

NATHAN ATWOOD ET AL.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 95-126

Decided November 7, 1997

Appeal from a decision by Administrative Law Judge Ramon M. Child denying a petition for award of costs and expenses, including attorney fees, under 43 C.F.R. § 4.1294(b). DV 94-4-R.

Reversed and remanded.

1. Regulations: Interpretation—Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Standards for Award

Because Departmental regulation 43 C.F.R. § 4.1294(b) does not require that an intervenor in a proceeding filed under SMCRA section 525(e) show a contribution separate and distinct from that made by the party who initiated the proceeding in order to obtain an award of costs and expenses including attorney fees from OSM, it was error to require intervenors to show their contribution was distinct from that of the applicant for relief.

2. Surface Mining Control and Reclamation Act of 1977: Attorney Fees/Costs and Expenses: Final Order

A request to order a hearing into whether a costs petition is reasonable is granted because the question was not adjudicated by the administrative law judge with whom it was filed pursuant to 43 C.F.R. § 4.1291.

APPEARANCES: F. Mark Hansen, Esq., Salt Lake City, Utah, for Appellants; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ARNESS

On October 14, 1994, Administrative Law Judge Ramon M. Child denied a petition by Appellants for payment by the Office of Surface Mining

Reclamation and Enforcement (OSM) of costs and expenses including attorney fees totaling \$17,550. The petition, filed by Nathan Atwood and 102 others, arose from their participation as intervenors in a proceeding brought by Co-Op Mining Company (Co-Op) challenging notice of violation No. 93-020-190-003 (NOV) issued by OSM for failure to restore part of the Trail Canyon Mine to approximate original contour (AOC), in conformity to Utah regulations approved by OSM under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). Following a hearing held before Judge Child in December 1993 at Salt Lake City, Utah, at which Appellants participated and appeared through counsel, a Decision was issued on June 6, 1994; therein, Judge Child vacated the NOV, finding that AOC had been achieved by Co-Op at the Mine. On that same day, Appellants filed their petition for costs and expenses, the rejection of which on October 14, 1994, gave rise to their timely appeal to this Board.

Judge Child's Decision of October 14, 1994, found that "an award of attorney's fees is not appropriate under 43 CFR 4.1294(b)" because Co-Op's successful challenge to the NOV was not affected by the participation of Appellants at the hearing or thereafter. (Decision at 2.) In reaching this conclusion, he found that "the outcome would have been the same without intervenor's participation," and denied the petition, after citing Donnell v. United States, 682 F.2d 240, 249 (D.C. Cir. 1992) (a case decided under the Voting Rights Act of 1965) in support of a conclusion that "an award of attorney's fees would be inappropriate if intervenors' submissions and arguments were mostly redundant of Co-Op's submissions." (Decision at 1.) Judge Child found as a fact that

intervenors' contribution was insignificant, being largely redundant of Co-Op's contribution. Intervenors did not call any witnesses or submit any exhibits; their counsel merely cross-examined witnesses and submitted briefs on the same issues being raised by Co-Op. The cross examination uncovered very little new evidence and was largely repetitive. Intervenors list the hearing transcript pages where they allegedly made their contribution. Most of the pages contain facts which are repetitive of facts previously developed by Co-Op. * * * Their briefs are also repetitive of Co-Op's briefs or address nondeterminative issues. In sum, the outcome would have been the same without intervenors' participation, and an award of attorney's fees is not appropriate under 43 CFR 4.1294(b).

(Decision at 1, 2 (page citations to hearing transcript omitted).)

Appellants contend that they made a substantial contribution to a full and fair determination of the issues by raising a new issue concerning environmental degradation that was resolved in their favor and therefore qualify for an award of costs and expenses under 43 C.F.R. § 4.1294(b). (Statement of reasons (SOR) at 3, 5.) They also point to their prior involvement in the controversy concerning AOC, and their argument that it

would not be possible to move the shoulder of an access road, as issues which were resolved in their favor by Judge Child's final Decision issued on July 6, 1994. (SOR at 5; Surrebuttal Brief (SB) at 1.) It is argued that their participation at the hearing was substantial and that two intervenors gave testimony relied upon by Judge Child when he found the AOC standard for the mine was met by Co-Op. (SOR at 6-10; SB at 2.)

In answer to Appellants' arguments concerning the extent and character of their participation in proceedings before Judge Child, OSM argues that Appellants have not shown their participation was separate and distinct from the case presented by Co-Op; this factor, OSM contends, precludes an award under 43 C.F.R. § 1294(b) because, as Judge Child concluded, the participation by Appellants at the hearing and thereafter was simply "redundant" of the case presented by Co-Op. (OSM Reply at 11.) The OSM acknowledges that the provision of the regulation allowing recovery of costs and expenses from OSM does not specifically require that Appellants' contribution to success on the merits of the Co-Op case be separate and distinct from the contribution made by Co-Op. Compare 43 C.F.R. § 4.1294(a) with 43 C.F.R. § 4.1294(b). It is contended, nonetheless, that the costs and expenses regulation requires such a reading, because there is "no logical reason why the same restriction is not implicit in section 4.1294(b)." (OSM Reply at 8.)

[1] This line of argument assumes that an identical standard for recovery of costs and expenses by intervening parties was intended in all cases. If that were so, however, the rule should so provide; there would then be no need to distinguish between cases where cost recovery from a permittee or from OSM is sought by an intervenor. The rule provided for cases, such as this one, where cost recovery is sought from the Government by an intervenor, states only that applicants must show they made a "substantial contribution to a full and fair determination of the issues." 43 C.F.R. § 4.1294(b). The rule governing recovery of costs by an intervenor from a permittee, however, contains an additional requirement that any applicant for reimbursement must show his contribution was "separate and distinct from the contribution made by a person initiating the proceeding." 43 C.F.R. § 4.1294(a). The OSM has not explained how we may safely ignore the essential difference between the two rules, nor is it explained why the rule should be interpreted to the detriment of Appellants. See, e.g., Western Engineering, Inc., 1 IBSMA 202, 212 (1979), where the Board of Surface Mining and Reclamation Appeals refused to apply an ambiguous regulation to the detriment of an applicant for temporary relief.

The record before us shows that Appellants participated throughout the AOC proceeding; they appeared at the hearing represented by counsel when some of them testified as witnesses. Their counsel briefed the case prior to Judge Child's ruling on June 6, 1994. Neither the extent of their participation nor their success on the merits can be denied. We find their position that enforcement action could lead to environmental degradation contributed substantially to a full and fair determination of the case, within the meaning of 43 C.F.R. § 1294(b).

Judge Child recognized that the rule provided for cost recovery from OSM was different than that governing permittees; he states that "§4.1294(b), unlike §4.1294(a), does not contain a requirement that intervenors' contribution be separate and distinct from the contribution made by Co-Op." (Decision at 1.) He nonetheless ruled that Appellants could not recover because their contribution could not be separated from that made by Co-Op; the effect of his ruling was to draw the inference for which OSM argues on appeal. He found that an additional requirement that there be a separate contribution appearing in subsection (a) was implicit in subsection (b), although no such proviso was stated therein. His ruling lacks support in the regulation provided for cases where cost recovery is sought from OSM and must therefore be reversed. Regardless whether Appellants' participation was "separate and distinct" from that of Co-Op, they are entitled to recover attorney fees under 43 C.F.R. § 1294(b).

[2] Appellants have supplemented the record on appeal with a request that this Board consider their petition for costs and expenses, including attorney fees, and have filed an amended affidavit of costs and attorney fees with us. As OSM points out, however, under 43 C.F.R. § 4.1291, costs petitions and supporting affidavits must be filed with the official making the "final order" that gives rise to the costs petition. In this case, the final order in question is Judge Child's Order issued on June 6, 1994. Because Judge Child did not consider the reasonableness of the amount of costs and expenses sought by Appellants when he denied their petition, the question whether their bill is reasonable is not before us on appeal.

In denying Appellants' costs petition, Judge Child also denied a request by OSM that he conduct a hearing into whether the amount requested by Appellants was reasonable; that request is now granted. The question whether the amount asked by Appellants is reasonable, is remanded to the Hearings Division for assignment to an administrative law judge who will conduct a hearing thereon.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision denying award of costs and expenses is reversed, and the record is remanded for further proceedings to determine a reasonable award to Appellants.

Franklin D. Amess
Administrative Judge

I concur.

David L. Hughes
Administrative Judge

