

SOUTHERN APPALACHIAN MINING CORP.

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 96-82 Decided October 23, 1998

Appeal from a decision of Administrative Law Judge David Torbett sustaining Notice of Violation No. 93-91-094-005 in Docket No. NX 93-31-R.

Reversed.

1. Surface Mining Control and Reclamation Act of 1977: Administrative Procedure: Burden of Proof—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 an application for review of a notice of violation, the burden of going forward to establish a prima facie case rests with OSM. Although the ultimate burden of persuasion rests with the applicant for review, the notice of violation will be affirmed only where OSM meets its burden of establishing a prima facie case.

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

OSM fails to make a prima facie case when it presents insufficient evidence to establish whether removal of equipment under the permit issued to the applicant for review is reasonably considered part of mining operations, part of reclamation, or neither, and thus fails to establish essential facts from which it may be determined that a violation of pertinent requirements has occurred.

APPEARANCES: Michael W. Boehm, Esq., Chattanooga, Tennessee, for Appellant; J. Nicklas Holt, 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 TERRY

Southern Appalachian Mining Corporation (Southern) has appealed from a September 19, 1995, Decision by Administrative Law Judge David Torbett, sustaining Notice of Violation (NOV) No. 93-91-094-005 in Docket No. NX 93-31-R. The NOV charged Southern with failing to begin reclamation of its minesite after cessation of operations in violation of 30 C.F.R. § 817.132. On October 28, 1994, Judge Torbett held a hearing on the matter in Chattanooga, Tennessee.

Southern is the permittee for an underground coal mining operation known as Area No. 1, State Permit No. 2595, located in Sequatchie County, Tennessee. Sanders Coal Company was the contract operator for Southern. By memorandum of June 18, 1993, William P. Sanders, President of Sanders Coal Company, notified the Mine Safety and Health Administration (MSHA) that the mine had "stopped production on 6-11-93 and is in the process of removing the equipment from the mine. * * * I request that the mine be removed from a production status effective 6-11-93." (Tr. 10-11; Ex. R-3.)

On June 24, 1993, Office of Surface Mining Reclamation and Enforcement (OSM) Inspector David Wilson inspected the minesite. He noted in his report that coal production had ceased on June 11, 1993, and that the removal of equipment had begun. Wilson observed that mining personnel were removing "cable," "mining equipment," and "the conveyor outside the mine." The Inspector therefore changed the status of the mine from AP (active production) to AR (active reclamation). (Tr. 8; Ex. R-2.) Wilson stated that he determined from MSHA records (the Sanders memorandum) that operations had ceased on June 11, 1993. (Tr. 9-10.)

On July 21, 1993, Wilson returned to the mine and issued the NOV, which charged Southern with failing to begin reclamation of the site after cessation of operations in violation of 30 C.F.R. § 817.132. That regulation provides in pertinent part: "(a) The person who conducts underground mining activities shall close or backfill or otherwise permanently reclaim all affected areas, in accordance with this chapter and according to the permit approved by the regulatory authority."

At the hearing, Wilson read from Permit No. 2595 (Ex. R-4), which provides in pertinent part:

Within one month, weather permitting, of cessation of active mining reclamation activities will begin. The mine entries will be sealed as per details under item 68 and should take about 2 weeks. Within one month of sealing the entries, the material in storage area No. 1 will be pushed back into the mine face and regraded. Within 2 weeks, weather permitting, the area will be retopsoiled. Discing, seeding and mulching will be completed within 2 weeks after topsoiling. After the material from the overburden storage area is replaced into the pit, topsoil will be regraded using dozers over the area previously occupied by the overburden. This will be accomplished within 2 weeks after completion of the face reclamation.

Wilson testified that the first step in abating the violation, the onset of reclamation, was the sealing of the entries, and that the operator abated the violation within the time allowed, by August 24, 1993. (Tr. 12-13, 15.)

Bill Penley, permit coordinator for Tennessee Consolidated Coal who had an application for transfer of the permit pending, testified that removal of mining equipment was completed on or about July 14, 1993, and that reclamation was commenced a few days after July 21. (Tr. 25-26, 29.) Penley opined that "active mining would be [completed] * * * upon the completion of the removal and doing everything to get it ready for reclamation." (Tr. 25.) Penley spoke of three phases - active production, when coal is being removed, equipment removal, after coal production has stopped, and reclamation, after equipment removal is complete. (Tr. 28.)

Judge Torbett ruled in his decision that the

plain meaning of the Applicant's permit indicates that Southern will begin reclaiming the site within one month of stopping coal production. The Applicant argues that it had thirty days from final equipment removal to begin reclamation. While it is true that the regulations require equipment to be removed before reclamation begins, the regulators did not intend for this rule to allow operators to postpone reclamation by dawdling in equipment removal. If Southern's argument is correct, operators could attempt to delay reclamation for as long as equipment remained on the site. 30 C.F.R. sec. 817.132 (1994).

The facts show that Southern's equipment was not removed from the site until over a month after the cessation of mining. Reclamation had not begun when the inspector visited the site a full week after equipment had been removed. Southern's permit requires reclamation to begin within one month after cessation of active mining. The Applicant's permit required it to begin reclamation by July 11, 1993. When the NOV was written on July 21, 1993, the Applicant had not begun any reclamation activity.

(Decision at 3.)

Accordingly, Judge Torbett held that the NOV had been properly issued.

Southern contends that for purposes of the timing of reclamation activities under its permit, removal of mining equipment constitutes "active mining." (Brief at 5.) Southern contends that "there is a great deal more involved in active mining * * * than simply coal production." Southern cites section 701 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1291(28) (1994), as including "virtually every activity in connection with the operation of a coal mine" and "not limited to those activities which actually produce coal." (Brief at 6.) Southern cites Russell Prater Land Co., 3 IBSMA 124 (1981), arguing generally that "active mining" encompasses more activities than those related directly to coal production.

Noting that Inspector Wilson classified the status of the mine as AR (active reclamation) on June 24, 1993, Southern argues alternatively that if equipment removal is not considered active mining, it must be considered active reclamation. Therefore, southern contends, the NOV was issued prematurely, since on July 21, 1993, Southern was in compliance with the timetable in its permit and with 30 C.F.R. § 817.132. (Brief at 11.)

OSM responds that the 1-month period to begin reclamation includes the time allowed for equipment removal. (OSM Brief at 5.) OSM notes that equipment removal was in process on June 18, 1993, and was completed on July 14, 1993. OSM further notes that the actual time necessary for equipment removal was 4 days short of a month. It asserts that if Southern had promptly initiated removal and promptly begun sealing the portals it would have been in compliance with its permit and no citation would have been issued.

[1, 2] In a section 521 enforcement proceeding (30 U.S.C. § 1271 (1994)) involving an application for review of an NOV, OSM has the burden of going forward to make a prima facie case showing that the party named in the notice is engaged in a coal mining operation and has violated SMCRA, the regulations, or a permit condition. 43 C.F.R. § 4.1171(a); see Roblee Coal Co. v. OSM, 130 IBLA 268, 276 (1994); Delmar Adkins v. OSM, 128 IBLA 1, 7 (1993); Rith Energy, Inc. v. OSM, 119 IBLA 83, 86 (1991); Alpine Construction Co. v. OSM, 114 IBLA 232, 235 (1990). Although the ultimate burden rests with the applicant for review (43 C.F.R. § 1171(b)), the NOV will be affirmed only where OSM meets its burden of establishing a prima facie case. See Delmar Adkins v. OSM, *supra*, at 7; Turner Brothers, Inc. v. OSM, 98 IBLA 395, 398 (1987); Calvert & Marsh Coal Co. v. OSM, 95 IBLA 182, 191 (1987). OSM makes a prima facie case where it presents essential facts from which it may be determined that a violation of pertinent requirements has occurred. S & M Coal Co. v. OSM, 79 IBLA 350, 354; 90 LD. 159, 161 (1984). However, a notice of violation will not be affirmed if OSM fails to meet its burden of establishing a prima facie case. Roblee Coal Co. v. OSM, *supra*, at 277; Apine Construction Co. v. OSM, *supra*, at 235.

In the instant case, we do not find that OSM has presented essential facts from which it may be determined that a violation of pertinent requirements has occurred. The gravamen of OSM's NOV is that Applicant failed to begin reclamation within 30 days of the termination of mining activities, although it was involved in equipment removal during this period. OSM claims reclamation did not begin until after July 21, 1993, more than 30 days after termination of mining activities. Nowhere is the process or breadth of reclamation defined with specificity in the statute, regulations or in the permit. ^{1/} Nor is active mining defined with specificity such that the prudent operator would know whether equipment removal is included within its definition.

^{1/} The term "reclamation" is defined in 30 C.F.R. § 701.5 as follows: "Reclamation means those actions taken to restore mined land as required by this chapter to a postmining land use approved by the regulatory authority."

In the instant case, Inspector Wilson visited the minesite on June 24, 1993, and the removal of equipment from the mine had been underway since June 18, 1993, 7 days after termination of coal removal. Wilson changed the classification from active mining to active reclamation as of June 11, 1993, in his report. In his testimony before the ALJ, however, he declined to consider equipment removal to be reclamation, but neither did he find it to be an aspect of active mining. The removal of equipment was completed on July 14, 1993, and the restoration of the land to a postmining land use approved by the regulatory authority was begun approximately 10 days later. On July 21, 1993, Wilson again visited the site and determined that the 30-day period measured from the termination of mining (June 11, 1993), after which reclamation had to be in progress, had been violated. If the equipment removal was included within the definition of active mining, there would be no violation. If equipment removal was included within the definition of reclamation, there would be no violation.

Since OSM has not explained how it would define equipment removal in the context of the regulations, or in the terms of the permit such that Applicant was put on notice that it would not be considered a part of active mining or a part of reclamation (although OSM recognized that it is a necessary predicate to restoration of the minesite by declaring the period of its accomplishment "Active Reclamation"), we will not here construe equipment removal to Applicant's detriment.

For the reasons set forth above, we determine that OSM has not established a prima facie case of violation of the requirements for reclamation set forth in the permit, on which the NOV was based.

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 appealed from is reversed.

James P. Terry
Administrative Judge

I concur.

James L. Bymes
Chief Administrative Judge

