

INTERSOUTH MINERAL CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT (APPELLANT)

IBLA 89-248

Decided february 14, 1991

Petition for discretionary review of decision of Administrative Law Judge David Torbett vacating civil penalty assessment. NX 7-30-P.

Affirmed as modified.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally--Surface Mining Control and Reclamation Act of 1977: Notices of Violation: Generally

In a proceeding concerning a petition for review of a proposed civil penalty, the issue of the validity of the underlying notice of violation may be raised. In such proceeding, the burden of going forward to establish a prima facie case that the violation occurred as alleged rests with OSM. The ultimate burden of persuasion to show that no violation occurred rests with the petitioner for review.

2. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof--Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally--Surface Mining Control and Reclamation Act of 1977: Evidence: Generally

In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. OSM must establish the basis for determination of the appropriate civil penalty charged an operator for allowing gullies to develop in an access road, including the basis for its implicit conclusion that existence of gullies is likely to endanger either use of the roadway or the surrounding land. Where the sum of the evidence reveals only that the gullies temporarily affected access along a small portion of the access road, and where there is no evidence that the gullies threatened adjacent land, OSM's conclusion and its accompanying assignment of 11 points for the seriousness of the violation are properly set aside.

3. Surface Mining Control and Reclamation Act of 1977: Civil Penalties: Generally

The Board of Land Appeals may direct OSM to waive a civil penalty where the total of penalty points properly assessed was 30 or less and no cessation order was issued. The Board will so direct where only a single, isolated violation is involved; where there is an absence of proof of any substantial harm from the violation, either on- or off-site; and where the record shows that the operator abated the violation as soon as practical.

APPEARANCES: Charles R. Miller, Jr., Esq., Intersouth Mineral Co., Inc., for appellant; David B. Parks, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

By order dated June 29, 1989, we granted a petition for discretionary review filed by the Office of Surface Mining Reclamation and Enforcement (OSM), from the August 31, 1988, decision of Administrative Law Judge David Torbett. <sup>1/</sup> In that decision, Judge Torbett vacated a civil penalty assessed by OSM against Intersouth Mineral Company, Inc. (Intersouth), in connection with reclamation operations under permit No. 82-128 in Marion County, Tennessee.

OSM assessed the civil penalty pursuant to section 518(a) of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1268(a) (1988), for failure to properly maintain a 1.8-mile haul road used for access to the reclamation activities at an underground mine. OSM issued notice of violation (NOV) No. 84-92-193-6 on September 18, 1984, following an inspection of the reclamation. The NOV noted that the "road contains gullies in several areas [and] also needs grad[ing]" (Exh. R-3 at 1). The NOV required Intersouth to grade the access road, filling in and covering areas containing gullies, by October 22, 1984 (Exh. R-5).

The time for abatement was subsequently extended, at Intersouth's request, until December 17, 1984 (Exh. R-6). The mine site was inspected on December 18, 1984, and the NOV terminated, as the OSM inspector found that the access road was being properly maintained (Exh. R-7).

In January 1987, more than 2 years and 2 months after the NOV was issued, OSM proposed a civil penalty of \$1,100 for the violation it named.

<sup>1/</sup> Our consideration of the petition for discretionary review was delayed by the fact that OSM's petition, although mailed to the Board, was not received here. The mailing of the petition to the Board within 30 days of receipt of Judge Torbett's decision nevertheless constituted timely filing. See 43 CFR 4.1107(g), 4.1270(b).

On January 8, 1987, OSM held an assessment conference, following which the proposed penalty was adopted by the conference officer.

The civil penalty was based on application of the methodology set forth in 30 CFR 845.13 and 845.14. OSM assigned points for each of the factors enumerated in 30 CFR 845.13. Regarding the seriousness of the violation, OSM assigned 11 points for the probability of occurrence of the event that the violated standard was designed to prevent. OSM assigned eight points for the extent of damage caused by the violation. Twelve points were assigned for the operator's negligence. No credit points were assigned for Intersouth's good faith. Taking the total number of points assigned, OSM computed the appropriate penalty using the conversion table in 30 CFR 845.14. The specified penalty was \$1,100 for 31 points.

On February 9, 1987, Intersouth filed a petition for review of the proposed civil penalty. The case was assigned to Judge Torbett for a hearing and decision. A hearing was held in Chattanooga, Tennessee, on June 23, 1988. Judge Torbett subsequently rendered his August 1988 decision vacating the civil penalty assessed by OSM, which filed its petition for discretionary review.

In his decision, Judge Torbett concluded that the NOV was properly issued, as there were "sufficient facts to find that there was a deep gully in the haul road" (Decision at 3). However, Judge Torbett found other grounds to vacate the civil penalty.

The OSM inspector's testimony is summarized as follows: The access road "had an area washed across the road where some water had formed several gullies in the road" (Tr. 11). He testified that the largest was deep enough that the OSM inspector could not drive his vehicle over it, and there were other smaller ones there as well (Tr. 11-12). He stated that the gully prevented vehicular access along the road to the mine site (Tr. 12). At the time the NOV was issued, reclamation of the mine site was under way; buildings and facilities were being torn down. No one had been at the site for several days and there had been no travel on the road for several days. The road had washed out (Tr. 19). The gully was created by water draining and washing across the road. Rocks had blocked the ditch line, diverting water across the road (Tr. 24, 58). No photographs were provided of the cited condition or its effects on surrounding lands.

Intersouth presented contrary testimony that no impassable gully had been found anywhere on the road (Tr. 28), and that no one using the road following issuance of the NOV had found access impaired as suggested by the inspector (Tr. 28-29), despite the fact that its workmen went in and out repeatedly along the whole access road (Tr. 50). Intersouth's witness also testified that the road, from the access gate for the first 500 or 600 yards (evidently including the spot where the OSM inspector found the gullies) is on rock, so that it would be extremely hard for a gully to form in it (Tr. 30).

The OSM inspector speculated at the hearing that the gullies might have been removed or greatly reduced by the passage of bulldozers over the

road on their way to the work site subsequent to the issuance of the NOV (Tr. 53). This suggests that the gullies were not deep and were not disruptive to operations at the site.

[1] In a proceeding concerning a petition for review of a civil penalty, OSM has the burden of going forward to establish a prima facie case as to the fact of the violation. 43 CFR 4.1155. The ultimate burden of persuasion as to the fact of violation rests with the petitioner for review. Id. OSM makes a prima facie case when it presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. See Coal Energy, Inc. v. OSM, 115 IBLA 385 (1989); S & M Coal Co. v. OSM, 79 IBLA 350, 354, 91 I.D. 159, 161 (1984); Tiger Corp., 4 IBSMA 202, 205, 89 I.D. 622, 623 (1982); Rhonda Coal Co., 4 IBSMA 124, 131, 89 I.D. 460, 464 (1982).

We hold, as did Judge Torbett, that OSM successfully met its prima facie burden of establishing that there was a violation of pertinent regulations, and that appellant did not meet its burden of persuasion that there was no violation.

At the time of issuance of the NOV, OSM had assumed direct Federal enforcement of the Tennessee permanent regulatory program. See 49 FR 15496 (Apr. 18, 1984); B & J Excavating Co. v. OSM, 89 IBLA 129, 131 (1985). Accordingly, Intersouth was cited with a violation of TAC 0400-1-15-.83 of the applicable Tennessee surface coal mining regulations. See 49 FR 21140, 21233 (May 18, 1984). Under TAC 0400-1-15-.83[2], road maintenance must include basic custodial care as required to protect the road investment and to prevent damage to adjacent resources. 42 FR 21233 (May 18, 1984). The inspector's testimony demonstrates that, by allowing gullies to form in the road such that passage was rendered difficult or impossible, at least temporarily, Intersouth failed to meet this standard. The operator's testimony, while calling into question the depth and seriousness of the gullies, fails to overcome the evidence that there were gullies in the road when the NOV was issued.

[2] In civil penalty proceedings, OSM bears the ultimate burden of persuasion regarding the amount of the civil penalty. 43 CFR 4.1155; A & S Coal Co. v. OSM, 96 IBLA 338, 342 (1987). That is, OSM must establish the basis for determination of the appropriate civil penalty. One of those bases is the seriousness of the violation. 30 CFR 845.13(b)(2).

Under 30 CFR 845.13(b)(2), OSM may assign up to 30 points, based on the seriousness of the violation, broken down into three factors. Two of these, the probability of occurrence (30 CFR 845.13(b)(2)(i)) and the extent of potential or actual damage (30 CFR 845.13(b)(2)(ii)) are relevant here. 2/ OSM assigned 11 points for the probability of occurrence of the event which the violated standard was designed to prevent. By so doing, OSM effectively

2/ The third, called the "Alternative," relates to a violation of an administrative requirement, such as a requirement to keep records (30 CFR 845.13(b)(2)(iii)), and is thus inapplicable here.

found it likely that the event which the violated standard was designed to prevent would occur. See 30 CFR 845.13(b)(2)(i).

We are not persuaded that OSM correctly assigned points for this factor. The requirement to fill the gullies and grade the road was designed to protect the road from the effects of erosion which could endanger use of the roadway and the surrounding land. TAC 0400-1-15-.83, 49 FR 21233 (May 18, 1984). The record does not support the conclusion that it was likely that these gullies would either endanger use of the roadway or endanger the surrounding land.

Where the record shows that the probability of occurrence of the event which the violated standard was designed to prevent is less than that determined by OSM, and that the extent and duration of a violation is limited, the Board may set aside OSM's determination as to the seriousness of a violation, including its assignment of penalty points. See Lone Star Steel Co. v. OSM, 98 IBLA 56, 66-67 (1987). The sum of the evidence here reveals only that use of the roadway was threatened to the extent that gullies formed that temporarily made access along a small portion of the access road somewhat difficult. The undisputed fact that Intersouth continued to pass heavy equipment along this road throughout the time following issuance of the NOV indicates that the road remained passable. Thus, the presence of the gullies was not a serious threat to the use of the road. In addition, there is no evidence that the gully threatened the adjacent land, and the NOV and accompanying documents do not mention any such damage, whether actual or potential. There is no photographic record of the cited condition or other evidence demonstrating that the gully was causing erosion of the road embankment or other surrounding land. We cannot agree that it was likely that any erosion endangering either the surrounding land or use of the roadway would occur and, accordingly, set aside OSM's assignment of 11 points for this criterion. 3/

3/ OSM asserts that the governing regulation is 30 CFR 816.150, from the Federal permanent program performance standards. These standards went into effect subsequent to issuance of the NOV here, when OSM withdrew its approval of the Tennessee program effective Oct. 1, 1984, and began to enforce the Federal permanent regulatory program. See 49 FR 38874 (Oct. 1, 1984); B & J Excavating Co. v. OSM, supra at 132.

However, even if 30 CFR 816.150 is deemed controlling, we are not persuaded that the assignment of points for this criterion was accurate. Under the performance standards set out at 30 CFR 816.150(b), applied to road maintenance by 30 CFR 816.150(e)(1), roads must be maintained so as to (1) control or prevent erosion and the air pollution attendant to erosion; (2) control or prevent damage to fish, wildlife, or their habitat and related environmental values; (3) control or prevent additional contributions of suspended solids to stream flow or runoff outside the permit area; (4) neither cause nor contribute to violation of water quality standards; (5) refrain from seriously altering normal flow of water in streambeds or drainage channels; (6) prevent or control damage to public or private property; and (7) use nonacid- and nontoxic-forming substances in road surfacing. We find nothing in the record indicating that allowing the gully to form in the road was likely to cause any of the listed damage.

[3] It is unnecessary to address how many points ought properly to have been assessed for this violation because, if the assessment is reduced by even one point to a total of 30, it is permissible to waive any civil penalty in this matter, as no cessation order was issued. See 30 CFR 845.12(b). The Board may order OSM to waive a civil penalty (see Lone Star Steel Co. v. OSM, 107 IBLA 134, 139 (1989); Lone Star Steel Co. v. OSM, 98 IBLA at 67), and we deem it appropriate to do so here. Our decision to direct that the penalty be waived here is influenced by the fact that only a single, isolated violation is involved (see Mud Fork Coal Corp., 5 IBSMA 44, 56-57, 90 I.D. 181, 188 (1983)); by the absence of proof of any substantial harm, either on- or off-site; and by Judge Torbett's discussion of Intersouth's action in abating the violation as soon as practical. See Lone Star Steel Co. v. OSM, 98 IBLA at 67. <sup>4/</sup>

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 as modified.

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David L. Hughes  
Administrative Judge

I concur:

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John H. Kelly  
Administrative Judge

<sup>4/</sup> Our resolution of this matter differs from Judge Torbett's in that we do not reach the questions of whether OSM's admitted delay in providing Intersouth with a notice of proposed assessment resulted in actual prejudice under 30 CFR 845.17(b)(2) and, if so, whether the relief he fashioned under the doctrine set out in Badger Coal Co., 2 IBSMA 147, 152, 87 I.D. 319, 322 (1980), was appropriate.