

U.S. STEEL MINING CO., INC.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-235

Decided April 4, 1995

Appeal from a decision of Administrative Law Judge David Torbett granting temporary relief from a decision of the Acting Chief, Applicant Violator System Office, Office of Surface Mining Reclamation and Enforcement, finding an ownership and control link and refusing to delete such information from the Applicant Violator System. Hearings Division Docket No. CH 95-1-AV.

Affirmed.

1. Surface Mining Control and Reclamation Act of 1977:
Applicant Violator System: Ownership and Control--
Surface Mining Control and Reclamation Act of 1977:
Temporary Relief: Evidence

A decision of an Administrative Law Judge granting temporary relief under 43 CFR 4.1386 from a decision by OSM finding an ownership and control link and refusing to delete such information from its Applicant Violator System is properly affirmed on appeal where OSM fails to establish that the Administrative Law Judge committed an error of law or abused his discretion in granting such relief.

APPEARANCES: Wayne A. Babcock, Esq., Office of the Solicitor, U.S. Department of the Interior, Pittsburgh, Pennsylvania, for the Office of Surface Mining Reclamation and Enforcement; Christopher B. Power, Esq., Michael B. Victorson, Esq., Amy A. Davis, Esq., Charleston, West Virginia, for U.S. Steel Mining Company, Inc.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

The Office of Surface Mining Reclamation and Enforcement (OSM) has filed an appeal from an oral decision issued from the bench by Administrative Law Judge David Torbett on January 24, 1995, granting U.S. Steel Mining Company, Inc. (USM), temporary relief from the December 23, 1994, decision of the Acting Chief, Applicant Violator System (AVS) Office, OSM.

In that decision, the Acting Chief found that USM controlled the coal mining operations of Gary Coal Sales, Inc. (GCSI), and Gary Enterprises, Inc. (GEI); that data contained in the AVS showed that GCSI and GEI were in violation of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 (1988), because they owed abandoned mine land (AML) reclamation fees and state civil penalties; and that the AVS also showed that USM had an ownership and control relationship with GCSI and GEI on permit Nos. U-58-84, U-61-84, and S-4030-89. He denied USM's request to remove such information from the AVS.

Following a hearing on the same date, Judge Torbett issued his decision essentially concluding, as required by 43 CFR 4.1386(g)(1), that USM had demonstrated a substantial likelihood of prevailing on the merits (Tr. 93-98). In addition, there was no indication that temporary relief would adversely affect public health or safety or cause significant, imminent environmental harm to land, air, or water resources (see Tr. 99-100). 1/

[1] In a decision dated March 3, 1995, in which we granted OSM's motion for expedited briefing, we announced the standard by which we would evaluate Judge Torbett's decision on temporary relief. U.S. Steel Mining Co. v. OSM, 132 IBLA 121 (1995). Therein, we stated at page 124:

[W]e believe that a deferential standard of review is appropriate where an Administrative Law Judge has conducted a temporary relief hearing in which all parties have had the opportunity to participate and thereafter renders a decision on such relief. In such a case, where an appeal is filed, the Board may limit its consideration to whether the decision was based on an error of law or whether the Administrative Law Judge abused his discretion. We do so in this case.

In its brief on appeal, OSM does not argue that Judge Torbett abused his discretion in making his temporary relief ruling. Instead, it contends his ruling "was based on an erroneous legal determination" (OSM Brief

1/ Under 43 CFR 4.1386(g), the Administrative Law Judge may only grant temporary relief if:

"(1) All parties to the proceeding have been notified of the petition and have had an opportunity to respond and a hearing has been held if requested;

"(2) The petitioner has demonstrated a substantial likelihood of prevailing on the merits; and

"(3) Temporary relief will not adversely affect public health or safety or cause significant, imminent environmental harm to land, air or water resources."

at 6). While acknowledging that a Board decision on the issue presented 2/ might "impact or even control the determination of the merits of the case," OSM asserted a "right to a ruling on the applicable legal standard in this case." Id.

OSM argues that Judge Torbett "seriously misinterpret[ed] the ownership or control rule" by assuming that the ability to control a mining operation is insufficient to establish an ownership or control link (OSM Brief at 6, 13). OSM contends that Judge Torbett improperly required "evidence of actual exercise of the power to establish control" (OSM Brief at 7). OSM asserts that the evidence clearly shows that USM had "the authority to direct the mining operations of the Gary companies" (OSM Brief at 8). The inclusion of the "right of first refusal to the coal" in USM's subleases with GEI and GCSI, OSM contends, is sufficient itself to establish control of the coal. Id. OSM argues that other facts establish that USM also had control over the "manner of conducting the coal mining operations through the permits and mining plans, the parties authorized to conduct the operations, control of the money generated by the operations and, particularly, control over payment of the taxes, including payment of the delinquent AML reclamation fees involved in this matter" (OSM Brief at 14).

USM asserts that it does not disagree with OSM's interpretation that under 30 CFR 773.5(b)(6), ownership or control may be based on either "(a) the exercise of actual control over the manner in which mining operations are conducted, or (b) the possession of authority to control mining\operations" (USM Brief at 11 (emphasis in original)). It contends, however, that Judge Torbett's ruling reflects a recognition of the proper standard because he turned to an examination of whether there was any evidence of actual control only because of the "lack of convincing evidence" of USM's authority to control the mining operations (USM Brief at 12). USM concentrates its brief on establishing, based on the facts of record, that it neither exercised actual control nor had the authority to control either mining operation.

Based on our preliminary review of the record, Judge Torbett's decision, and the briefs of the parties submitted on appeal, we agree with USM that Judge Torbett's ruling constituted a finding that the record on temporary relief showed that USM had a substantial likelihood of prevailing on the merits because it did not either exercise actual control or have the authority to control the mining operations. We conclude that OSM

2/ OSM posed the issue as "the proper interpretation of 30 C.F.R. §773.5(b)(6) and, in particular, the evidence necessary to rebut the presumption of control specified in paragraph (b)(6) of the ownership and control rule" (OSM Brief at 6).

has failed to show that Judge Torbett's ruling granting temporary relief was based on an error of law or constituted an abuse of discretion. 3/

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.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

James L. Byrnes
Chief Administrative Judge

3/ In our decision we expressly informed the parties that we would not resolve the merits of this case in ruling on the temporary relief appeal.