same conclusion obtains in this case, and we adopt the rationale set forth in 103 IBLA at 12-16.

[1] On appeal, appellant does not challenge the fact of the violation cited in the NOV or the fact that it failed to abate the violation by June 16, 1985, the final date for abatement set in the NOV. Rather, appellant's only contention is that the CO was improperly issued because the OSMRE inspector abused his discretion in failing to extend the time for abatement beyond June 16, 1985.

The record indicates that appellant requested a 30-day extension of time for abatement of the violation by letter dated June 14, 1985, received by OSMRE on June 17, 1985 (See Tr. 28). That letter stated in pertinent part:

Due to the tremendous amount of rain received during the past month, our equipment for abating alleged violations has fallen behind schedule. As of this date, we have not been able to

schedule equipment on the above named permit, due to other alleged violations needing abatement. Therefore, we are requesting a 30-day extension to abate the above named violation.

(Exh. A-1).

The OSMRE inspector testified that he had received the extension request at the time he issued the CO, but did not grant the request because the request came after the abatement date; ground conditions during the abatement period were "dry enough to have been able to be working on the gullies;" and the gullies were "eroding so fast that I didn't want to give them anymore than five weeks in order to start working on the problem" (Tr. 28).

Departmental regulation 30 CFR 722.12(b) provides that OSMRE "may extend the time to abate a violation by written notice if the failure to abate within the time set was not caused by the permittee's lack of diligence." (Emphasis added.) This regulation indicates that OSMRE may extend the time for abatement either upon request by the permittee or upon its own motion where the failure to abate has not been caused by the permittee's lack of diligence. ^{1/} Thus, the question in this case is whether the failure to abate was due to a lack of diligence on the part of appellant. We find that it was.

Appellant contends that its failure to abate was caused by the fact that there were "heavy rains * * * throughout the abatement period" which prevented it from moving the necessary equipment onto the permit area (Statement of Reasons (SOR) at 14). At the hearing, appellant introduced into evidence reports of climatological data compiled by the National Climatic Data Center of the National Oceanic and Atmospheric Administration, U.S. Department of Commerce. Two of those reports contained daily precipitation figures for the months of May and June 1985, for Muskogee, Oklahoma, which is situated 1 to 2 miles from the permit area (Tr. 44; Exhs. A-4 and A-5).

Appellant claims that, based on the data from May 7 through June 16, 1985, there were 15 days with recorded precipitation totalling nearly 9 inches and that there never was dry weather "for more than six days" (SOR at 10). However, examination of the data reveals that while

^{1/} Given our result in this case, we need not decide whether the OSMRE inspector properly relied in part, in denying the request, on the fact that the request was filed the day after the abatement period ended, where the last day for abatement was a Sunday, and appellant filed the request for extension on Monday. We note, however, that the Interior Board of Surface Mining and Reclamation Appeals ruled that OSMRE did not abuse its discretion in denying a request filed after the expiration of the abatement period. White Winter Coals, Inc., 1 IBSMA 305, 314, 86 I.D. 675, 679 (1979), aff'd, No. 3-80-3 (E.D. Tenn. Apr. 3, 1980); see also Apex Co., 4 IBSMA 19, 27, 89 I.D. 87, 91 (1982).

there clearly were heavy rains during the month of June 1985, 2/ in which there were 16 days available for abating the violation, precipitation during May 1985 was not "heavy." In fact, during the 25 days in May 1985 in which abatement could have been undertaken, a total of only 2.68 inches of precipitation were recorded (Exh. A-4). In addition, appellant's exhibit A-6 shows that the total recorded precipitation for Muskogee for May 1985 was 2.73 inches, which was 2.30 inches less than normal. Despite this fact, there is no evidence that appellant took any action in May 1985 to abate the violation. The climatological data submitted by appellant does not support its claim that it could not at any time during the abatement period move the necessary equipment onto the site to correct the conditions causing the violation.

Further, while the OSMRE inspector admitted that he did not inspect the permit area during the abatement period, he based his conclusion that the ground was dry enough to permit abatement work on inspections of other minesites operated by appellant in that area (Tr. 29, 66-67). In rebuttal, appellant presented no evidence regarding actual ground conditions on the permit area or any of appellant's other minesites in the area during the abatement period. Rather, appellant relied on the testimony of Gregory G. Govier, formerly appellant's chief mining engineer, who, when asked whether appellant could have abated the violation prior to expiration of the abatement period, considering the rain, replied: "No, sir, I do not believe we could have" (Tr. 55; see SOR at 11; Tr. 48, 52).

The testimony of the OSMRE inspector is sufficient to support the conclusion that actual ground conditions on the permit area were not such as to preclude abatement work, where his testimony was based on direct observation of the condition of neighboring sites during the relevant time period. Appellant failed to overcome the evidence presented by OSMRE. Moreover, as OSMRE points out on appeal, appellant premised its extension request on the fact that it had fallen behind in its abatement because its equipment was being utilized on these other sites. Thus, it appears that appellant could have performed the abatement at the site in question, but chose to work at other locations. The consequences of that choice must be borne by appellant.

All the above establishes that appellant's failure to abate was, in fact, caused by appellant's lack of diligence in arranging for prompt abatement of the cited violation during periods of time when abatement work could have been performed. Thus, a vital prerequisite to the exercise of OSMRE's discretionary authority under 30 CFR 722.12(b) is absent. Accordingly, we affirm Judge Miller's conclusion, in his decision, at pages 4 and 5, that the OSMRE inspector properly determined that appellant "could have performed the reclamation work in a timely manner" and that the inspector "did not abuse his discretion by failing to grant an extension."

2/ During the first 16 days in June 1985, the data shows precipitation on 8 of those days totalling 6.16 inches (Exh. A-5).

Therefore, 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.

Bruce R. Harris
Administrative Judge

I concur:

Anita Vogt
Administrative Judge
Alternate Member