

COLOWYO COAL COMPANY L.P.

IBLA 97-121

Decided October 30, 2000

Appeal from a decision of the Acting Associate Director for Policy and Management Improvement, Minerals Management Service, denying an appeal of the assessment of late payment charges on coal royalty payments. MMS-94-0004-MIN.

Affirmed.

1. Bankruptcy Code: Generally--Coal Leases and Permits: Royalties--Payments: Generally

The Minerals Management Service is authorized under 30 C.F.R. § 218.202 to impose a late payment charge where royalty payments for coal from Federal coal leases are untimely. The imposition of late payment charges is appropriate to compensate the Government for loss of use of funds due but not paid. A late payment charge is properly assessed against the lessee for late payment of royalties when payment for coal production under a coal supply agreement is delayed because the purchaser is in bankruptcy.

APPEARANCES: Charles L. Kaiser, Esq., Christopher L. Richardson, Esq., and Charles A. Breer, Esq., Denver, Colorado, for Colowyo Coal Company L.P.; Howard W. Chalker, Esq., Peter J. Schaumberg, Esq., and Geoffrey Heath, Esq., Office of the Solicitor, U.S. Department of the Interior, Washington, D.C., for the Minerals Management Service.

OPINION BY ADMINISTRATIVE JUDGE TERRY

Colowyo Coal Company L.P. (Colowyo) has appealed from a September 20, 1996, decision of the Acting Associate Director for Policy and Management Improvement, Minerals Management Service (MMS), denying its appeal of a December 9, 1993, assessment by the Chief, Valuation and Standards Division (VSD), Royalty Management Program, MMS, of late payment charges in the amount of \$70,273.72 for the late payment of royalties on coal production from Federal coal lease No. M49-034365-0 and \$10,223.15 for the late payment of royalties on coal production from Federal coal lease No. M50-029224-0, for the period May 1, 1990, to February 1, 1993.

On December 1, 1979, Colowyo entered into a Coal Supply Agreement (Agreement) with Colorado-Ute Electric Association (Colorado-Ute), Tri-State Generation and Transmission Association (Tri-State), Platte River Power Authority (Platte River), and Salt River Project Agricultural Improvement and Power District (Salt River) for the delivery of coal produced from the Colowyo Mine. Pursuant to the terms of the Agreement, Colowyo delivered coal for use at Craig Station Unit Nos. 1, 2, and 3 located near Craig, Colorado. Coal delivered to Craig Station Nos. 1 and 2 was for the account of Tri-State, Platte River, Salt River and Colorado-Ute; coal delivered to Craig Station No. 3 was for the sole account of Colorado-Ute.

On March 30, 1990, Colorado-Ute filed a voluntary petition under Chapter 11 of the Bankruptcy Code, 11 U.S.C. §§ 1101-1146 (1994). See In re Colorado Ute-Electric Association, Inc., Case No. 90-B-03761 C (D. Colo. filed Mar. 30, 1990). Colowyo petitioned the bankruptcy court for \$3,549,314, the total amount owed by Colorado-Ute for the March 1990 sales. As a result of the bankruptcy filing, Colorado-Ute did not pay for the coal purchased from Colowyo in March 1990, and Colowyo did not pay royalties to MMS for this coal when due as required by its leases.

On December 9, 1993, the Chief, VSD, notified Colowyo that MMS was assessing late-payment interest charges in the amount of \$70,273.72 for lease No. M49-034365-0 and \$10,223.15 for lease No. M50-029224-0 for the period May 1, 1990, to February 1, 1993. The Chief explained the assessment in item 8 of her letter as follows:

Pursuant to the authority of 30 C.F.R. § 206.257(i) (1992), royalty is due on coal sales made to Colorado-Ute, but not timely paid for, in March 1990. Colowyo states that the total March 1990 sales amount was approximately \$3,549,314. Colowyo remitted \$352,380 to MMS on July 30, 1992, following receipt of a partial payment of \$2,819,043 received under the bankruptcy proceedings on June 30, 1992. Late-payment interest is due on the \$352,380 royalty payment for the period May 1, 1990, through July 31, 1992. The remaining \$730,184 payment was received by Colowyo in December 1992 and royalty of \$91,273 was received by Minerals Management Service (MMS) on February 1, 1993. Late-payment interest is due on the \$91,273 royalty payment for the period May 1, 1990 through February 1, 1993. Late-payment interest has been calculated pursuant to 30 CFR § 218.202 (1992) for these periods and are appended to our Findings and Conclusions, which is Enclosure 1.

(MMS Letter Order dated December 9, 1993, at 3.)

On appeal to the Director, MMS, Colowyo explained that under the bankruptcy laws, Colorado-Ute could not pay and Colowyo, as an unsecured creditor, could not collect for coal delivered to Colorado-Ute in March 1990 until a bankruptcy judge entered an order confirming a reorganization

plan which provided for payments to the unsecured creditors. See 11 U.S.C. §§ 362 and 549 (1994). (Statement of Reasons (SOR) filed February 9, 1994, at 2-3.) Colowyo noted that the bankruptcy judge entered an order confirming a plan of reorganization for Colorado-Ute on April 15, 1992. Ultimately, Colowyo stated, the Colorado-Ute Trustee paid Colowyo for the March 1990 coal delivery pursuant to the bankruptcy court's order confirming the Colorado-Ute plan and Colowyo paid MMS royalties on those proceeds. (SOR filed February 9, 1994, at 3-4.)

Colowyo asserted, however, that the amount and timing of any payment it would finally receive for its prepetition claim could not be determined until a plan of reorganization was confirmed and the total of the prepetition claims was determined. Colowyo contended that it was not possible to predict what payment it would definitely receive on its prepetition claim until April 1992 when the reorganization plan was confirmed by the bankruptcy judge. (SOR filed February 9, 1994, at 5-6.) Colowyo emphasized that Colorado-Ute was legally precluded from paying for the March coal shipment and Colowyo was legally precluded from seeking to recover such payments. Colowyo maintained that, under these circumstances, it was not required to pay royalties in April 1990. (SOR filed February 9, 1994, at 6-7.)

Colowyo referred to Board and MMS decisions to support its position that late payment charges were not due in this case.

In his decision, the Acting Associate Director stated that the assessment of late payment interest is required even when the lessee's purchaser is subject to bankruptcy proceedings. Citing 30 C.F.R. § 218.202 (1995), he stated that the failure to make timely payments under solid mineral leases will result in the collection of late payment charges. Referring to MMS precedents and 30 C.F.R. § 206.257(i) (1995), ^{1/} he noted that the Director will waive late payment interest accrued due to a disputed price adjustment, when the lessee, acting for the mutual benefit of itself and the Federal Government, has made every good faith effort to collect the funds due and owing. He distinguished the case at issue by pointing out that there was no dispute as to the value of production because Colowyo knew the value of production at the time the production occurred and could have paid royalties at that time. Accordingly, he denied Colowyo's appeal.

In its SOR, Colowyo argues that MMS' decision fails to recognize that its payments fit within MMS' and the Department's previously recognized exceptions to late payment interest. Colowyo cites Cities Service Oil & Gas Corp. (Cities Service), 104 IBLA 291 (1988), in which MMS recognized that late payment interest will be waived where the lessee cannot collect payments because of reasons beyond its control such as pending legal proceedings. Colowyo also refers to Cotton Petroleum Corp., 112 IBLA

^{1/} The Acting Associate Director incorrectly cited this regulation as 30 C.F.R. § 205.257(i).

1, 2 (1989), in which MMS recognized "that an interest assessment may be waived in certain instances where the lessee is precluded from paying royalty by circumstances beyond its control (e.g., pending conclusion of controlling administrative proceedings)." Colowyo contends that its case fits within this exception. Colowyo explains that since Colorado-Ute was legally precluded from paying for the March coal shipment and Colowyo was legally precluded from seeking independently to recover such payments, the late payment was not the fault of Colowyo and was clearly beyond its control. Colowyo points out that a bankruptcy proceeding which determines the amount the purchaser must pay the lessee is, as contemplated by MMS, a "controlling [legal] proceeding" which precludes a lessee's obligation to pay interest. See Id.; (SOR at 5-7).

Colowyo notes that MMS acknowledges that it will forego late payment interest which accrues due to disputed price adjustments. See 30 C.F.R. § 206.257(i); (SOR at 8).

In its response, MMS points out that 30 C.F.R. § 206.257(i) provides that a royalty payment is not due on monies resulting from a price increase until the lessee receives those monies if a lessee makes timely application for a price increase under its contract, the purchaser refuses, and the lessee takes timely, documented measures to force compliance. However, MMS notes that this regulation also states that "[t]his paragraph shall not be construed to permit a lessee to avoid its royalty payment obligations in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of coal." 30 C.F.R. § 206.257(i). MMS points out that the preamble to its notice of proposed rulemaking makes it clear that 30 C.F.R. § 206.257(i) does not extend the due date of royalty payments due to a lessee being unable to collect the sales price from its purchaser. The preamble reads as follows:

Section 206.259(e) [2/] would not operate to excuse a lessee from paying any royalty if, for example, a purchaser received coal and then failed to pay. In such an event, the lessee still would be required to pay royalty based on the value of the coal. This section is intended to apply only to the lessee's obligation to pursue price increases to which it may be entitled under its contract.

52 Fed. Reg. 1840, 1844 (Jan. 15, 1987); (SOR at 2).

Referring to 30 C.F.R. § 218.202, MMS asserts that the assessment of late payment charges for the late payment of royalties due on coal production is required by the regulations, and that late payment charges begin to accrue on the date the royalty was due. See 30 C.F.R. § 218.202(b). MMS states that Colowyo's royalty payments were late and, therefore, the regulations required it to assess late payment charges. (Response at 2-3.)

2/ MMS notes that in the proposed rule, 30 C.F.R. § 206.257(i) was promulgated as 30 C.F.R. § 206.259(e).

MMS asserts that a lessee's problems obtaining payment from its purchaser do not excuse it from its obligation to make timely royalty payments. (Response at 4, citing Dugan Production Corp., 107 IBLA 91, 94 (1989).)

[1] The regulation dealing with late payment charges, 30 C.F.R. § 218.202, provides in pertinent part as follows:

(a) The failure to make timely or proper payment of any monies due pursuant to leases and contracts subject to these rules will result in the collection by MMS of the full amount past due plus a late payment charge. *
* *

(b) Late payment charges will be assessed on any late payment or underpayment from the date that the payment was due until the date that the payment was received at the MMS * * *.

The sole issue for consideration is whether a late payment charge is properly assessed against the lessee for late payment of royalties when payment for coal production under a coal supply agreement is delayed because the purchaser is in bankruptcy.

Colowyo does not deny that its royalty payments were late. Under 30 C.F.R. § 218.202, late payment charges will be assessed on any late payment from the date that the payment was due until the date that the payment was received at the MMS. The language of this regulation is clear. It is the responsibility of the lessee to report and fully pay all royalties timely. Since Colowyo did not pay its royalties as required by its lease, MMS properly assessed late payment charges. See 30 C.F.R. § 218.200.

Colowyo refers to 30 C.F.R. § 206.257(i) in an attempt to show that late payment charges should not be assessed in the present case. That regulation reads in pertinent part as follows:

If the lessee makes timely application for a price increase allowed under its contract but the purchaser refuses, and the lessee takes reasonable measures, which are documented, to force purchaser compliance, the lessee will owe no additional royalties unless or until monies or consideration resulting from the price increase are received. This paragraph shall not be construed to permit a lessee to avoid its royalty payment obligation in situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of coal.

Colowyo focuses on the language of that regulation which provides that "the lessee will owe no additional royalties unless or until monies or consideration resulting from the price increase are received." However, 30 C.F.R. § 206.257(i) also provides that "[t]his paragraph shall not be construed to permit a lessee to avoid its royalty payment obligation in

situations where a purchaser fails to pay, in whole or in part or timely, for a quantity of coal." Providing a narrow exception to the time royalties are due, 30 C.F.R. § 206.257(i) concerns price increases only. It is therefore inapplicable in Colowyo's situation.

Appellant cites Cities Service, supra, and Cotton Petroleum Corp., supra, to support its contention that MMS has recognized that late payment interest will be waived where the lessee cannot collect payments because of reasons beyond its control, such as pending legal proceedings, or pending conclusion of controlling administrative proceedings. (SOR at 5-6.)

In Cities Service, supra, the Board held that MMS properly imposed late payment charges when the royalty amounts owing were not paid pending resolution of a dispute between a lessor and the purchaser of the product. In Cotton Petroleum Corp., the Board upheld the assessment of interest charges for late payment of royalty where the error in payment resulted from a defect in the manufacture of the metering equipment used to measure production. The Board stated that the fact that the defect was caused by the negligence of a third party (the manufacturer) and was not readily apparent to the lessee will not absolve the lessee of liability for accurate measurement of production and payment of interest on any royalty thereon not timely paid. Although MMS did acknowledge in its briefs filed on appeal in these cases that late payment interest will be waived in certain circumstances, we note in both cases that MMS did, in fact, argue that late payment charges should be assessed.

Another case in which the Board upheld the assessment of late payment charges when royalties due on coal leases were not timely paid is Cyprus Western Coal Co., 103 IBLA 278, 282 (1989), which MMS cited in its response. In Cyprus Western, MMS assessed the appellant late payment charges for the late payment of royalties. Cyprus Western paid the late royalties pursuant to an MMS order to pay. Cyprus Western asserted that it paid the additional royalties timely after they were assessed, and thus, late payment charges were not due. The Board rejected appellant's argument stating that since Cyprus did not pay a portion of its royalties within the time specified in the lease, its payment was not "timely" within the meaning of 30 C.F.R. § 218.202 and MMS properly assessed a late charge.

Appellant's arguments do not persuade us that MMS intended that, when royalty amounts owing are not paid because the purchaser of the coal is in bankruptcy, a late payment charge should not be assessed pursuant to 30 C.F.R. § 218.202. We do not find that bankruptcy presents a more compelling reason for MMS to forego assessing a late payment charge than the reasons advanced by the appellants in the cases discussed above. See Joseph S. Calabrese, 25 IBLA 241, 242-243 n.1 (1976) (bankruptcy or inability to pay does not constitute justifiable cause for failure to pay oil and gas lease rental timely). As MMS noted in its response, a lessee's problems obtaining payment from its purchaser do not excuse it from its obligation to make timely royalty payments. Dugan Production Corp., supra.

Colowyo cites MMS decisions to support its contention that MMS will forego late payment interest when a lessee takes reasonable measures to collect a disputed price. Therefore, it contends that it is arbitrary and capricious to forego late payment interest in that situation, but to impose late payment interest when a lessee takes reasonable measures in a bankruptcy proceeding to collect payment due under a contract. (SOR at 8-9.) Regardless of any apparent similarity between the facts in the MMS decisions cited by Colowyo and the facts presented in this appeal, the Board is not bound by MMS decisions.

Colowyo's late payments entitled the Government to interest, *i.e.*, compensation for the delay in payment. See Atlantic Richfield Co., 21 IBLA 98, 113, 82 I.D. 316, 323 (1975). The Board has recognized that the imposition of late payment charges is appropriate to compensate for the loss of use of funds due but not paid. Peabody Coal Co., 72 IBLA 337, 348 (1983). A late payment charge was properly assessed in this case pursuant to 30 C.F.R. § 218.202(a) and (b). See Bear Coal Co., 136 IBLA 59, 64 (1996); Cyprus Western Coal Co., *supra* at 282.

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 affirmed.

James P. Terry
Administrative Judge

I concur:

John H. Kelly
Administrative Judge

