



PACIFIC COAST COAL COMPANY v. OSM
173 IBLA 266 Decided January 11, 2008



United States Department of the Interior
Office of Hearings and Appeals
Interior Board of Land Appeals
801 N. Quincy St., Suite 300
Arlington, VA 22203

PACIFIC COAST COAL COMPANY

v.

OFFICE OF SURFACE MINING RECLAMATION AND ENFORCEMENT

IBLA 2006-284

Decided January 11, 2008

Appeal from the denial of an application for an award of fees and expenses under the Equal Access to Justice Act. Hearings Division Docket No. DV 2002-2-R (EAJA).

Affirmed.

1. Attorney Fees: Equal Access to Justice Act: Generally--
Equal Access to Justice Act: Generally

In order to qualify for an award of fees and expenses under section 203 of the Equal Access to Justice Act, (1) a party must be an eligible applicant pursuant to 43 U.S.C. § 504 (b)(1)(B)(2000) and 43 C.F.R. § 4.604; (2) the applicant must be a prevailing party in an adversary adjudication conducted by the Department or agency; and (3) the Department or agency must be unable to demonstrate that its position in the underlying adversary adjudication was substantially justified.

2. Attorney Fees: Equal Access to Justice Act: Substantially
Justified--Equal Access to Justice Act: Generally

An application for an award of fees and expenses to a prevailing party is properly denied when the agency's position in the proceeding is "substantially justified," based on the record as a whole.

3. Attorney Fees: Equal Access to Justice Act: Substantially Justified--Equal Access to Justice Act: Generally

OSM's position that truck drivers for the contractor responsible for delivering clean fill at the operator's coal pits, in accordance with the requirements of the operator's revised coal permit, could not also accept delivery on behalf of the operator had a reasonable basis in law and fact and was therefore substantially justified, based on the record as a whole, even though the operator prevailed at an adjudicatory proceeding on the question of who may be an authorized representative under the permit revision order.

APPEARANCES: David J. Morris, General Manager, Black Diamond, Washington, for appellant; John S. Retrum, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY ADMINISTRATIVE JUDGE ROBERTS

Pacific Coast Coal Company (PCC) has appealed from an August 14, 2006, decision by Administrative Law Judge (ALJ) Harvey C. Sweitzer denying its application for an award of fees and expenses (Application) under the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504 (2000),¹ and the implementing regulations at 43 C.F.R. § 4.601, *et seq.*² PCC applied for fees and expenses arising out of an

¹ This statute provides in pertinent part: "An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that party in connection with that proceeding, unless that adjudicative officer of the agency finds that the position of the agency was substantially justified" 5 U.S.C. § 504(a)(1) (2000).

² The Office of Hearings and Appeals adopted revised regulations implementing EAJA, effective Feb. 8, 2006, approximately 5 months prior to the issuance of Judge Sweitzer's decision. Subsections (a)(1) and (a)(2) of current 43 C.F.R. § 4.605 provide:

(a) You may receive an award for your fees and expenses in connection with a proceeding if:

(1) You prevailed in the proceeding or in a significant and discrete substantive portion of a proceeding; and

(continued...)

adversarial proceeding pertaining to a Notice of Violation (NOV) issued by the Office of Surface Mining Reclamation and Enforcement (OSM) to PCC in May 2002. Applying the criteria set forth in 5 U.S.C. § 504(a)(1) and 43 C.F.R. § 4.605(a)(1) and (2), Judge Sweitzer denied the award, *inter alia*, on the ground that although PCC demonstrated that it is a prevailing party in the underlying proceeding, OSM demonstrated that its position was substantially justified. For the reasons that follow, we affirm Judge Sweitzer's decision to deny PCC's Application.

I. BACKGROUND

A. The Permit Revision Order

PCC operates the John Henry Mine (Mine) located near Black Diamond, Washington. PCC's Permit Application Package for the Mine, approved by OSM, contains a mining plan for several coal pits. PCC receives off-site fill material for disposal at the Mine in accordance with a Permit Revision Order (PRO) OSM issued on December 15, 2000. That PRO provides, in pertinent part, that "[i]ndividual trip tickets for each truck delivering material for disposal at the mine site shall show . . . [a] legible signature of an authorized representative of [PCC], accepting delivery of the clean fill." Dec. 15, 2000, PRO at ¶ a.5. This Board affirmed a February 28, 2002, decision of Administrative Law Judge William E. Hammett upholding that PRO in *Pacific Coast Coal Co. [(PCC)] v. OSM*, 158 IBLA 115 (2003), *aff'd PCC v. OSM*, C.A. No. 03-0260Z (W.D. Wash.) (Feb. 2, 2004, Order).

In *PCC v. OSM*, 158 IBLA at 128, PCC argued that OSM was not authorized to place reporting restrictions on the disposal of off-site material within the boundaries of the permitted mine site because OSM had not demonstrated that the restrictions were "necessary to ensure compliance with SMCRA" or "its implementing regulations." On January 6, 2003, this Board affirmed Judge Hammett's decision, holding that the permit revision was a reasonable exercise of OSM's authority to regulate the conditions under which mining and reclamation are approved, and that the reporting restrictions set forth in the PRO were reasonable, given PCC's history with respect to

² (...continued)

(2) The position of the Department or other agency over which you prevailed was not substantially justified. The Department or other agency has the burden of proving that its position was substantially justified.

unauthorized disposal activities at the Mine.³ *Id.* at 125, citing *Turner Brothers, Inc. v. OSM*, 101 IBLA 327, 332 (1988).

B. NOV Nos. 01-141-244-3 and 02-141-244-3

In September 2001, while PCC's appeal of the PRO was pending with Judge Hammett, OSM issued NOV No. 01-141-244-3 to PCC for failure to comply with the terms of the PRO and ensure that individual trip tickets were signed at the time of delivery. *See* Judge Hammett's Decision at 3. After Judge Hammett issued the decision upholding the PRO, PCC "appointed" three truck drivers employed by its contractor, J.R. Hayes & Sons, to sign trip tickets upon completion of each delivery, but OSM was not informed of this development. *Id.* at 5-6; *see also* Apr. 4, 2002, Letter from David J. Morris, PCC, to J.R. Hayes & Sons, Inc.

In May 2002, OSM mine inspectors observed several haul trucks disposing of off-site materials within the boundaries of the John Henry Mine. The inspectors stopped the trucks, inspected the drivers' trip tickets, and concluded that, although the drivers were signing the tickets on each run, they were not authorized representatives of PCC, as specified by the PRO. *Id.* On May 17, 2002, OSM issued an NOV to PCC for "failure to have an authorized representative of [PCC] [accept] delivery of each truck load of clean fill material by affixing a legible signature to individual trip tickets."⁴ NOV No. 02-144-244-3. OSM cited PCC for violating 30 C.F.R. § 773.17(b) and (c), which implement the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1201 *et seq.* (2000), and require a permittee to conduct its operations in compliance with the terms and conditions of its permit. *Id.* The NOV required PCC to (1) cease all deliveries of fill material to the Mine; (2) submit a permit revision package defining "authorized representative of PCC"; and (3) resume deliveries only after OSM had approved the additional permit revisions. *Id.*

PCC subsequently proposed to revise the PRO by defining "authorized representative of PCC" to mean "a person designated in writing by the applicant who shall be knowledgeable of the applicant's fill disposal operations and who shall be present on the mine site while fill operations are conducted." PCC Permit Revision Proposal dated May 21, 2002, at 3-17a, ¶ 3.3.1.7; *see* PCC Request for Formal Review, Attachment (Att.) 5. OSM rejected PCC's proposal, stating that the permit

³ The record in that case demonstrated that OSM issued NOV's to PCC for unauthorized disposal of waste material at the Mine on Aug. 19, 1999, Nov. 16, 2000, and Jan. 22, 2001. *PCC v. OSM*, 158 IBLA at 119-22.

⁴ At the time, PCC's appeal of Judge Hammett's decision affirming the Dec. 15, 2000, PRO was pending before the Board. *See PCC v. OSM*, 158 IBLA at 115, 117.

revision would not be approved unless PCC drafted it to require that the “authorized representative” would be an employee of PCC. *Id.*, Att. 6 at 2.

C. Judge Hammett’s July 28, 2002, Decision

PCC sought review of the NOV under 30 U.S.C. § 1275(a) (2000) and 43 C.F.R. § 4.1160 *et seq.*, and the matter was assigned to Judge Hammett. The parties stipulated that a hearing was not necessary to resolve the matter and, after considering cross-motions for summary judgment, Judge Hammett issued a decision reversing the NOV. Upon motion by OSM, Judge Hammett consolidated the appeal with PCC’s appeal of NOV No. 01-141-244-3, pertaining to when the trip tickets were required to be signed. Judge Hammett’s Decision at 1-2. Judge Hammett rendered a decision affirming the requirement that trip tickets were to be signed at the time delivery was accepted, and reversing the NOV charging PCC with violating the terms of its PRO by failing to have an authorized representative sign the tickets. *Id.* at 5, 9.

Judge Hammett’s decision noted that the PRO did not define “authorized representative,” and that the term, as it is ordinarily used, “does not simply mean ‘employee.’” *Id.* at 7-8. It stated that, “[i]f OSM had intended the term ‘authorized representative’ to be limited to PCC employees, it could, and should, have stated as much in the PRO.” *Id.* at 8. In the absence of “any explicit language in the PRO,” he concluded that the fact that truck drivers from another firm “are delivering material to PCC” does not disqualify them “from accepting material on PCC’s behalf.” *Id.* at 9. Finally, the decision held that the drivers accepted delivery of the fill on behalf of PCC when it [was] loaded on their trucks at the source.” *Id.* OSM did not appeal Judge Hammett’s decision.

D. PCC’s Application for an Award of Fees and Expenses

PCC subsequently filed an application for an award of fees and expenses pursuant to EAJA, 30 U.S.C. § 504(a) (2000). Judge Hammett denied it, concluding that PCC was limited to applying for costs and expenses pursuant to section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000).⁵ Feb. 9, 2004, Order Denying Application for Fees and Expenses at 4-7. We reversed that Order on appeal, holding that “a permittee may apply for fees and other expenses under 5 U.S.C. § 504(a) of EAJA, or for costs and expenses, including attorney fees, under 30 U.S.C. § 1275(e) of

⁵ Section 525(e) of SMCRA, 30 U.S.C. § 1275(e) (2000), authorizes the award of costs and expenses (including attorney’s fees) to any person, “as determined by the Secretary to have been reasonably incurred” by such person “for or in connection with his participation in” any administrative proceeding under SMCRA, and provides that such costs and expenses may be assessed “against either party” as the Secretary “deems proper.”

SMCRA.” *PCC v. OSM*, 165 IBLA 52, 60 (2005). We remanded the matter for a determination of whether PCC should be awarded fees and expenses under EAJA. *Id.* at 61. Upon the death of Judge Hammett, the case was reassigned to Judge Sweitzer for purposes of rendering a decision.⁶

II. JUDGE SWEITZER’S DECISION

In his decision denying PCC’s application pursuant to EAJA, Judge Sweitzer noted that PCC would be eligible for an award for “allowable fees and expenses” if three conditions were met. First, under 43 C.F.R. § 4.604(b)(5),⁷ PCC must demonstrate that “it was a corporation with a net worth of not more than \$7 million and not more than 500 employees” “as of the date the adversary adjudication was initiated.” Decision at 3. Second, 43 C.F.R. § 4.605(a)(1) required PCC to show that it “prevailed over the Department in the adversary adjudication for which it seeks an award.” *Id.* at 4. Third, pursuant to 43 C.F.R. § 4.605(a)(2), PCC could receive an award if OSM failed to demonstrate that “the position of the Department in that adversary adjudication was substantially justified.” *Id.*, citing *Fields v. United States*, 29 Fed. Cl. 376, 377 (1993); and *J. Claude Frei and Sons v. BLM*, 145 IBLA 390, 394 (1998). The decision stated that “the applicant has the burden of proving that it prevailed” in the adjudication, and that “[t]he Department has the burden of proving that its position was substantially justified.” Decision at 4, citing 43 C.F.R. § 4.605(a)(2); *Fields v. United States*, 29 Fed. Cl. at 377; and *BLM v. Cosimati*, 131 IBLA 390, 397 (1995). Under 43 C.F.R. § 4.606(a), the decision noted, “allowable fees and expenses” are limited to “those of the applicant’s attorney(s) and expert witness(es).” Decision at 4.

Judge Sweitzer ruled that PCC had established that it is eligible for an award under EAJA, and that it had prevailed over the Department in the underlying adversary adjudication. *Id.* at 4. But he denied the claim because OSM established that the position it took in the underlying adversary proceeding was substantially justified. *Id.* at 4-5.

⁶ Citations in this opinion to “Decision” are to Judge Sweitzer’s decision denying PCC’s application for fees and expenses. Elsewhere, we have cited to Judge Hammett’s decision, as such.

⁷ This regulation provides: “You are an eligible applicant [for an award of attorney fees and expenses] if you are . . . [a] partnership [or] corporation . . . with a net worth of \$7 million or less and 500 or fewer employees”

III. ANALYSIS

[1, 2] In order to qualify for an award of fees and expenses under section 203 of EAJA, (1) a party must be an eligible applicant pursuant to 43 U.S.C. § 504 (b)(1)(B) (2000) and 43 C.F.R. § 4.604; (2) the applicant must be a prevailing party in an adversary adjudication conducted by the Department or agency; and (3) the Department or agency must be unable to demonstrate that its position in the underlying adversary adjudication was substantially justified. 43 U.S.C. § 504(a)(1); 43 C.F.R. § 4.605(a)(1) and (2)⁸; *PCC v. OSM*, 173 IBLA 12, 17, 21 (2007). An application for an award of fees and expenses to a prevailing party is properly denied when the agency's position in the proceeding is "substantially justified" based on the record as a whole. 5 U.S.C. § 504(a)(1) (2000); *PCC v. OSM*, 173 IBLA at 12, 21. That PCC was eligible for the award and that it was a prevailing party are not in dispute in this appeal. What is in dispute is whether OSM's position in the proceeding was substantially justified.

Whether an agency was "substantially justified" in its position is not necessarily based upon the adjudicator's disposition of the matter.⁹ See *PCC v. OSM*, 173 IBLA at 21. As noted, the statute's use of the word "substantially" in regard to the Government's position has been viewed by the Supreme Court as not meaning "justified to a high degree," but rather "justified in substance or in the main"--that is, justified to a degree that could satisfy a reasonable person." *Heirs of David F. Berry*, 156 IBLA 341, 344 (2002), quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). The Board has stated that the Government's "position may be substantially justified even if it is not ultimately vindicated by the evidence." *Heirs of David F. Berry*, *supra*; see *BLM v. Ericsson*, 98 IBLA 258, 263-64 (1987). In short, OSM's position must show a "reasonable basis both in law and fact." *Pierce v. Underwood*, *supra*; *BLM v. Ericsson*, 98 IBLA at 263.

⁸ See n.1 *supra*.

⁹ As Congress has stated: "The standard, however, should not be read to raise a presumption that the Government position was not substantially justified, simply because it lost the case. Nor, in fact, does the standard require the Government to establish that its decision to litigate was based on a substantial probability of prevailing." H.R. Rep. No. 96-1418, 96th Cong. 2d Sess. 11, reprinted in 1980 U.S. Code Cong. & Admin. News 4984, 4990. As the Board has held: "Even if the Government loses . . . one cannot conclude its position was not substantially justified. Otherwise, the EAJA would be no different from an automatic fee-shifting statute, which Congress clearly did not intend it to be." *Kaycee Bentonite Corp.*, 79 IBLA 182, 196, 91 I.D. 138, 146 (1984) (citations omitted).

On appeal, PCC agrees that Judge Sweitzer correctly stated the governing law, but argues that he erred in finding that OSM demonstrated that its position in the underlying adjudication was “reasonable in both law and fact.” Statement of Reasons (SOR) at 5. PCC argues that OSM’s premise that the “authorized representative” must be an employee of PCC was unreasonable, as OSM provided no factual or legal basis for that interpretation of the PRO. PCC alleges that “[i]t is clearly not reasonable for OSM, from a practical, let alone a legal reason, to demand that a permittee fill any position with an employee rather than a contractor,” as many coal businesses are run “entirely by contractors and not by employees of the permit holder.” *Id.* at 6-7. PCC points out that there is no regulation under SMCRA defining the term “authorized representative,” and the fact that Judge Hammett rejected OSM’s directive that PCC amend the PRO to limit the term to an employee of PCC indicates that OSM had no basis in law for issuing the NOV. *Id.* at 7. Quoting *Contractor’s Sand and Gravel, Inc. v. Mine Safety and Health Review Commission [MSHRC]*, 199 F.3d 1335 (D.C. Cir. 2000), PCC maintains that this situation is one in which “the standard of review on the merits is so close to the reasonableness standard applicable to determining substantial justification that a losing agency is unlikely to be able to show that its position was substantially justified.” SOR at 7-8.

A. Judge Sweitzer’s Analysis

In holding that OSM prevailed on the question of substantial justification, Judge Sweitzer stated that “OSM need only establish that its position had a reasonable basis both in law and in fact,” citing *BLM v. Ericsson*, 98 IBLA at 263. Decision at 5. He summarized Judge Hammett’s rationale for holding that the truck drivers could accept delivery of the fill on behalf of PCC as follows:

Judge Hammett found that PCC had not violated the terms of its permit by appointing the truck drivers delivering fill material to the John Henry Mine as PCC’s authorized representatives for purposes of accepting that fill. However, Judge Hammett noted that “[n]ormally, one assumes that a person ‘accepting delivery’ will be someone other than the person making the delivery -- as is the case with certified mail or Federal Express packages.” July 28, 2003, Dec[ision] at 9. Judge Hammett went on to conclude that “although it is unusual, this forum does not view the fact that the drivers are delivering material to PCC as disqualifying them from accepting material on PCC’s behalf.” *Id.*

Decision at 5. In ruling that OSM was nevertheless substantially justified in issuing the NOV, Judge Sweitzer stated: “[O]ne would not ordinarily expect someone delivering an item to also accept that item on behalf of the recipient. Accordingly, and notwithstanding Judge Hammett’s July 28, 2003, Decision, OSM’s position that

truck drivers delivering fill material could not accept delivery of that material on behalf of PCC had a reasonable basis in law and fact” *Id.*

B. OSM’s Position was Substantially Justified

1. The NOV Did Not Misinterpret the Scope of the PRO

In arguing that OSM’s insistence that the authorized representative also be an employee was unreasonable, PCC overlooks what was actually charged in the NOV. The NOV does not cite PCC for failure to place an *employee* on site to accept delivery; the NOV states that the “nature of the permit condition violated” was “[s]pecifically, failure to have an *authorized representative* of PCC accepting delivery of each truck load of clean fill material by affixing a legible signature to individual trip tickets.” NOV No. 02-141-244-3 (emphasis added). The NOV thus requires no more or less from the appellant than does the PRO, which requires that “[i]ndividual trip tickets for each truck delivering material for disposal at the mine site shall show . . . [a] legible signature of an authorized representative of [PCC], accepting delivery of the clean fill.” Dec. 15, 2000, PRO at ¶ a.5 (emphasis added). Likewise, the NOV did not require the violation to be abated by having PCC provide an employee on site, but required PCC to amend the permit to provide a definition of “authorized representative.” While negotiations broke down between OSM and PCC about the wording of the definition, we conclude that the NOV did not misinterpret the scope of the PRO.

2. A Reasonable Inquiry: Who May Accept Delivery?

[3] Although Judge Hammett’s decision reversing the NOV rejects the notion that “authorized representative” means only an “employee,” the salient question in Judge Hammett’s analysis is whether the *bearer* of the fill material could also *accept delivery* of that fill material on behalf of the recipient (in this case, PCC). The ALJ explored the issue of what “accepting delivery” meant within the context of the PRO in the portion of his decision that analyzed the question of *when* delivery is accepted, rather than *who* may accept delivery, the issue presented in this appeal. NOV No. 01-141-244-3 required that individual trip tickets be signed at the time delivery was accepted. But pertinent to our discussion here, Judge Hammett’s decision with regard to NOV No. 01-141-244-3 states:

The process of using a signature to “accept delivery” is a familiar one to any person who works in an office which on occasion receives certified mail or Federal Express packages. The act of signing for the item being delivered is a means of showing that the person who is signing is accepting responsibility for the item, and shows that the carrier has in turn fulfilled its responsibility to deliver the item.

. . . . Reading the PRO as a whole, including OSM's statement that the PRO was being issued because "additional control measures" were necessary for the disposal of offsite fill material, it is unreasonable to read the requirement for a signature accepting delivery as allowing a PCC representative to sign the trip ticket weeks later Signing the trip ticket under those circumstances would not be "accepting delivery," but would instead be an act empty of meaning.

Accordingly, the requirement that a trip ticket have a signature accepting delivery means that a PCC authorized representative must sign a particular trip ticket before the corresponding act of disposal occurs. A person can accept delivery only if he or she is aware of what is being delivered, and only if he or she is present when delivery takes place. *Moreover, the term "accepting" implies a voluntary act which takes place at a time when "rejecting" is still possible. In the context of PCC's responsibilities to ensure that fill material being disposed at the mine comes from certain specific locations, a signature "accepting delivery" is acknowledgment on the part of PCC that the fill material being accepted meets the requirements of PCC's permit.*

Judge Hammett's Decision at 4-5 (emphasis added).

The above-quoted analysis, when considered in light of Judge Hammett's remarks pertaining to the question before us--that is, *who* may accept delivery--makes clear that, under the terms of the PRO, who may be an "authorized representative" cannot be severed from the question of who may "accept delivery." Judge Hammett's analysis pertinently continues: "Finally, with regard to *who* may be designated an authorized representative, this forum applies a standard of reasonableness in the absence of any explicit language in . . . the PRO. *The authorized representative's task is to accept delivery of the clean fill.*" Judge Hammett's Decision at 9 (emphasis added). Judge Hammett's analysis quoted above casts light on why OSM might reasonably question whether a driver hauling fill on behalf of one contractor would also have the authority to reject that fill material on behalf of another.

Judge Hammett nonetheless found that the arrangement met the requirements of the PRO, holding that "although it is unusual, this forum does not view the fact that the drivers are delivering material to PCC as disqualifying those drivers from accepting material on PCC's behalf." But he discussed opposing arguments,

which Judge Sweitzer considered in the opinion now on appeal.¹⁰ We again quote Judge Hammett:

In this forum’s view, the strongest argument for the proposition that the truck drivers were *not* appropriate “authorized representatives” is that, under these circumstances, the person delivering fill material is also the person “accepting delivery” of the material. *Normally, one assumes that a person “accepting delivery” will be someone other than the person making the delivery*

Judge Hammett’s Decision at 9 (emphasis added). But he ultimately concludes: “However, in this case, the drivers, acting as PCC’s authorized representatives, and knowing their destination ahead of time, may be deemed to have accepted delivery of the material when [it] is loaded on their trucks at the source.” *Id.*¹¹

3. OSM’s Position was Reasonable

Accordingly, we hold that Judge Sweitzer correctly ruled that OSM’s position demonstrates “a reasonable basis both in law and in fact,” and that its position was therefore substantially justified, based on the record as a whole, including Judge’s Hammett’s earlier decisions. In this case, Judge Hammett acknowledged that PCC’s interpretation of the PRO to fit its particular situation was “unusual,” but nevertheless

¹⁰ Judge Sweitzer’s opinion states: “I agree with Judge Hammett’s above-quoted observations, which bespeak the fact that one would not ordinarily expect someone delivering an item to also accept that item on behalf of the recipient.” Decision at 5.

¹¹ Judge Hammett’s analysis is supported by the common understanding of the terms “accept,” “acceptance,” “deliver,” and “delivery.” While the terms are used in a variety of contexts and undoubtedly have shades of meaning, a general definition of “acceptance” is found in *Black’s Law Dictionary* 27 (4th ed. 1968), where it is defined as, *inter alia*, “[t]he act of a person to whom a thing is offered or tendered by another, whereby he receives the thing with the intention of retaining it, such intention being evidenced by a sufficient act.” Likewise, “accept” is defined in *Black’s* as “to receive with intent to retain.” *Id.* at 26. “Delivery” is defined, *inter alia*, in *Black’s* as “giving real possession to the vendee or his servants or special agents who are identified with him in law and represent him.” *Id.* at 515. *Black’s* also notes that “[d]elivery’ occurs whenever, at a time and place fixed by law or agreed on by parties, seller does everything necessary to put goods completely and unconditionally at buyer’s disposal.” *Id.* at 516. Given these common usage definitions, OSM could reasonably question, as Judges Hammett and Sweitzer point out, whether the deliverer of the fill material could also “accept delivery” on behalf of PCC.

affirmed it, given the leeway in the language of the PRO. In doing so, he did not conclude that OSM had unreasonably interpreted the PRO, but was careful to interpret the PRO so as not to render it “empty of meaning.” See OSM Answer at 14. OSM’s decision to issue the NOV was reasonable in law and in fact, and its position was substantially justified, considering the record as a whole.¹²

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, Judge Sweitzer’s July 8, 2005, decision denying fees and expenses to PCC pursuant to 43 U.S.C. § 504(a) (2000) is affirmed.

_____/s/_____
James F. Roberts
Administrative Judge

I concur:

_____/s/_____
James K. Jackson
Administrative Judge

¹² In reaching this conclusion, we have considered and rejected all arguments advanced by the parties not specifically addressed herein. We add here a brief note with respect to Judge Sweitzer’s application of 43 C.F.R. § 4.606(a), which provides that “[i]f the criteria in §§ 4.603 through 4.605 are met, you may receive an award under this subpart only for the fees and expenses of your attorney(s) and expert witness(es).” Judge Sweitzer stated that “PCC is not entitled to an award for legal work performed by a non-attorney or expenses incurred directly by itself because the intent of EAJA is to encourage litigants to retain legal counsel.” Decision at 4. Given our determination that Judge Sweitzer correctly ruled that OSM was substantially justified in issuing the NOV, we do not further address PCC’s argument that Judge Sweitzer improperly cited David J. Morris’ status as a non-lawyer as a reason for denying PCC’s Application. See *PCC v. OSM*, 173 IBLA at 17 n.7.