

TENNESSEE CONSOLIDATED COAL CO.

IBLA 93-164

Decided July 16, 1996

Appeal from a decision of the Chief, Reclamation Review Section, Office of Surface Mining Reclamation and Enforcement, Knoxville, Tennessee, disapproving application for Phase I bond release.

Reversed and remanded.

1. Surface Mining Control and Reclamation Act of 1977: Bonds: Release of--Surface Mining Control and Reclamation Act of 1977: Performance Bond or Deposit: Release

OSM's disapproval of an application for a Phase I bond release on the grounds that the applicant was neither the permittee nor the permittee's agent will be reversed where the applicant completed the permittee's Phase I reclamation obligations as set forth in a settlement agreement between the applicant and OSM.

APPEARANCES: Michael W. Boehm, Esq., Chattanooga, Tennessee, for appellant; J. Nicklas Holt, Esq., Knoxville, Tennessee, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE KELLY

Tennessee Consolidated Coal Company (TCC) has appealed an October 8, 1992, decision of the Chief, Reclamation Review Section, Office of Surface Mining Reclamation and Enforcement (OSM), Knoxville, Tennessee, disapproving TCC's application for Phase I bond release for the reason that TCC is not the permittee nor its agent.

The bond release pertains to a surface coal mining site in Marion County, Tennessee, which was leased from TCC by Jessie P. Shipley, d/b/a J.P. Shipley Coal Company (Shipley). In September 1984, Shipley obtained Tennessee State Permit No. 2283123, posted the required performance bond (two certificates of deposit totaling \$34,900 made payable to Shipley, or the State of Tennessee, or the United States) and commenced mining. Shipley subsequently abandoned the site without performing adequate reclamation, resulting in judgements against him for injunctive relief and collection of civil penalties. By letter dated February 28, 1991, OSM informed TCC of its determination that TCC was the owner or controller of the Shipley operation, and was therefor responsible for Shipley's reclamation and financial obligations. The letter also advised TCC that if it

failed to assume its responsibilities, OSM would block the approval of any future permitting by TCC or any entity linked with it.

Negotiations between OSM, TCC, and TCC's parent corporation, A.T. Massey Coal Company Inc. (Massey), resulted in a June 13, 1991, Settlement Agreement (Agreement), whereby Massey and TCC agreed to "take all necessary remedial reclamation measures necessary to abate outstanding violations of Jessie P. Shipley Coal Co. * * * and to complete such performance by October 31, 1991" (Paragraph 3). Massey and TCC also agreed to pay \$120,000 for civil penalties, and \$10,546.51 for reclamation fees and interest assessed against Shipley. On February 13, 1992, TCC obtained a judgement against Shipley for \$120,000 in the Chancery Court of Marion County, Tennessee (No. 5538). An Execution and Garnishment of Shipley's certificates of deposit was issued to OSM for partial satisfaction of the judgement, and OSM answered that the funds were not subject to execution by TCC because they were "held as bonds to guarantee that mine sites operated by [Shipley] will be reclaimed to the standards set forth under the Surface Mining Control and Reclamation Act of 1977 [SMCRA]."

Subsequently, on July 8, 1992, TCC filed a request for Phase I bond release and, along with other documents, attached a certificate of reclamation stating that TCC was "the real party in interest" and had reclaimed the site in accordance with SMCRA and the settlement. OSM responded to the request by letter dated July 24, 1992, advising TCC that "[a]ll of the documents submitted are acceptable," that there was "no record of outstanding Notices of Violations or Cessation Orders," and that an inspection of the site would be scheduled. Proof of publication of the required public notice was filed on August 14, 1992. An on-site inspection and evaluation was conducted on September 30, 1992. The resulting October 8, 1992, report did not find any site conditions which would preclude release, but noted that "this site does have a history of effluent problems that has accounted for violations in the past" (Reclamation Review Evaluation-Site Evaluation Review at 2). The report, however, recommended that TCC's application for bond release be denied until it "obtains a notarized statement from the permittee (Jessie Shipley) designating [TCC] as their agent with the power to apply [for] and receive bond release." *Id.*

In its October 8, 1992, decision, OSM disapproved TCC's application, stating that its records did not indicate that TCC had ever been designated as Shipley's agent, and that it was OSM's policy that "bond release may be granted only to the permittee or his or her agent." OSM informed TCC that it could reapply for Phase I bond release when OSM received a notarized statement from Shipley designating TCC as its agent with power to apply for and receive bond release.

On appeal, TCC argues that OSM acknowledged in paragraph 10 of the Agreement that TCC has a legitimate claim to the proceeds of Shipley's bond to defray its cost of reclamation. TCC asserts that it has performed its reclamation obligation to the extent that Phase I bond release is now appropriate.

OSM responds that the governing statute and regulation expressly provide that the "permittee" must file a request for release of a performance bond, and that the only exception is where the permittee or its designated agent has given consent.

In their initial pleadings, TCC and OSM cited Administrative Law Judge Torbett's decision entitled In the Matter of William H. Pullen, Jr., decided February 24, 1992 (before the Hearings Division by referral from the Board in William H. Pullen, Jr., 112 IBLA 218 (1989)). On April 13, 1995, the Board issued William H. Pullen, Jr., 132 IBLA 224 (1995), affirming Judge Torbett's decision to grant the Phase I bond release. By Order dated October 2, 1995, we provided TCC and OSM the opportunity to brief the effect of the Board's decision in Pullen on the present appeal. Both parties filed briefs.

For the reasons set forth below, we reverse OSM's decision and remand the case for consideration of TCC's application for a Phase I bond release.

The rights and obligations of the parties as to Shipley's performance bond are addressed in paragraph 10 of the Agreement:

The parties to this Agreement recognize that there is a performance bond posted by Jessie P. Shipley with OSM in connection with the Shipley site (Permit No. 2283123) to assure its reclamation. Since under the terms of this Agreement TCC and Massey are going to reclaim this site, OSM acknowledges that TCC and Massey may have a legitimate claim to the proceeds of such bond to defray the expenses they are incurring performing such reclamation. OSM agrees to cooperate, to the full extent permitted by law, with TCC and Massey in their efforts to obtain the proceeds of such bond provided all requirements of SMCRA are met.

As indicated previously, it is not disputed that TCC performed its reclamation obligations under the Agreement. OSM, however, essentially argues that it cannot perform its obligation to cooperate with TCC in obtaining the bond because it is not permitted by law to consider an application for bond release from anyone other than the permittee or its agent.

Contrary to OSM's argument, a party other than the permittee can apply for bond release. The general rule is reflected in section 519 of SMCRA, 30 U.S.C. § 1269(a) (1994), which provides that "[t]he permittee may file a request with the regulatory agency for the release of all or part of a performance bond or deposit." See also 30 CFR 800.40(a). This rule, however, is not without exception. The Board's decision in Pullen held that a party other than the permittee or its agent was entitled to apply for bond release where the record indicated the party acted as the guarantor of the permittee's reclamation obligation.

William H. Pullen, Jr., 132 IBLA at 226 n.4. Thus, the Board has illustrated that it will not apply a strict interpretation of section 519 in all cases. Moreover, the Board has stressed that OSM should be bound by its agreements unless they are prohibited by law. In Gabriel v. OSM, 105 IBLA 53 (1988), the Board addressed the question of whether OSM was bound by the terms of an agreement it made with an operator. The agreement suspended enforcement action pending litigation, and the operator suspended its operations in reliance upon the agreement. The Board held that OSM was bound by the agreement, and reversed OSM's decision to issue a notice of violation for conditions created by the suspension of operations. Further, the Board noted that a party who enters into an agreement with OSM should not do so at his peril, and stated that "[i]t is important that we establish that OSMRE is bound by the agreements which it makes, to the extent they are enforceable and proper under the law." Id. at 60.

Based on the above authorities, we conclude that OSM is bound by paragraph 10 of the Agreement to consider TCC's application for Phase I bond release, and that such consideration is not prohibited by law.

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 reversed, and the case is remanded to OSM for consideration of TCC's application for Phase I bond release.

John H. Kelly
Administrative Judge

ADMINISTRATIVE JUDGE BURSKI CONCURRING:

While I agree with the lead opinion's determination that, under the facts of this case, the Office of Surface Mining Reclamation and Enforcement (OSM) is properly bound by the terms of its agreement with Tennessee Consolidated Coal Company (TCC), I would go further. I would hold that, even in the absence of an agreement between OSM and TCC, the rejection by OSM of TCC's application for a Phase I bond release was in error.

The instant case presents a situation in which, following a default by the approved permittee (J.P. Shipley Coal Company), the permittee's lessor (TCC), whom OSM had determined owned or controlled Shipley within the meaning of section 510(c) of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1260(c) (1994), and was thus subject to possible sanctions under the Applicant/Violator System (see 30 CFR Part 773), agreed to pay accrued civil penalties in the amount of \$120,000, reclamation fees and interest and to reclaim the subject site. In addition to entering into the agreement with OSM, under which terms OSM pledged itself "to cooperate, to the full extent permitted by law, with TCC * * * in their efforts to obtain the proceeds of such bond provided all requirements of SMCRA are met," TCC subsequently obtained a judgment against Shipley in the amount of \$215,000 from the Chancery Court of Marion County, Tennessee. TCC then proceeded to reclaim the site in accordance with its agreement and tendered the civil penalties, reclamation fees, and interest per its agreement. OSM agrees that the site has been sufficiently reclaimed to allow a Phase I bond release. When, however, TCC attempted to obtain such a release, OSM rejected its application on the ground that only the permittee (Shipley) can apply for bond release.

OSM does not deny that a money judgment against Shipley was, in fact, entered by a local court of competent jurisdiction. Instead, it apparently relies on the theory that the monies which it holds (in the total amount of \$34,900) are not subject to execution by a judgment creditor, since they were held as bonds to guarantee reclamation of mine sites operated by Shipley. OSM's position, however, confuses what it can be required to do with what it can and should do.

I have no quarrel with the proposition that, until OSM is satisfied that reclamation has been accomplished, release of the bonds can neither be compelled nor authorized. To do so would effectively undermine the fundamental reason why a bond is required in the first instance, i.e., to guarantee reclamation. But, once reclamation has been achieved, I believe that considerations of Federal/State comity clearly support the view that OSM ought to recognize the outstanding judgment and, upon proper application by the judgment creditor, tender such funds as have been held as guarantee to that creditor. The only reason for requiring that the permittee make the application for a refund is, presumably, to protect the United States from subsequent liability. The existence of the judgment against Shipley, given the facts disclosed in the instant appeal, should be sufficient protection for the Government.

Moreover, the position of OSM is internally inconsistent. Thus, on the one hand it argues that only the permittee or its agent may file for bond release based on language in the applicable statute and regulations (see 30 U.S.C. § 1269(a) (1994), "The permittee may file a request * * *"; 30 CFR 800.40(a)(1), "The permittee may file an application * * *." [Emphasis supplied.]) which would normally be seen as permissive rather than mandatory. Yet, at the same time, it ignores the fact that nothing in the statute or present regulations authorizes an agent of the permittee to file an application for bond release. Indeed, if 30 CFR 800.40(a)(1) is to be rigidly adhered to, as OSM contends, then by the force of its own logic there can be no basis for allowing an agent of the permittee to file an application, particularly since the predecessor of the present bond release regulation, 30 CFR 807.11(a) (1980), had expressly provided that "[t]he permittee or any person authorized to act on his behalf [emphasis supplied]" could apply for a bond release. Assuming a rigid interpretation of the language of the present regulations, the deletion of the underlined phrase in the 1983 amendments to Subchapter J would, if anything, seem to compel an interpretation which affirmatively prohibits an agent of the permittee from filing for bond release.

My view would encompass an interpretation of 30 CFR 800.40(a)(1) which both includes agents of a permittee within the word "permittee" while at the same time treats the phrase "may file" as words of authorization rather than limitation. Given the particular facts of this case, I believe that TCC can and should be permitted to file a bond release application for this site.

For the foregoing reasons, in addition to those set forth in the lead opinion, I agree with the disposition of the instant appeal.

James L. Burski
Administrative Judge

